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THE
FEDERAL REPORTER.

VOLUME 80.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

JUNE—JULY, 1897.

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RULES OF COURT.

UNITED STATES CIRCUIT COURT OF APPEALS.

Fifth Circuit.

25.¹

Rule 25, as amended February 27, 1894, reads as follows:

ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. One hour will be allowed for the plaintiff in error or appellant to open and present his case, and one hour will be allowed to the defendant in error or appellee to answer; thirty minutes will then be allowed to the plaintiff in error or appellant to reply. No more time will be allowed for argument without special leave of the court.

37.

Ordered, that the following rule be adopted and published:

RULE XXXVII.

WRITS OF ERROR IN CRIMINAL CASES.

1. Writs of error to review criminal cases tried in any district or circuit court of the United States within this circuit, which may be reviewed under the provisions of the act of March 3, 1891, creating this court, and the act of congress amendatory thereof, approved January 20, 1897, may be allowed in term time or in vacation by the circuit justice assigned to this circuit, by either of the circuit judges, or by any district judge who presided on the trial, and the

¹ For rule 25 originally adopted in the Fifth circuit, see 21 C. C. A. cxxiv., 78 Fed. cxxiv.

proper security be taken, and the citation be signed by him, and he may also grant a supersedeas and stay of execution or proceedings pending the determination of such writ of error.

2. Where such writ of error is allowed in any criminal case as aforesaid, the circuit court or district court, before which the accused was tried, or the trial judge, or the circuit justice assigned to the circuit, or either of the circuit judges, shall have the power, after the citation has been duly served, to admit the accused to bail in such amount as may be fixed, such bail bond to be, as near as may be, in the form prescribed in the appendix to these rules.

Promulgated June 11, 1897.

APPENDIX.

[Form of Appearance Bond on Writ of Error in Criminal Cases.]

Know all men by these presents:

That we, —, as principal, and —, as sureties, are held and firmly bound unto the United States of America in the full and just sum of — dollars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Scaled with our seals and dated this — day of —, in the year of our Lord one thousand eight hundred and ninety —.

Whereas, lately at the — term, A. D. 189—, of the — court of the United States for the — district of —, in a suit pending in said court between the United States of America, plaintiff, and —, defendant, a judgment and sentence was rendered against the said —, and the said — has obtained a writ of error from the United States circuit court of appeals for the Fifth circuit, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States circuit court of appeals for the Fifth circuit, at the city of New Orleans, Louisiana, sixty days from and after the date of said citation, which citation has been duly served.

Now, the condition of the above obligation is such that if the said — shall appear in the United States circuit court of appeals for the Fifth circuit on the first day of the next term thereof, to be held at the city of —, on the first Monday in —, A. D. 189—, and from day to day thereafter during said term, and from term to term, and from time to time, until finally discharged therefrom, and shall abide by and obey all orders made by the said United States circuit court of appeals for the Fifth circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence of the said — court against him shall be affirmed by the said United States circuit court of appeals for the Fifth circuit, then the above obligation to be void; else to remain in full force, virtue, and effect.

———— [Seal.]

———— [Seal.]

———— [Seal.]

Approved:

Judge of the —.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

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Hon. HORACE GRAY, Circuit Justice.
Hon. LE BARON B. COLT, Circuit Judge.
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Hon. ARTHUR L. BROWN, District Judge, Rhode Island.²

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Hon. EDWARD G. BRADFORD, District Judge, Delaware.⁴
Hon. EDWARD T. GREEN, District Judge, New Jersey.⁵
Hon. ANDREW KIRKPATRICK, District Judge, New Jersey.⁶
Hon. WILLIAM BUTLER, District Judge, E. D. Pennsylvania.
Hon. JOSEPH BUFFINGTON, District Judge, W. D. Pennsylvania.

¹Deceased.

²Confirmed December 15, 1896.

³Deceased.

80 F.

⁴Confirmed May 11, 1897.

⁵Deceased October 10, 1896.

⁶Confirmed December 15, 1896.

FOURTH CIRCUIT.

Hon. MELVILLE W. FULLER, Circuit Justice.
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Hon. JAMES W. LOCKE, District Judge, S. D. Florida.
Hon. WILLIAM T. NEWMAN, District Judge, N. D. Georgia.
Hon. EMORY SPEER, District Judge, S. D. Georgia.
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Hon. THOMAS S. MAXEY, District Judge, W. D. Texas.

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Hon. HENRY F. SEVERENS, District Judge, W. D. Michigan.
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Hon. GEORGE R. SAGE, District Judge, S. D. Ohio.
Hon. CHARLES D. CLARK, District Judge, E. and M. D. Tennessee.
Hon. ELI S. HAMMOND, District Judge, W. D. Tennessee.

¹Deceased.²Confirmed May 5, 1897.

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Hon. HENRY B. BROWN, Circuit Justice.
 Hon. WILLIAM A. WOODS, Circuit Judge.
 Hon. JAMES G. JENKINS, Circuit Judge.
 Hon. JOHN W. SHOWALTER, Circuit Judge.
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 Hon. WILLIAM H. SEAMAN, District Judge, E. D. Wisconsin.
 Hon. ROMANZO BUNN, District Judge, W. D. Wisconsin.

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 Hon. WALTER H. SANBORN, Circuit Judge.
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 Hon. RENSSELAER R. NELSON, District Judge, Minnesota.³
 Hon. WM. LOCHREN, District Judge, Minnesota.⁴
 Hon. ELMER B. ADAMS, District Judge, E. D. Missouri.
 Hon. JOHN F. PHILIPS, District Judge, W. D. Missouri.
 Hon. ELMER S. DUNDY, District Judge, Nebraska.⁵
 Hon. WILLIAM D. McHUGH, District Judge, Nebraska.⁶
 Hon. W. H. MUNGER, District Judge, Nebraska.
 Hon. ALFRED D. THOMAS, District Judge, North Dakota.⁷
 Hon. CHARLES F. AMIDON, District Judge, North Dakota.⁸
 Hon. ALONZO J. EDGERTON, District Judge, South Dakota.⁹
 Hon. JOHN E. CARLAND, District Judge, South Dakota.¹⁰
 Hon. JOHN A. MARSHALL, District Judge, Utah.
 Hon. JOHN A. RINER, District Judge, Wyoming.

¹Deceased November 17, 1896.²Commissioned December 15, 1896.³Resigned May 16, 1896.⁴Commissioned May 18, 1896. Con-
firmed same date.⁵Deceased October 28, 1896.⁶Resigned.⁷Deceased August 8, 1896.⁸Commissioned August 31, 1896. Confirmed
February 18, 1897.⁹Deceased August 9, 1896.¹⁰Commissioned December 15, 1896.

NINTH CIRCUIT.

Hon. STEPHEN J. FIELD, Circuit Justice.

Hon. JOSEPH McKENNA, Circuit Judge.¹

Hon. WM. W. MORROW, Circuit Judge.²

Hon. WILLIAM B. GILBERT, Circuit Judge.

Hon. ERSKINE M. ROSS, Circuit Judge.

Hon. JOHN J. DE HAVEN, District Judge, N. D. California.³

Hon. OLIN WELLBORN, District Judge, S. D. California.

Hon. HIRAM KNOWLES, District Judge, Montana.

Hon. CORNELIUS H. HANFORD, District Judge, Washington.

Hon. THOMAS P. HAWLEY, District Judge, Nevada.

Hon. CHARLES B. BELLINGER, District Judge, Oregon.

Hon. JAMES H. BEATTY, District Judge, Idaho.

Hon. ARTHUR K. DELANEY, District Judge, Alaska.

¹ Resigned.

² Commissioned May 20, 1897.

³ Commissioned June 8, 1897.

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CASES
ARGUED AND DETERMINED
IN THE
UNITED STATES CIRCUIT COURTS OF APPEALS AND THE
CIRCUIT AND DISTRICT COURTS.

HOLT et al. v. INDIANA MANUF'G CO.
(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 354.

CIRCUIT COURTS OF APPEALS—JURISDICTION—CONSTITUTIONAL QUESTIONS.

A suit between citizens of the same state to enjoin the collection of a state tax on the value of patent rights, on the ground that the state statute authorizing the tax contravenes the federal constitution, is not a suit arising under the patent laws so as to give jurisdiction to the circuit court of appeals, but is one involving the validity of a state statute under the constitution of the United States, and must, therefore, be taken direct from the circuit court to the supreme court, under section 5 of the act of March 3, 1891.

Appeal from the Circuit Court of the United States for the District of Indiana.

The Indiana Manufacturing Company, the appellee, a corporation organized and existing under the laws of the state of Indiana, brought suit in the court below against the appellants, who were, respectively, Sterling R. Holt, the treasurer, Joel A. Baker, the assessor, Thomas Taggart, the auditor, and George Wolf, the assessor, of Center township, of Marion county, and who, with the other appellants, constituted the board of review of Marion county, and who are, respectively, citizens of the state of Indiana, to enjoin the collection of certain personal taxes for the years 1892, 1893, 1894, and 1895, assessed upon the capital stock and certain tangible property of the Indiana Manufacturing Company. The gravamen of the charge in the bill is that the larger part of the assessment made by the taxing authorities was for the supposed value of certain rights under letters patent of the United States owned by the appellee, and which it is claimed are not subject to assessment or taxation by state authority; and that its capital stock, aside from its tangible property which was conceded to be assessable, represented solely the supposed value of the letters patent. So far as the assessment included tangible property owned by the appellee, the taxes levied thereon had been paid. Jurisdiction is asserted, notwithstanding there existed no diversity of citizenship, upon the grounds that the suit is brought to redress the deprivation, under color of the laws of the state of Indiana, of a right secured by the constitution and laws of the United States, and that the statutes of the state of Indiana requiring the taxation of patent rights or letters patent of the United States are repugnant to the constitution of the United States, and are void; and upon the further ground that the suit is one arising under the patent laws of the United States. A general demurrer for want of equity was overruled,

and the defendants thereupon pleaded to the merits. The court below decreed for the complainant (the appellee here), holding that the material allegations of the bill were established by the proofs; that the taxes assessed upon the valuation of the company's capital stock were an indirect assessment for taxation of the letters patent owned by the complainant; that the statutes of the state of Indiana relating to and requiring the taxation of patent rights or letters patent of the United States are unconstitutional, invalid, and void; that the cloud placed upon the title of the corporate property of the company by reason of such assessment and taxation should be removed; and that the defendants (appellants) and their successors in office should be and they were perpetually enjoined from the collection of such taxes, "or any other amount [of taxes] which may be claimed to be due on account of the value of any patent rights or letters patent owned or held by complainants, directly or indirectly, or on account of the value of the stock of complainant by which such patent rights or letters patent may be represented." The appeal is from that decree.

William A. Ketcham and Alfred R. Hovey, for appellants.
Chester Bradford, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge, after such statement of the case, delivered the opinion of the court.

At the threshold we are confronted with an objection to the jurisdiction of this tribunal to entertain the appeal which seems insuperable. There is no question involving the jurisdiction of the court below. That jurisdiction rested upon the ground that the suit was instituted to uphold a right secured by the constitution and laws of the United States, of which the complainant below was sought to be deprived under color of the laws of the state of Indiana, and the decision below held those laws to be unconstitutional and void. The fifth and sixth sections of the act of March 3, 1891, whereby this court was established, and its jurisdiction defined (26 Stat. 826, c. 517), classify the cases which may be taken by appeal or writ of error from the circuit or district courts to the supreme court of the United States, and those which may be taken to this court. The fifth section provides that appeals or writs of error in the following cases may be taken directly to the supreme court of the United States: (1) In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision. (2) From the final sentences and decrees in prize causes. (3) In case of a conviction of a capital or otherwise infamous crime. (4) In any case that involves the construction or application of the constitution of the United States. (5) In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question. (6) In any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States. Section 6 provides that the appellate jurisdiction of this court shall be exercised to review by appeal or by writ of error the final decisions in the district courts and the existing circuit courts in all cases other than those provided for in section 5, unless otherwise provided by law. This section also enumerates the cases in which the judgment or decrees of this court shall

be final, recognizing its right to certify to the supreme court any question or proposition of law within the appellate jurisdiction of this court concerning which it desires the instruction of that court for its proper decision.

While it is true that the bill asserts jurisdiction in the court below in part upon the ground that it is a suit arising under the patent laws of the United States, it cannot be said that in any just sense this is a case arising under the patent laws of the United States, so as to confer jurisdiction by appeal upon this court, and in respect to which its decision would be final. It is true that the wrong complained of had for its subject-matter the taxation of rights secured by letters patent issued by the United States under its patent laws. It is not correct, however, to say that, therefore, a suit to prevent such taxation arises under the patent laws of the United States. *Brown v. Shannon*, 20 How. 55; *Hartell v. Tilghman*, 99 U. S. 547; *Albright v. Teas*, 106 U. S. 613, 1 Sup. Ct. 550; *Manufacturing Co. v. Hyatt*, 125 U. S. 46, 8 Sup. Ct. 756; *U. S. v. Palmer*, 128 U. S. 262, 269, 9 Sup. Ct. 104; *Marsh v. Nichols*, 140 U. S. 344, 11 Sup. Ct. 798; *Wade v. Lawder* (decided March 1, 1897) 17 Sup. Ct. 425.

The question at issue is whether the statutes of the state of Indiana authorizing such taxation are repugnant to the constitution of the United States. That is not a question arising under the patent laws of the United States. The jurisdiction of the court below, there being no diversity of citizenship of the parties, rested and could rest only upon the ground that the constitutional rights of the complainant below were infringed by the laws of the state of Indiana which were repugnant to and in contravention of the constitution of the United States. The statute provides that in such cases appeals or writs of error may be taken directly to the supreme court. The case falls within the classification of cases in section 5 over which this court has no jurisdiction upon appeal. It is urged that we should entertain the jurisdiction and certify the question of the validity of the laws of Indiana to the supreme court. That we cannot do. If we have jurisdiction, we may decide the question without certifying it to the supreme court. If we have not jurisdiction, we cannot acquire it by, or assume it for the purpose of, the discretionary act of certification. The decisions in *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. 118; *Maynard v. Hecht*, 151 U. S. 324, 14 Sup. Ct. 353; *U. S. v. Jahn*, 155 U. S. 109, 15 Sup. Ct. 39; *In re New York & P. R. S. S. Co.*, 155 U. S. 523, 531, 15 Sup. Ct. 183; *In re Lehigh Min. & Manuf'g Co.*, 156 U. S. 322, 326, 15 Sup. Ct. 375; *Shields v. Coleman*, 157 U. S. 168, 176, 15 Sup. Ct. 570; *Colvin v. City of Jacksonville*, 157 U. S. 368, 15 Sup. Ct. 634,—in which it was held that in cases where the jurisdiction of the lower court is involved, the party “must elect whether he will take his writ of error or appeal to the supreme court upon the question of jurisdiction alone, or to the circuit court of appeals upon the whole case; if the latter, then the circuit court of appeals may, if it deem proper, certify the question of jurisdiction to this court,”—have reference only to cases involving the jurisdiction of the court below, which are comprehended within the first subdivision of the fifth section of the act. They have no application to the other subdivisions of the

section, which classify the cases in which the supreme court has jurisdiction upon appeal or writ of error. In those cases its jurisdiction is exclusive. *Horner v. U. S.*, 143 U. S. 570, 576, 12 Sup. Ct. 522; *Carey v. Railway Co.*, 150 U. S. 170, 181, 14 Sup. Ct. 63; *Chappell v. U. S.*, 160 U. S. 499, 509, 16 Sup. Ct. 397; *Scott v. Donald* (Jan. 18, 1897) 165 U. S. 58, 17 Sup. Ct. 265. The circuit courts of appeals have jurisdiction only in cases other than those provided for in section 5. This case is therefore one in which the jurisdiction of the court below and the right to relief depended upon the question whether the laws of the state of Indiana which sanctioned the taxation in question were in contravention of the constitution of the United States, and therefore a case arising under the constitution or laws of the United States. It was so considered by the court below, and relief was granted solely upon that ground. We are constrained to the conclusion that this court has no jurisdiction of an appeal from that decree, and that the proper and only remedy of the appellants is by appeal to the supreme court of the United States. Appeal dismissed.

TURNBULL WAGON CO. v. LINTHICUM CARRIAGE CO. et al.

(Circuit Court, N. D. Ohio, W. D. February 20, 1897.)

1. REMOVAL OF CAUSE—SEPARABLE ACTION.

A bill by a creditor to enjoin an execution sale of the insolvent debtor's property, set aside the levies, and subject the property to the claims of all the creditors pro rata, is not a separable action within the removal acts.

2. SAME—LOCAL PREJUDICE.

Local prejudice justifying the removal of a suit to enjoin an execution sale of the property of an insolvent company, and subject it to the claims of all the creditors, is not shown by an affidavit alleging that the newspapers of the county have denounced the company for alleged fraudulent dealings with its property; that the common pleas judge, on hearing a motion for the appointment of a receiver, stated that he "would see" that defendants did not take the property out of the county; and that the opposing lawyers referred to them in abusive terms.

Some time in the fall of 1896, Story & Bunnell, of Baltimore, Md., had judgments entered on certain cognovit notes against the Linthicum Carriage Company, of Defiance, Ohio, in the court of common pleas of Marion county, Ohio, and on these judgments levies were made on the property of the corporation at Defiance. Subsequent judgments were taken in favor of the First National Bank of Defiance and other parties, and levies followed. The property of the carriage company was advertised for sale under these levies, pending which the Turnbull Wagon Company, of Defiance, instituted suit in the court of common pleas of Defiance county against the execution creditors and the sheriff of said county on behalf of itself and all other creditors who (under the statute of Ohio) might come in and join in the prosecution of the suit, to enjoin the sale of the property, set the levies aside, and subject the property of the insolvent carriage company to satisfy the claims of the creditors pro rata. It was also sought by the plaintiff to subject certain unpaid subscriptions of Story & Bunnell, and possibly their stock liability

in the carriage company, to pay the claims of the creditors. To the petition a demurrer was filed on behalf of the sheriff (Story & Bunnell not appearing in name), by Brumbach & Thatcher, of Toledo, and John W. Winn, of Defiance, attorneys. Harris & Cameron appeared as attorneys for the plaintiff and for the First National Bank. Henry Newbegin appeared for John F. Deatrick & Sons and other creditors by cross petition. Other creditors were represented severally by N. G. Johnston, S. T. Sutphen, and B. B. Kingsbury, attorneys, of Defiance. On hearing of the demurrer, it was overruled by the court of common pleas. Immediately thereafter, Thatcher & Winn asked the court to have certain banks of Baltimore made parties to the suit, as parties in interest, without stating what the interest was, and the order was made by consent, with leave in the future to file a cross petition in the case. Soon after, and before filing their cross petition, or otherwise pleading in the case, the new parties, the Baltimore banks, filed a petition and bond for removal of the case to the United States circuit court (at Toledo), on the ground of diverse citizenship and a separate controversy. The right to remove was contested by Harris & Cameron and by Henry Newbegin, attorneys, and on hearing by the court of common pleas the order of removal was refused, on the ground that there was no separable controversy in the case; the court not passing on the other questions argued. Thatcher & Winn, as attorneys for the Baltimore banks, now applied to the circuit court of Defiance county for a writ of mandamus against Judge Snook, the judge of the court of common pleas, to compel him to make the order of removal. The state circuit court overruled this motion, refusing to entertain jurisdiction by writ of mandamus, to review the order of the lower court. To same effect is *In re Atlantic City R. Co.*, 164 U. S. 633, 17 Sup. Ct. 208. In this state of the case the attorneys for the Baltimore banks filed a transcript of the record in the United States circuit court. Harris & Cameron and Henry Newbegin, on behalf of their clients, followed the case there, and moved to remand, and filed briefs to sustain their motion. After this Thatcher & Winn, on behalf of the Baltimore banks, filed their petition and bond in the United States circuit court to transfer the case there for hearing on the ground of local prejudice.

Harris & Cameron, for plaintiff.

Henry Newbegin, for certain cross petitioners on the motion to remand.

Orville S. Brumbach and Charles A. Thatcher, for defendants.

HAMMOND, J. The motion of the plaintiff to remand this case to the state court for want of jurisdiction must be granted. The case falls within the category of *Deposit Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733, and not that of *Barney v. Latham*, 103 U. S. 205. In the first of these cases the supreme court of the United States, in an opinion by Mr. Chief Justice Waite, held that a creditors' bill to subject incumbered property to the payment of the creditors' judgment by a sale and distribution of the proceeds among lienholders according to their respective priorities is not a divisible action, and therefore is

not removable under the removal acts. It is, he says, but a single cause of action; and the fact that each defendant may have a separate defense does not create a separate controversy, within the meaning of the removal acts. In that case the purpose of the bill was precisely the same as in this, and the cases are substantially alike in all respects. There a nonresident mortgage creditor, claiming a first lien, sought to remove the cause, and the court said that the answer and cross bill claiming to have the property sold and applied to that mortgage as a prior lien was only an incident to the suit of the creditor, for the reason that the creditor wished to have property subjected not alone to his own or to the mortgage debt, but that he wanted complete relief that would secure a sale of the entire property, free of all incumbrances, and a division of the proceeds according to the adjusted equities of all the parties. Here the defendants asking removal (the two Baltimore banks) hold, by assignment, the cognovit judgment notes given to the defendants Story and Bunnell, or the firm of Story & Bunnell. It seems that neither of these defendants, original or substituted by assignment, had filed any answer or cross bill at the time the petition for removal was filed; but enough appears to see that the relief they must ask in some form will be precisely the same as that asked by the removing petitioner in the case of Deposit Co. v. Huntington, *supra*. They claim a lien prior to all others, through older judgments, where, as in the Deposit Company Case, the oldest lien was a mortgage; but this can make no difference whatever. The one case seems to be a precise precedent for the other.

It is true that in this case an additional relief is asked against Story & Bunnell, the assignors of the Baltimore banks, the removing petitioners, to which relief, if granted, the said assignees must respond, in the sense, at least, that their judgments cannot be paid until all equitable rights against Story & Bunnell are adjudicated and adjusted. If they owe, under the statutes of Ohio, for additional assessments of their stock, it is altogether probable that such assessments may be equitably set off against the judgments in the hands of their assignees. But, if so, both the claim for the amount of assessments due and the claim to have them set off against the judgments are incidental to the main purposes of the bill, just as much as in the case cited in the supreme court of the United States the claim of a prior lien was incidental. It is not necessary to decide here whether any or what equities exist, but none can exist which involve priorities of lien, liability to respond to demand for assessments and set-off, that can be foreign and separable from the general purpose to administer this insolvent firm in a general bill that shall bring into one suit all who are interested in the assets of the concern, and all who have any claims against it. Everything, properly speaking, which concerns the assets as a claim against them, is but a graft upon the original and main relief. This would be so under the general equity law for the administration of the assets of an insolvent debtor, and particularly so under the statutory provisions for the convenient administration of the assets of an insolvent corporation. Many cases could be cited, which

have been decided under the removal acts, to this effect, but the one already mentioned is so complete a precedent that it is all-sufficient.

Since the original petition was filed, another petition is filed here, asking for removal on the ground of local prejudice, which the court declines to grant, upon the ground that the proof of local prejudice is not at all satisfactory. It depends mainly upon the affidavits of Thatcher & Winn, who are lawyers in the case; and the counter affidavits filed by the plaintiff contradict every important, or even plausible, allegation of the defendants' affidavits. It must be remembered that this case is not tried by a jury, but by an equity judge. Recognizing this, the affiants for the defendants seek to involve the common pleas judge by averring that on a certain occasion, when a motion was heard for the appointment of the receiver, in reply to uncomplimentary remarks made by a lawyer about the defendants he said: "We will see to it that they are not allowed to carry this property out of the county." Other witnesses deny that any such remark was made by the judge, and say that he only stated, in reply to what the lawyer said, that he would see that the rights of all the parties should be protected. Even if the judge said what the affidavits affirm, it is the most trivial support for any application to remove the case on the ground of local prejudice, or even bias on his part. It was his duty to see that they should not carry the property out of the county, pending this litigation, and does not at all imply, whatever may be said in criticism of it, that he had any bias against the defendants. The affidavits also say that the lawyer mentioned called the defendants "rascals," etc. But surely it has not come to this, that the federal removal act proceeds upon the idea of removing cases because of uncomplimentary or abusive remarks by lawyers about their adversaries in litigation. Much is said in the affidavits about a newspaper publication in the county, denouncing the defendants for their alleged fraudulent transactions in relation to the management of their company. But again, it has not come to this, that the federal courts will remove cases merely because of newspaper articles denunciatory of individuals. These are the most formidable allegations in the affidavits. Taken altogether, they may show that the failure of this company and this litigation has not created probably more than ordinary excitement in the community where the corporation carried on its business. It is not to be denied that public opinion may be so inflamed, even as against individuals, that such local prejudice would exist as might justify the removal of a case to be tried before an equity judge; but such an inflammatory state of public opinion should be most extraordinary, and far more intense than anything shown by these affidavits, even if they were not contradicted by equally weighty affidavits on the other side. *Detroit v. Detroit City Ry. Co.*, 54 Fed. 1.

Merely because a judge is to be elected by the people is no reason why this removal act of congress should be enlarged and extended to remedy any evil that may be thought to exist in that regard, and the averments in these affidavits in that behalf are not

to be taken as justifying such an extension and use of the act of congress. The case in Detroit, above cited, does not decide any such doctrine, but only where mob violence and public antagonism about public institutions, like railroads and such like, may affect an electoral populace, the fact may be taken to prove local prejudice.

There are reasons arising out of the comity of the federal and state courts towards each other which might justify, if they do not demand, that this court should refuse to exercise the jurisdiction, even if it existed in a case like this. Often the courts do decline, from mere considerations of comity, to exercise a jurisdiction that technically they possess, and this is nearly always so where the res is in possession of another court. It is only under the most extraordinary circumstances that such a disposition of the court having control over the property should take place, although the power exists. Therefore, if there were here a separable controversy, inasmuch as the state court, having possession of the property by its receiver, and proceeding to administer the assets, has denied our jurisdiction by refusing to approve the bond and sanction the removal, it might be wise in this court to withhold any action if the motion to remand should be denied until the defendant had established the right of removal through the process of the appellate jurisdiction of the supreme court of the United States over the state court itself. Surely, if that were a wise thing to do, this court should not retain jurisdiction except in the clearest possible case of its existence. When this case is remanded, if the jurisdiction exists in behalf of these defendants, they may vindicate it by an appeal from the state courts to the supreme court of the United States; and, if it be only doubtful, it is better to remit them to that remedy than to retain this jurisdiction at this stage of the proceedings, and engage in a disagreeable conflict of authority with the state courts. Of course, this principle or plan of action should not be allowed when it would amount to the denial of a plain right of removal, which the state court obdurately and perversely refused to sanction, but it should be sufficient to turn the scale in an evenly-balanced case, to say nothing of a doubtful case.

It is not necessary to consider other objections to our jurisdiction that have been taken in the argument, such as that the petition for removal does not affirm the existence of local prejudice in all adjacent counties to which the case might be removed under the laws of Ohio, nor the further provision of the Ohio statutes that another judge may be designated when objection is tenable against the one before whom the case is pending. Whether such considerations as these would affect the question of removal, under the federal statute, we need not inquire. The motion to remand will be allowed, and the petition to remove on the ground of local prejudice will be disallowed. Ordered accordingly.

LOBENSTINE v. UNION EL. R. CO.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 291.

FEDERAL COURTS—STATE DECISIONS.

The decisions of the supreme court of Illinois to the effect that an abutting lot owner in that state cannot stop the construction of a railroad in the street, that his remedy is in damages, and that a proceeding to enjoin must be by the city or attorney general, are binding upon the federal courts.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

On November 16, 1895, William C. Lobenstine, a citizen of the state of New York, filed his bill in the circuit court of the United States for the Northern district of Illinois against the Union Elevated Railroad Company, a corporation organized under the laws of Illinois, to enjoin the construction of an elevated street railway track on Wabash avenue, in the city of Chicago, in front of premises owned by complainant, and abutting on that street. The east boundary of complainant's lot is part of the frontage on Wabash avenue between Lake and Harrison streets. The bill shows an ordinance enacted October 17, 1895, by the common council of the city of Chicago, granting to defendant "the right to construct and operate its elevated railroad on Wabash avenue, between Lake and Harrison streets, in said city." It is provided by statute in Illinois (sections 201, 202, c. 114, and section 90, par. 63, art. 5, c. 24, Starr & C. Ann. St.) that a city cannot enact such an ordinance without the consent of persons owning at least one-half the frontage along the line of street where the proposed improvement is to be constructed. The bill disputes the validity of the ordinance, and hence the right of the defendant to proceed, on the ground that the consents of frontagers owning at least half the abutting property were not, in fact, obtained, or, if obtained, that a money consideration was unlawfully paid or promised by the defendant for such consents. Complainant moved in the circuit court for a preliminary or pendente lite injunction. Defendant filed no answer or affidavit, but resisted the motion, on the ground that the bill showed no cause of action. The motion was denied by the judge holding the circuit court, and complainant brings the record to this court on appeal from that order.

A. W. Green and H. S. Robbins, for appellant.

Clarence A. Knight and John R. Wilson, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

SHOWALTER, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

By the rule in Illinois, the remedy of complainant is an action at law to recover against defendant whatever damages, if any, complainant sustains by the building and use of the railway track on the public street. In Illinois the right to stop such a use of the public street as is here objected to is not incidental to complainant's ownership of an abutting lot. As declared by the highest judicial authority of the state, the frontage statute adds nothing to the property right of a frontager. In building its railway track in the street, the defendant acts under color of the ordinance; that is to say, under an assumed grant from the city. A judicial proceeding to enjoin defendant—in other words, to determine whether the ordinance is valid or invalid, whether the additional use of the street is lawful or unlawful—must be by the city, or the attorney general as representing the public.

Under the constitution (section 13, art. 2) and laws of the state, the frontager may, as already said, recover whatever damages he sustains by reason of the additional public burden on the street; but he cannot control the public use of the street as a highway by preventing the construction thereon of additional facilities for the traveling public. To this effect are the decisions of the supreme court of Illinois. *Patterson v. Railroad Co.*, 75 Ill. 588; *Corcoran v. Railroad Co.*, 149 Ill. 295, 37 N. E. 68. *Doane v. Railroad Co.* (opinion filed on the 16th day of October, 1896, in the supreme court of Illinois, and not yet officially reported) 46 N. E. 520.

The ownership of real estate in Chicago by a nonresident is subject to precisely the same limitations as though vested in a person residing in that city. The local law, as declared in the Illinois constitution and statutes, and in the judicial opinions of the highest court of the state, is determinative in the one case, as in the other. No question arising out of the constitution of the United States, or any federal statute, is here involved. The subject-matter of the litigation is local, and not transitory; and it is the rule of land law in Illinois, and not elsewhere, which must measure the rights of the parties. By that rule, the dominion and proprietorship which this complainant exercises over his lot on Wabash avenue does not comprehend the right to stop the proposed improvement on the public street in front of his lot. This court cannot, therefore, disturb the ruling appealed from. The assignment of error here, namely, that the circuit court erred in not granting the preliminary or pendente lite injunction, is overruled, the order appealed from is affirmed, and the cause remanded to the circuit court for further proceedings not inconsistent with this opinion.

BRAZORIA COUNTY et al. v. YOUNGSTOWN BRIDGE CO.¹

(Circuit Court of Appeals, Fifth Circuit. February 2, 1897.)

No. 534.

1. APPEAL—PRACTICE—WAIVER OF OBJECTION TO DEMURRER.

When a demurrer is irregularly filed, it may be wholly disregarded or taken from the files upon motion of the complainant, and, where neither of these things has been done, the complainant will not be heard to complain upon appeal that the demurrer was irregularly filed because unaccompanied by the required certificate of counsel and affidavit of defendants.

2. CONSTITUTIONAL LAW—CONTRACTS BY COUNTIES—FAILURE TO LEVY TAX.

Under Const. Tex. art. 11, § 7, which provides that "no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon, and to provide at least two per cent. as a sinking fund," a contract made by a county for the building of two bridges, to be paid for in county bonds, is void, in the absence of any provision for the levy of a tax to pay the interest and to provide a sinking fund; and the county cannot be compelled by mandamus to issue the bonds to the bridge company, although the bridges have been constructed and the county is using them.

¹ Rehearing pending.

3. SAME—POWERS OF COURTS OF EQUITY.

Where a contract is void at law, for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or, in the absence of fraud, accident, or mistake, to so modify it as to make it legal, and then enforce it.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

This was a suit in equity brought by the Youngstown Bridge Company against Brazoria county, Tex., and others, to obtain a construction and reformation of a contract entered into between it and Brazoria county, and praying that an action at law upon the contract be suspended until the further order of the court. A decree having been rendered in favor of complainant, reforming the contract as prayed, defendants have appealed.

On May 25, 1892, the county of Brazoria, state of Texas, entered into a written contract with appellee, the Youngstown Bridge Company, for the construction of two iron bridges. The contract, which was duly executed by the respective parties, required the appellee to furnish all necessary material, and to construct the bridges according to the plans and specifications attached thereto. In consideration of the construction of the bridges, the county agreed to pay to the appellee the sum of \$16,000, payment to be made in the bonds of the county, in denominations of \$100 each, payable 20 years from the date of same, with interest at the rate of 6 per cent. per annum; the bonds, however, to be redeemable at any time after 5 years from their date. As to the time of the completion of the work, and the failure to perform the contract within the stipulated period, the following provisions occur in the contract: "Both of said bridges are to be completed in accordance with this contract within five months from this date, unless the completion of same is prevented by unavoidable accidents or the act of God; and upon a failure upon part of the party of the first part to so complete said bridges within said time, and to tender the same to the party of the second part, then the party of the first part hereby agrees to pay to the party of the second part the sum of fifty dollars (\$50.00) for each day after the expiration of five months from date hereof until both of said bridges are completed according to this contract, and tendered to the party of the second part, which said amount is to be deducted from the purchase price herein agreed to be paid for such bridges. * * * The fifty dollars agreed to be paid upon a failure to complete said bridges within five months from this date is to be paid as liquidated damages for such failure." The bridges were constructed by the appellee, but not within the specified time. The county is, however, using them, but refusing to issue the bonds. To compel the county to comply with its contractual obligations, the appellee on February 8, 1893, instituted a suit at law, in the circuit court for the Eastern district of Texas, at Galveston, in which Brazoria county, the county judge, the county commissioners, the clerk of the county commissioners' court, and the county treasurer were made parties defendant. The petition in the suit at law alleged fully the facts in reference to the execution of the contract, the authority of the county to make it, the performance by the plaintiff and breach by the defendant, and prayed the issuance of a writ of mandamus to require the county authorities to issue to the plaintiff, the Youngstown Bridge Company, the bonds of the county, to the amount of \$16,000, agreeably to the provisions of the contract. The concluding prayer of the petition is as follows: "That a writ of mandamus issue to the county judge and the said commissioners, ordering and compelling them, at the said next regular term of the commissioners' court of Brazoria county, Texas, to pass an order, and duly enter the same upon the minutes of said court, providing for the levy and collection of a tax sufficient to pay the interest and to create a sinking fund for the payment of said bonds, and providing by said order for the annual levy and creation of sufficient tax for said purpose; for all costs of court; and for such general and special relief as the plaintiff may show itself entitled upon the trial hereof." The petition contained no allega-

tion to the effect that Brazoria county had made any provision, by levy of a tax, for interest on the bonds and a sinking fund, as required by the constitution of the state. To the petition the defendants interposed a general demurrer and filed a special answer. The material defense of the county, as set forth in the answer, is embodied in the following averments: "That one of the conditions and provisions of said contract set out by plaintiffs in their said original petition, and sued on in this case, is that said bridges are to be completed in accordance with this contract within five months from this date, unless the completion of the same is prevented by unavoidable accidents or the act of God; and upon a failure upon the part of the party of the first part to so complete said bridges within said time, and to tender the same to the party of the second part, then the party of the first part herein agrees to pay to the party of the second part the sum of fifty dollars for each day after the expiration of five months from date hereof, until both of said bridges are completed according to this contract and tendered to the party of the second part, which said amount is to be deducted from the purchase price herein agreed to be paid for such bridges." The date of said contract is May 25, 1892. Defendants allege that, if said bridges referred to herein and in plaintiffs' original petition were ever at any time tendered to defendants herein, such tender was not made, or pretended to have been made, until June 27, 1893, or 211 days after the expiration of 5 months from date of said contract. The Youngstown Bridge Company, plaintiff in the suit at law, and appellee here, filed its bill on March 24, 1894, against the defendants in the suit at law, who are appellants on this appeal, to obtain a construction and reformation of the contract entered into between it and Brazoria county. The bill alleges the execution of the contract, the power of the county to make it, the completion of the bridges, and their acceptance and use by the county. It further alleges that appellee, without any fault of its own, failed to complete the bridges until June, 1893; that the liquidated damage clause was inserted in the contract by accident and mutual mistake of the parties; and that the clause in question was understood and intended to be a mere penalty, and not to be enforced literally as in the contract provided. The purpose of the bill was to secure relief against what appellee regards as a penalty imposed for failure to construct the bridges within the stipulated time, on the ground, as stated, that the clause was made a part of the contract by accident and mutual mistake of the parties. Relief appropriate to the allegations of the bill is prayed, and, further, that the suit at law be suspended until the further order of the court, and also that the county be enjoined from issuing other bonds until it complied with its obligation to issue bonds to the appellee in the sum of \$16,000, according to the terms and stipulations of the contract. On April 7, 1894, the appellants and appellee entered into an agreement touching the matter of the issuance of an injunction, and a temporary injunction was duly issued in conformity with the stipulation. Appellants answered the bill August 6, 1894, but, in view of the conclusion reached by the court, the averments of the answer need not be stated. Replication was filed by the appellee January 5, 1895, and testimony taken on the issues joined. The appellants filed a demurrer to the bill on March 16, 1896, but the usual certificate of counsel is not thereto appended. There, however, appears an affidavit of one of the counsel for appellants that the "demurrer is not interposed for delay." On the same day, to wit, March 16, 1896, the demurrer was heard, and the following order entered: "On this day came the parties to this suit, by their attorneys, and thereupon came on to be heard the defendants' demurrer to the complainant's bill, and was argued; but, the argument not being concluded, the further consideration of the matter was postponed until to-morrow." On March 17th the hearing of the cause on demurrer, the pleadings, and proofs was concluded, and the demurrer was overruled. The court decreed the liquidated damage clause of the contract "to be a provision for a penalty for the nonperformance of said contract, and not liquidated damages, and that said amount of \$50 per day does not fix the amount of damage, but is only a penalty." The decree proceeds as follows: "It is further considered, ordered, adjudged, and decreed that, in all actions sought to be maintained by said complainant upon said contract, that the said terms of said contract be so construed, and that it be used in evidence with said construction, and that the said contract be, and the same is hereby, re-

formed to the extent that the said provision of \$50 per day to be paid by complainant in the case of failure to construct said bridge within the time specified is and was a provision for a penalty, and not an amount fixed as the damages which would accrue in case of nonperformance of said contract." The decree further orders the suit at law to proceed to a hearing, and perpetuates the temporary injunction theretofore issued. From this decree the defendants below appeal.

Branch T. Masterson, for appellants.

J. N. Coleman, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge, after stating the case, delivered the opinion of the court.

Before entering upon a discussion of the merits of the case, it becomes necessary to dispose of a preliminary question suggested by the appellee. It is objected by counsel for appellee that the demurrer interposed by appellants to the bill was irregularly filed and heard, because it was unaccompanied by the usual certificate of counsel and affidavit of the defendants, and for the additional reason that it was filed on the eve of the final hearing of the cause, and long after the filing of the answer. By equity rule 31, it is provided that:

"No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of defendant that it is not interposed for delay; and if a plea, that it is true in point of fact."

Construing the rule quoted, it is said by the supreme court:

"Inasmuch as the so-called demurrer was fatally defective, in lacking the affidavit of defendant and certificate of counsel required by rule 31, there was no error in disregarding it and entering a decree pro confesso." *Furnace Co. v. Witherow*, 149 U. S. 576, 13 Sup. Ct. 937; *National Bank v. Insurance Co.*, 104 U. S. 76; *Preston v. Finley*, 72 Fed. 850; *Taylor v. Brown* (Fla.) 13 South. 957.

Referring to the foregoing statement of the case, it will be observed that the demurrer was accompanied by an affidavit of one of the counsel for the appellants to the effect that the demurrer was not interposed for delay. Whether such an affidavit made by counsel in the cause would be the equivalent to the usual certificate by counsel and affidavit of the defendant, need not be determined, as we are satisfied that the appellee is not in a position to avail itself of the irregularities suggested. When a demurrer is irregularly filed, it may be wholly disregarded, or taken from the files, upon motion of the plaintiff. *Ewing v. Blight*, 3 Wall. Jr. 134, Fed. Cas. No. 4,589; *Taylor v. Brown*, supra; *Keen v. Jordan*, 13 Fla. 327; 1 Beach, Mod. Eq. Prac. § 323. In this case the appellee neither disregarded the demurrer, nor moved to strike it from the files. On the contrary, the demurrer came on for hearing, was argued by counsel, and, as shown by the decree, overruled by the court. Objection is here made—for the first time, so far as the record discloses—to the irregularities complained of. That the appellee is too late in urging its objections seems to be well settled.

Upon this point, Mr. Chief Justice Randall, speaking for the court in *Keen v. Jordan*, 13 Fla. 332, 333, says:

"The appellee, however, suggests in his brief that the demurrer was properly overruled, because it was not accompanied by the certificate of counsel that in his opinion it is well founded in law, as required by the thirty-first rule of chancery practice. This objection of appellee relates to an irregularity of which he should have taken advantage by motion to strike off the demurrer. Upon an appeal, parties cannot take advantage of any irregularity which they have either consented to or waived. 1 Barb. Ch. Prac. 396. Here the parties proceeded to argument and judgment upon the demurrer, thus waiving this irregularity. The demurrer was overruled by the court,—not struck off or disregarded. Where a defendant is guilty of an irregularity in filing a demurrer, the plaintiff may, on application, obtain an order to take the demurrer off the files, but not that the demurrer be overruled. 1 Daniell, Ch. Prac. 617, 618."

See *Goodyear v. Toby*, 6 Blatchf. 130, Fed. Cas. No. 5,585; *Clements v. Moore*, 6 Wall. 310; *Hayes v. Dayton*, 18 Blatchf. 425, 8 Fed. 702.

The appellee having waived the right to object to the consideration of the demurrer, the contention urged by counsel in its behalf must be held to be untenable. We will therefore proceed to consider such of the questions raised by the demurrer, and insisted upon in the specifications of error, as require decision. Appellants assign, among others, the following grounds of error:

"The court erred in overruling the defendants' demurrer, and in rendering the decree in favor of complainant and against these defendants, and in not dismissing the complainant's bill, for this: (1) That the whole basis of this suit was an alleged mutual mistake, but the allegations in the bill do not show any facts constituting a mistake, nor does it allege such mistake as could be relieved against by the court, or could be made the basis of the decree rendered herein, canceling in part the contract as signed and executed by the parties to it. (2) The allegations of the bill do not show that the contract sought to be changed and corrected was a legal or binding obligation of the county of Brazoria, for this: That, under the constitution and laws of the state of Texas, the county of Brazoria could not make a legal or binding contract to issue its bonds, as provided in said contract, without, at the time when the debt was created, levying a tax to pay the interest and sinking fund on the same; and it does not appear by said bill that any tax was levied when said debt was created or contract made, or at any time, and the evidence shows that no tax was levied for that purpose."

As to the first specification, we do not deem it necessary to determine whether the bill is demurrable for the cause assigned; for, although the bill may be admitted to be sufficient, still it is apparent that the proof does not support the allegations. The gravamen of the complaint is that the liquidated damage clause of the contract was the result of accident and mutual mistake of the parties. But there is no testimony showing or tending to show the truth of such charge. On the contrary, the proof clearly shows that the clause was deliberately inserted in the contract, and that all the parties signed it with full knowledge of the existence of all its provisions. *Gano v. Palo Pinto Co.*, 71 Tex. 102, 8 S. W. 634. It seems to have been the purpose of appellee to elicit from the county judge, and the two members of the commissioners' court whose testimony was taken, their views touching the construction of the liquidated damage clause of the contract, and the motives which

actuated the parties in making it a part of the agreement. But the question of the construction of contracts is one for the courts, and a court of law is equally competent with a court of equity to perform that duty.

The second specification of error presents the real question in the case, and upon its solution the fate of the bill depends. Under this assignment it is contended, in effect, by appellants, that the contract in question is not valid and binding upon Brazoria county, because no provision was made at the time of its execution for levying and collecting a sufficient tax to pay the interest on the debt thus created, and to provide a sinking fund, as required by the constitution of the state. The bill alleges the execution of the contract, and the fact that, under the laws of Texas, Brazoria county had authority to provide for the construction of bridges. The allegations are specific as to the performance of the contract by the appellee, and the acceptance and use of the bridges by the county. Indeed, it may be generally said that the bill, in respect of the question now being considered, is amply sufficient, save and except in one respect: There is nothing in the bill to show affirmatively, nor anything stated from which it may be inferred, that Brazoria county has made provision for the debt created by the contract, by levying a tax to pay the interest and to provide a sinking fund. The idea that such provision was made by the county is negatived by the concluding prayer of the petition in the suit at law, as recited in the bill, by which the appellee prays for a mandamus to compel the levy of a tax to pay the interest on, and provide a sinking fund for, the debt created. The prayer is in the following words:

"That a writ of mandamus issue to the county judge and the said commissioners, ordering and compelling them, at the said next regular term of the commissioners' court of Brazoria county, Texas, to pass an order, and duly enter the same on the minutes of said court, providing for the levy and collection of a tax sufficient to pay the interest and to create a sinking fund for the payment of said bonds, and providing by said order for the annual levy and creation of sufficient tax for said purpose."

It may be further observed that the contract in this case does not provide for the payment of the bridges in money, but the provision is specific that they shall be paid for in the bonds of Brazoria county, running through a series of years. Questions, therefore, of ordinary municipal indebtedness and current expenses, payable in current funds, which are considered in some of the decisions, have no pertinency to the question here discussed. Since Brazoria county has failed to make provision for the payment of the debt created by the contract, by the levy of a tax to pay the interest and to provide a sinking fund, is the contract relied upon by the appellee valid and binding upon the county, as a contract for the issuance of bonds? Section 7, art. 11, of the constitution of the state of Texas, provides:

"But no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon, and to provide at least two per cent. as a sinking fund."

It is said by Mr. Justice Gaines, speaking for the court, in *City of Terrell v. Dessaint*, 71 Tex. 773, 9 S. W. 594, that:

"The language is general and unqualified, and we find nothing in the context to indicate that the framers of the constitution did not mean precisely what is said; that is, that no city should create any debt without providing by taxation for the payment of the sinking fund and interest."

This question has been repeatedly before the courts of Texas, and the same construction has been invariably placed upon the constitutional provision. The language is so clear that it admits of but one interpretation. The provision means precisely what it says, and it cannot be evaded or set at naught to meet the supposed hardships of particular cases. Where the meaning of constitutional provisions is plain and obvious, it is the duty of courts to give effect to such meaning, without attaching to the words employed a forced construction, and one not intended by the framers of the instrument. The remarks of Mr. Justice Lamar, as the organ of the court, in *Lake Co. v. Rollins*, 130 U. S. 670, 9 Sup. Ct. 652, are apt and appropriate in this connection:

"We are unable," says the justice, "to adopt the constructive interpolations ingeniously offered by counsel for the defendant in error. Why not assume that the framers of the constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain, and in such cases there is a well-settled rule which we must observe. The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself, and, when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument."

That the contract here sought to be reformed and enforced is an invalid obligation, and therefore not enforceable against Brazoria county, is conclusively shown by the following authorities: *City of Terrell v. Dessaint*, supra; *Citizens' Bank v. City of Terrell*, 78 Tex. 450, 14 S. W. 1003; *Biddle v. City of Terrell*, 82 Tex. 335, 18 S. W. 691; *McNeill v. City of Waco* (Tex. Sup.) 33 S. W. 322; *Noel v. City of San Antonio* (Tex. Civ. App.) 33 S. W. 263; *Kuhls v. City of Laredo* (Tex. Civ. App.) 27 S. W. 791; *Wade v. Travis Co.*, 72 Fed. 985; *Berlin Iron Bridge Co. v. City of San Antonio*, 62 Fed. 882. See, also, *Millsaps v. City of Terrell*, 8 C. C. A. 554, 60 Fed. 193, and *Wiegel v. Pulaski Co.* (Ark.) 32 S. W. 116.

But it is contended by counsel for the appellee, in his brief, that:

"Taking this entire transaction as one, as we must, the contract to build was only the initial step. It was a step towards the creation or incurring of a debt, but it was not incurred until the bridges were built and the bonds issued."

This position of counsel seems to be satisfactorily answered by the supreme court of Texas in the case, before cited, of *McNeill v. City of Waco*, 33 S. W. 322. In that case, at page 324 of 33 S. W., Mr. Justice Denman says:

"By parity of reasoning, we think it follows that a contract entered into for the construction or erection of any public improvement authorized by law, but not properly a part of the ordinary expenses of the corporation, * * * would be the creation or incurring of a debt, within the meaning of the constitution. We conclude that the word 'debt,' as used in the constitutional

provisions above quoted, means any pecuniary obligation imposed by contract, except such as were, at the date of the contract, within the lawful and reasonable contemplation of the parties, to be satisfied out of the current revenues for the year, or out of some fund then within the immediate control of the corporation."

The contract entered into between the appellee and Brazoria county being void because, in the attempt to create the debt evidenced thereby, the express provisions of section 7, art. 11, of the constitution were ignored and violated, and there being no evidence in the record of accident or mutual mistake on the part of either of the parties in the execution of the contract, it cannot be seriously claimed that a court of equity has the power to reform the instrument, and infuse into it constitutional force and vigor. In *Hedges v. Dixon Co.*, 150 U. S. 192, 14 Sup. Ct. 74, the principle is clearly stated by Mr. Justice Jackson, as the organ of the court, in the following language:

"Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or, in the absence of fraud, accident, or mistake, to so modify it as to make it legal, and then enforce it. Courts of equity can no more disregard statutory and constitutional requirements and provisions than courts of law. They are bound by positive provisions of a statute, equally with courts of law; and, where the transaction or the contract is declared void because not in compliance with express statutory or constitutional provision, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof." *Litchfield v. Ballou*, 114 U. S. 192, 193, 5 Sup. Ct. 820.

It is unnecessary to consider other questions raised by the assignment of errors. The propositions already discussed establish that the bill of appellee cannot be sustained, and our conclusion is that the decree of the circuit court should be reversed and the cause remanded, with directions to set aside the order perpetuating the injunction, and dismiss the bill without prejudice; the costs of this appeal and of the circuit court to be taxed against the appellee. Ordered accordingly.

On Rehearing.

(June 10, 1897.)

PER CURIAM. On a former hearing we reversed the decree appealed from, and remanded the cause, with directions to set aside the order perpetuating the injunction, and to dismiss the bill without prejudice.

In a petition for rehearing, the opinion and decision of the court of civil appeals, Second district of Texas, in *Mitchell Co. v. City Nat. Bank of Paducah, Ky.*, 39 S. W. 628, was called to our attention, and thereon we granted a rehearing, which has been argued at length orally and by brief; whereupon, on full consideration, we are of the opinion that our former decree was right and should be restored.

It is therefore ordered, adjudged, and decreed that the decree ap-

pealed from be, and the same is hereby, reversed, and the cause is remanded, with instructions to set aside the order perpetuating the injunction, and to dismiss the bill without prejudice.

MERCANTILE TRUST CO. v. ATLANTIC & P. R. CO. et al

(Circuit Court, S. D. California. April 7, 1897.)

1. RAILROAD RECEIVERS—AFFIRMANCE OF SALE—RIGHTS OF BONDHOLDERS.

The S. R. Co. entered into an agreement with the A. R. Co. and two other railroad corporations by which the S. Co. agreed to sell a certain described line of railroad, without equipment, to the A. Co., for a stipulated sum, of which a large amount was to be paid in cash, and the rest either in cash or in bonds of the A. Co., the payment of the purchase price being guaranteed by the other two companies in consideration of their interest in securing a connection over the line sold. It was also agreed that, as the S. Co. could not then give a clear title, it should lease the line in question to the A. Co., until it could give clear title, for a stipulated rental, including all taxes on the property, such rental being also guaranteed by the other two companies. The A. Co. took possession of the line, and afterwards executed a mortgage covering it, with other property. In a suit for the foreclosure of this mortgage, subsequently brought, receivers of the road were appointed, who paid the rental and taxes under the agreement with the S. Co. from time to time, in part with the proceeds of receivers' certificates issued upon their representations of the necessity to the mortgaged road of the line sold by the S. Co. *Held*, that the agreement between the several companies was not a mere lease, but was a contract for a sale, the conditions of which the mortgagees who derived their rights under it could not, while asserting such rights, be permitted to disaffirm; but, if ever open to disaffirmance, the acts of the receivers had affirmed it.

2. SAME—RESISTING TAX ASSESSMENT—COSTS OF LITIGATION.

Prior to the appointment of the receiver of the A. Co., the S. Co., to which the taxes on the line in question were assessed, objected to an increase, by the California state board of equalization, of the assessment of its property, including said line, and sought, by litigation extending over several years, to reduce such assessment, and, having failed to do so, presented a claim to the receiver of the A. Co. for a proportional part of the amount paid by it, including interest, penalties, and costs. *Held*, that as the contract under which the A. Co. held the line in question provided for the payment of taxes, and as the receivers had been directed in the order appointing them to pay the taxes due and to become due, the receiver should now be directed to pay the tax, and, as the A. Co. had assented to the contest instituted by the S. Co., they should also be required to pay a proportionate share of the interest, penalties, and costs.

Alexander & Green and White & Monroe, for complainant.

C. N. Sterry, for receiver.

Henry S. Brown, J. E. Foulds, and J. H. Chapman, for Southern Pac. R. Co.

Neill B. Field and A. W. Hutton, for United States Trust Co.

ROSS, Circuit Judge. On the 20th day of August, 1884, a contract was made and entered into in writing by and between the

Southern Pacific Railroad Company, a corporation organized under and in pursuance of the laws of the state of California, as party of the first part; the Atlantic & Pacific Railroad Company, a corporation created and organized under the acts of the congress of the United States, as party of the second part; the St. Louis & San Francisco Railway Company, a corporation organized under the laws of the state of Missouri, as party of the third part; and the Atchison, Topeka & Santa Fé Railroad Company, a corporation organized pursuant to the laws of the territory and state of Kansas, as party of the fourth part,—which recited that whereas, the party of the first part to the contract was then the owner of a certain line of railway in the state of California, particularly described therein; and whereas, it had then been agreed by and between the parties to the contract that such line of railway should be sold by the party of the first part thereto, and purchased by the party of the second part, upon the terms and conditions therein stated; and whereas, in consequence of the lien then existing upon such line of railway under the mortgage made and executed by the party of the first part, bearing date April 1, 1875, the party of the first part could not then make clear title to such line of railway, it had then been agreed that, until clear title thereto could be made, such line of railway should be leased by the party of the first part to the party of the second part, upon certain terms and conditions therein stated; and whereas, the parties of the third and fourth parts were then largely interested pecuniarily in the acquisition of such line of railway by the party of the second part “by lease and purchase as aforesaid,”—the respective parties did thereupon, in consideration of the premises and the mutual undertakings and agreements in the contract stated, and for other good and valuable considerations therein acknowledged, covenant and agree to and with each other as follows:

First. The party of the first part agreed to sell to the party of the second part, and the party of the second part agreed to purchase from the party of the first part, the said line of railway, described as extending from the west end of the bridge over the Colorado river at or near The Needles, in the state of California, 242.37 miles, or thereabouts, to the easterly margin of the grounds or yards of the party of the first part used in connection with the Mojave Junction station, or with the main line of railroad of the party of the first part between Goshen and Yuma, together with the right of way therefor 200 feet in width, and the switches, sidings, turnouts, station buildings, section houses, turntables, and other appurtenances, together with the right to connect at Mojave Junction with the tracks of the party of the first part, but excluding the equipment of the road, and any interference with the right of way and depot grounds of the party of the first part at the junction mentioned, at and for the price of \$30,000 a mile, that is to say, \$7,271,100, of which purchase price one-sixth part, that is to say, \$1,211,850, to be paid in cash, and the remaining \$6,059,250 to be paid by the party of the second part to the party of the first part either in cash or in first mortgage 6 per cent. bonds of the party of the second part, issued under and

secured by its first mortgage bearing date July 1, 1880, the prompt payment of the principal and interest of which to be legally guaranteed by the parties of the third and fourth parts to the contract, respectively; it being expressly agreed that the sale should be consummated and the purchase price of the line of railway paid whenever the party of the first part should be able to make clear title thereto, discharged from the lien of its first mortgage, bearing date April 1, 1875, and from all other liens existing thereon at the time of the contract, or which may be imposed thereon by the party of the first part at any time thereafter.

Second. The contract declared that in the meantime, and until the consummation of such sale and payment of the purchase price of the property, the party of the first part agreed to and did lease and demise to the party of the second part, and the party of the second part agreed to and did hire from the party of the first part, from the 1st day of October, 1884, the said line of railway, together with the appurtenances, in the contract agreed to be sold, at and for the annual rental of \$1,800 per mile, that is to say, \$436,266, payable semiannually during the continuance of such lease; and the party of the second part covenanted and agreed to and with the party of the first part, for itself and its successors and assigns, to pay to the party of the first part, its successors and assigns, as rental for the line of railway and appurtenances mentioned, until the consummation of the sale and the payment of the purchase price, as provided for, the sum of \$218,133 on the 1st days of April and October in each and every year; and, further, for itself and on behalf of its successors and assigns, to further promptly pay and discharge all taxes and assessments which should thereafter become due upon said property, or any part of it, or which might become in any wise due or owing in respect to the same, and would maintain, repair, and replace such property so that the same should at all times be and remain in substantially as good plight and condition as it then was, the nature and character of the property being considered.

Third. The contract further provided that, in case default should be made in the payment of any installment of such rental at the time stipulated for its payment, and such default should continue for 30 days, the party of the first part, its successors and assigns, might thereupon, and without demand or other formality, enter upon and take possession of the said line of railway, with its said appurtenances, and should be thereafter entitled to hold, retain, and enjoy the same as of its original estate therein; but, notwithstanding such entry, the party of the second part, its successors and assigns, should be liable to the party of the first part, its successors and assigns, for any and all damage in any wise resulting from the nonfulfillment of the contract, or any wrongful acts or omissions of the party of the second part, its successors or assigns, in respect to the said property, or any part thereof. The contract contained the further provision that, in case of the happening of any such default in respect to the payment of the rental provided for, and the continuance of such

default for 30 days, then, and in that event, at the election of the party of the first part, its successors or assigns, the right of the party of the second part to purchase the premises under the provisions of the contract should cease and determine.

Fourth. The party of the third part and the party of the fourth part to the contract, for themselves and their respective successors and assigns, in consideration of their pecuniary interest in the stock and securities of the party of the second part and their interest in the opening and maintenance of a through line of freight and passenger traffic over their respective lines of railway and over the line of railway then belonging to the party of the first part (the subject of the contract), and for other good and valuable considerations in the contract acknowledged, guarantied to the party of the first part, its successors and assigns, the prompt payment to the party of the first part, its successors and assigns, of the several installments of rental and of the purchase price therein agreed to be paid by the party of the second part to the party of the first part, and that, in case default should be made by the party of the second part in the payment of such installments of rent, or of any part thereof, or in the payment of such purchase price at the time or times stipulated for the payment thereof, the parties of the third and fourth parts, for themselves and their respective successors and assigns, would promptly pay to the party of the first part, upon demand, any and all amounts in respect of which the party of the second part should make such default, which amounts so paid by the party of the third or fourth part should be justly chargeable by the party paying the same against all amounts then due, or which might become due, from it to the party of the second part for traffic over such leased lines, or any line of the party of the second part, and should be otherwise enforceable as a debt of the party of the second part to the party of the third or fourth part who should have paid the same; it being understood and agreed, however, that the parties of the third and fourth parts should not be liable in solido for such amounts, but that each of such parties should be liable only for the one-half part of the several installments of rent and the purchase price thus guarantied by it.

The contract in question contained other provisions not important to be specially mentioned. Under and by virtue of this contract, the Atlantic & Pacific Railroad Company, on the 1st day of October, 1884, took actual possession of the line of railroad therein described, and its appurtenances, excepting only the equipment thereof, and continued in the actual and exclusive possession, use, and control thereof until the appointment by this court of receivers of the property, since which time the receivers have, respectively, been in such actual and exclusive possession, use, and control. While the Atlantic & Pacific Railroad Company was in possession, use, and control of the line of railroad and its appurtenances extending from The Needles to Mojave, under and by virtue of the aforesaid contract of August 20, 1884, to wit, on the 1st day of September, 1887, it executed a mortgage, covering, among other property, its right, title, and

interest thereto and therein, to the Mercantile Trust Company of New York to secure the payment of certain bonds. The Atlantic & Pacific Railroad Company had previously, to wit, on the 1st day of July, 1880, executed to the Union Trust Company of New York a mortgage to secure the payment of certain other bonds, which mortgage was broad enough to cover, and whose terms did cover, the after-acquired interest of the mortgagor in the line of railroad and its appurtenances, constituting the subject-matter of the contract here in question. By virtue of its mortgage, and because the Atlantic & Pacific Railroad Company had made such default in its terms and conditions as entitled it to do so, the Mercantile Trust Company, on the 8th day of January, 1894, commenced suit in this court for the foreclosure of its mortgage, and to obtain the appointment of a receiver or receivers of all of the property covered thereby during its pendency. That mortgage covering the entire line of road of the Atlantic & Pacific Company, the principal portion of which is situated in the territories of New Mexico and Arizona, the mortgagee had previously commenced similar suits in the United States courts for those territories, in each of which suits three receivers of the property of the mortgagor there situated were appointed. Of the portion of the mortgaged property situated within this judicial district this court, in the suit here brought by the Mercantile Trust Company, appointed the same receivers who had been appointed by the court of primary jurisdiction. Those receivers at once qualified, and took possession of such of the line of road as extended from The Needles to Mojave, with its appurtenances. Subsequently, to wit, on June 14, 1895, the Mercantile Trust Company filed an amended and supplemental bill in its suit in this court, in which the United States Trust Company of New York was made a party defendant as the holder of a first mortgage on the said line of road extending from The Needles to Mojave, with its appurtenances. To that amended and supplemental bill the United States Trust Company appeared by counsel. Later in the proceedings in the suit, one of the original receivers having deceased, and the remaining two having tendered their resignations, this court, following the similar action of the court of primary jurisdiction, accepted their resignations, to take effect upon the appointment and qualification of a successor or successors. Thereupon this court, still following the similar action of the court of primary jurisdiction, appointed C. W. Smith receiver of the property situated within this judicial district, who qualified as such, and received from the former receivers herein the possession of the said property, since which time he has been, and now is, in its actual and exclusive possession, use, and control. On the 25th day of August, 1896, the receiver, Mr. Smith, filed in and presented to this court his petition, setting forth the contract of August 20, 1884, made and entered into between the Southern Pacific Railroad Company, the Atlantic & Pacific Railroad Company, the St. Louis & San Francisco Railway Company, and the Atchison, Topeka & Santa Fé Railroad Company, and the continuous and exclusive possession, under that contract, of the line of road extending from The Needles to Mojave, with its appurtenances, by the Atlantic

& Pacific Railroad Company, and the receivers of its property ever since, and further alleging that the receivers so appointed have not disavowed that contract, but, on the contrary, during the receivership, have expressly acknowledged and admitted its terms and conditions, so far as the receivership is concerned. The petition of the receiver further states that the receivers have at all times promptly paid to the Southern Pacific Railroad Company all taxes paid by it, or claimed to have been paid by it, upon the line of railroad described in the contract of August 20, 1884, including not only taxes assessed and levied for the years in which the receivers have been in possession of that line of road, but also for taxes which were levied and reassessed against the Southern Pacific Railroad Company for the years 1885, 1886, and 1887; that the state board of equalization of the state of California, in August, 1887, for the purposes of state and county taxation for the fiscal year ending June 30, 1888, assessed the Southern Pacific Railroad Company, as the owner and operator of a line of railroad running in more than one county in said state, consisting of 1,022.33 miles in the state of California, together with the franchises, roadway, roadbed, rails, and rolling stock, at the sum of \$16,500 per mile, and that included in that assessment and valuation was the line of railroad described in said contract of August 20, 1884; that thereafter and in due time the state board of equalization of California apportioned of said total assessment of the franchises, roadway, roadbed, rails, and rolling stock of the defendant to the county of Kern the amount of \$2,476,945 of said total assessment of the railroad therein of 153.47 miles, and to the county of San Bernardino the sum of \$4,220,022 for the railroad therein of 261.47 miles; that at that time, of the line of road described in said contract of August 20, 1884, there was situated 35.64 miles in Kern county, Cal., and 206.87 miles in the county of San Bernardino, which constituted a part of the said 1,022.33 miles; that from the time of the execution of the said contract of August 20, 1884, to the present time, the line of road described in that contract, because of the revenue laws of the state of California, has been assessed by the state board of equalization of the state of California to the Southern Pacific Railroad Company, which has, whenever it saw fit to do so, paid the taxes due upon the line of road described in said contract of August 20, 1884, and made bills therefor against the Atlantic & Pacific Railroad Company and the receivers thereof; that neither the receivers nor the Atlantic & Pacific Railroad Company have ever attempted to pay the taxes thereon, but have always waited until the Southern Pacific Railroad Company should pay the same, for the reason that in each county there were additional taxes against the balance of the lines of railroad belonging to the Southern Pacific Railroad Company, and therefore there was no way of paying the amount due upon the portion of road extending from Mojave to The Needles without paying the entire amount due from the Southern Pacific Railroad Company in each county; that when the taxes became due which were levied and assessed upon said lines of railroad of the Southern Pacific

Railroad Company for the year 1888 [1887], the Southern Pacific Railroad Company failed to pay the same, and that the said taxes became delinquent on the last Monday of December, 1887, at 6 o'clock p. m.; that the total amount of taxes levied for the fiscal year ending June 30, 1888, against the Southern Pacific Railroad Company for its railroad in the county of Kern was \$34,479.07, and that upon the failure to pay the same there was added to it by the comptroller of the state the sum of \$1,723.95 as penalty; that there was levied for the same year in the county of San Bernardino upon said assessment upon the total lines of railroad belonging to the Southern Pacific Railroad Company the sum of \$30,468.56, and that there was added to said amount as a penalty, upon its becoming delinquent, the sum of \$1,523.42; that on the 2d day of January, 1891, the state of California caused an action to be brought in the superior court of the state of California in and for the city and county of San Francisco against the Southern Pacific Railroad Company to recover the entire amount of taxes which had been levied in the various counties upon the lines of railway owned and operated by it, including the line of railroad mentioned and described in the written contract of August 20, 1884, and seeking to recover the total sum of \$251,134.26, with 5 per cent. penalty thereon, which included the sums so levied in Kern and San Bernardino counties, as aforesaid, and that afterwards, to wit, February 3, 1893, a judgment was duly rendered in the action for the total sum of \$251,134.26, together with interest thereon from the 27th day of December, 1887, at the rate of 7 per cent. per annum, amounting to \$89,654.91, together with 5 per cent. penalty upon said principal sum, amounting to \$12,556.66, and the further sum of \$18,835.06 for attorney's fees, and \$42.16 costs against the Southern Pacific Railroad Company; that thereafter an appeal was duly taken from that judgment to the supreme court of California, which court affirmed the judgment (38 Pac. 912) except as to the amount allowed for interest, namely, the sum of \$89,654.91, and as to the sum of \$6,278.31 allowed as attorney's fees to one A. R. Cotton; that afterwards the Southern Pacific Railroad Company appealed from that judgment to the supreme court of the United States, pending which appeal the operation of the judgment was stayed; that pending the appeal to the supreme court of the United States, and in 1894, the state board of equalization, under an act of the legislature of the state of California approved March 23, 1893, made a reassessment of the taxes due from the Southern Pacific Railroad Company on its system of railroads for the year ending June 30, 1888, and, taxes having been duly levied thereon upon that reassessment, the Southern Pacific Railroad Company, in the fall of 1894, paid the first half of the taxes upon such reassessment, and made a bill to the receivers of the Atlantic & Pacific Railroad Company for their proportion, amounting to the sum of \$14,902.86, which bill the receivers paid in due time; that thereafter, and in the spring of 1896, the supreme court of the United States affirmed the judgment so appealed from (16 Sup. Ct. 794), after which the Southern Pacific Railroad Company paid the

amount thereof, and on the 8th day of June, 1896, made and presented to the present petitioner, as receiver, a bill for the proportion of the taxes which it claimed to be due from the receiver under the contract entered into between the Southern Pacific Railroad Company, the Atlantic & Pacific Railroad Company, the St. Louis & San Francisco Railway Company, and the Atchison, Topeka & Santa Fé Railroad Company; that included in the bill so made is the sum of \$5,981.87, as the portion of attorney's fees collected by the state of California which the Southern Pacific Railroad Company claims that the receiver should pay; and that there is also added to said bill the sum of \$12,580.36 as and for interest on the judgment from the date of its rendition to the date of its payment, at 7 per cent. per annum, and being the proportion which the Southern Pacific Railroad Company claims that the receiver should pay.

The petition of the receiver further alleges that the action of the Southern Pacific Railroad Company in permitting a penalty to be added to the said tax and in permitting attorney's fees, costs, and interest to accrue thereon, was without the knowledge or consent of the Atlantic & Pacific Railroad Company or its receivers, in that neither the Atlantic & Pacific Railroad Company nor its receivers had any voice in the matter, nor was that company or its receivers ever consulted about the same. The petition of the receiver further states that the United States Trust Company objects to the payment by the receiver of any part of the bill so presented by the Southern Pacific Railroad Company, and he therefore asks the advice and order of this court as to what he shall do in the premises. The bill presented by the Southern Pacific Railroad Company, concerning which the controversy arises, is as follows:

San Francisco, Cal., June 8, 1896.

Atlantic and Pacific R. R. Co. to Southern Pacific Company, Pacific System.
Amended Bill.

Charged in
Month of
1896.

June 8. For state and county taxes as paid by Southern Pacific Company under judgment of U. S. supreme court, March, 1896, for the year ending June 30, 1888, on the franchise, roadbed, rails, rolling stock, etc., of the line from Mojave to The Needles.

Valuation returned by the So. Pac. R. R. Co. in 1887.....	\$9,570,200
Roadbed, etc	\$ 8,182,900
Rolling stock	1,387,300, or 14.50%

Original assessment of So. Pac. R. R. Co. in 1887:

Amount of tax, \$251,134.26.....	\$16,139 60 per mile
Less 14.50%	2,340 24

\$13,799 36

Kern Co., 35.64 miles R. R. at \$13,799.36 per mile, \$491,809.19, at \$2.00 per \$100.....	\$ 9,836 18
San Bernardino Co., 206.87 miles R. R., at \$13,799.36 per mile, \$2,854,673.60, at \$1.33 per \$100.....	37,967 15

\$47,803 33

Amount brought forward.....	\$47,803 33
Proportion of \$47,803.33 to total tax (\$251,134.26), 19.03%.	
Add penalty	\$12,556 66
Add attorney fees.....	18,877 22
	<hr/>
	\$31,433 83
19% of \$31,433.88	5,981 87
	<hr/>
	\$53,785 20
Interest from date of judgment, Feb. 5/93, to June 8/96, 3 years	
4 mos. 3 days, at 7% per annum.....	12,580 36
	<hr/>
	\$66,365 56
Less payments by company:	
Bill rendered and paid, 1st Inst. of reassessment	
Nov. 22/94	\$14,902 86
Interest, Nov. 22/94, to June 8/96, 1 year 6 mos. 16	
days, at 7%.....	1,611 16
Interest on tender of 2d Inst. of reassessment, Apr.	
25/95, to June 8/96, 1 year 1 mo. 13 days, at 7%..	1,167 80
	<hr/>
	17,681 82
	<hr/>
	\$48,683 74

I certify the above to be correct. E. B. Ryan,

Examined. George T. Klink.

Approved. E. C. W.

Payment should be made to the treasurer S. P. Co., San Francisco, Cal. If any item is questioned, or explanation is required, address General Auditor, San Francisco, Cal.

The Mercantile Trust Company and the United States Trust Company each filed an answer to the petition of the receiver. By its answer, the former objected to the payment of any portion of the penalty or attorney's fees included in the bill in question, and the latter protested against the payment of any portion of the bill, on the ground that the tax in question became delinquent, and the penalty accrued, prior to the appointment of either of the receivers, and that, while the claim may be valid against the Atlantic & Pacific Railroad Company, it is invalid as against its mortgagees, and consequently not a proper charge against the receiver. Thereafter the Southern Pacific Railroad Company filed an intervening petition, asking the court to direct the payment of the bill rendered by it, to which the receiver and the United States Trust Company filed answers. The matters at issue were thereupon referred to a special master to take the proofs of the respective parties, and report the same, together with his findings of fact and conclusions of law, to the court. The report of the master was filed December 11, 1896, and to the report the Southern Pacific Railroad Company filed exceptions January 4, 1897. Thereafter the report and the exceptions thereto came on regularly for hearing, at which time the receiver, by leave of the court, amended his petition by so changing the clause therein in relation to the acknowledgment and ratification by the receivers of the contract of August 20, 1884, as to make it read as follows:

And that the receivers have not disavowed said contract, neither have said receivers affirmed said contract in any manner whatever, unless their acts with reference thereto shall in law be deemed to amount to an affirmation thereof.

The first and third findings of the special master are to the effect that the Southern Pacific Railroad Company leased the line of railroad extending from The Needles to Mojave, with its appurtenances, to the Atlantic & Pacific Railroad Company, which company entered into possession thereof under such lease, and continued in such possession until the appointment of the receivers. To these findings the Southern Pacific Railroad Company excepted, on the ground that they are contrary to the terms and legal effect of the written contract of August 20, 1884.

The sixteenth finding is as follows:

The value of the leased property, for the purposes of taxation for the year 1887, considered separately from any franchises or rolling stock (and taking into consideration the fact, which I find to be true, that the cost of operating the leased property has for many years prior and subsequent to the appointment of the receivers herein exceeded its earnings), was \$4,000 per mile, or a total of \$969,480, which is 5.39% of the entire valuation of the franchises, roadway, roadbed, rails, and rolling stock of the Southern Pacific Railroad Company in California, as fixed by the state board of equalization for that year.

To this finding, the Southern Pacific Railroad Company excepted, on the ground that all of the testimony upon which it is based was erroneously admitted, and was objected and excepted to by the intervenor at the time, and upon the ground that the finding is unsupported by the evidence as given, and is not a finding of the value of the property for the purpose of taxation for the year 1887, considered separately from any franchises or rolling stock, and, further, is in entire disregard of the contract of August 20, 1884.

The nineteenth finding is as follows:

I find that 5.39% of \$251,154.26, the amount of the original tax for 1887, without interest or penalties, amounts to the sum of \$13,536.13.

To this finding the intervenor excepted, upon the ground that it is not within the issues presented by the pleadings.

The twenty-second finding is as follows:

I find that the action of the intervenor, the Southern Pacific Railroad Company, in refusing to pay the said taxes levied and assessed for the fiscal year of 1887, ending June 30, 1888, and in defending the said suit of the state of California therefor, was wholly voluntary upon its part, and was in no manner induced or caused by any request, consent, or advice upon the part of the defendant the Atlantic and Pacific Railroad Company, represented by W. C. Hazeldine, its general attorney, or other attorney, officer, or agent having authority in the premises, or upon the part of the present or former receivers herein, or of any attorney or representative of such receivers.

To this finding the intervenor excepted, upon the ground that it is not only unsupported by, but is directly contrary to, the evidence in the case.

The twenty-third finding is as follows:

I find that, while the original receivers and the present receiver have continued to operate and use the leased line of road since their respective appoint-

ments, the contract of lease dated August 20th, 1884, has not been expressly or impliedly affirmed or adopted by them in such manner as to require the present receiver to pay the account of the intervener in question.

To this finding the intervener excepted, on the ground that it is in conflict with the petition of the receiver, and with the answer filed thereto by the United States Trust Company of New York, and with the orders theretofore made by the court in the cause, and with the evidence in the case.

Exceptions were also taken by the Southern Pacific Railroad Company to all of the conclusions of law reported by the special master, the first of which is to the effect that the evidence offered and introduced before him, showing the respective amounts of taxes levied and assessed for the years 1883, 1884, 1885, and 1886, and subsequently reassessed and paid by the intervener, was irrelevant and immaterial, and should, together with the findings of fact based thereon, be disregarded. The second is to the effect that, although the amounts shown by the bill rendered by the intervening petitioner to the receiver were not paid until June 6, 1896, yet inasmuch as such payments were made exclusively on account of taxes due for the fiscal year 1887, ending June 30, 1888, upon the assessment made by the state board of equalization for that year on all of the property of the Southern Pacific Railroad Company, including the Mojave Division, such payments do not, under the orders appointing the receivers, and under the facts shown by the evidence, and found, constitute such an equitable claim, charge, or lien, as against the United States Trust Company, upon the property, or the earnings thereof in the hands of the receiver, as to require or justify the payment of the account, or any part thereof, by the receiver. The third conclusion of law is to the effect that the evidence introduced by the respective parties before the master in reference to the justice and fairness of the total taxes levied for the year 1887 and other years, upon the property of the intervener, which was charged by that company against the Atlantic & Pacific Railroad Company under the contract of August 20, 1884, was irrelevant and immaterial, and should, together with the findings of fact thereon, be disregarded. The fourth and last conclusion of law is to the effect that an order should be made and entered directing the receiver not to pay any part of the bill rendered by the intervening petitioner, the Southern Pacific Railroad Company, and that its petition in that behalf be dismissed.

The findings of the special master, to which no exceptions were taken show, among other things:

That the receivers originally appointed in this suit took possession of the property described in the contract of August 20, 1884, and continued to operate it as a part of the Atlantic & Pacific Railroad until the appointment and qualification of the present receiver, who thereupon took possession of the property, and has ever since continued to operate it as a part of the Atlantic & Pacific Railroad. That the

Southern Pacific Railroad Company returned its franchises, roadway, roadbed, rails, and rolling stock, situated in the state of California, and subject to taxation by the state board of equalization, at the following valuation, for the following years:

(A) For the franchise, roadway, roadbed, and rails, for the year 1885	\$ 8,991,350 00
For the rolling stock.....	1,383,050 00
Total	\$10,374,400 00
(B) For the year 1886, for the franchises, roadway, roadbed, and rails	\$ 9,991,300 00
For the rolling stock.....	1,387,300 00
Total	\$11,378,600 00
(C) For the year 1887, for the franchises, roadway, roadbed, and rails	\$ 8,992,592 00
For the rolling stock.....	1,427,350 00
Total	\$10,419,942 00

That the state board of equalization of the state of California increased the valuation as returned by the Southern Pacific Railroad Company for the years 1885, 1886, and 1887, as follows:

For the year 1885 the value of the franchises, roadway, roadbed, rails, and rolling stock was fixed by the state board of equalization at \$17,000,000. For the year 1886 the value of the same property was fixed by the same board at \$17,000,000. For the year 1887 the value of the same property was fixed by the same board at \$16,500,000.

That the valuations so fixed by the state board of equalization of the state of California were so fixed for each year, respectively, as an entirety; and that the state board of equalization did not attempt to assess separately the value of either the franchises, the roadbed, roadway, or rails, or of the rolling stock; and that the evidence fails to show upon what, if any, particular class of property returned by the Southern Pacific Railroad Company for taxation for these years the increase in valuation was made. That the Southern Pacific Railroad Company successfully resisted in the courts the collection of the taxes assessed against it for the years 1885 and 1886 by the state board of equalization of the state of California. That, in pursuance of legislation authorizing such action, the state board of equalization of the state of California reassessed the property of the Southern Pacific Railroad Company in California for the years 1885 and 1886, and attempted to reassess the same property for the year 1887. That, as a result of such reassessment, the valuation of the said property as fixed by the state board of equalization for the years 1885 and 1886 was reduced as follows: "For the year 1885, to \$9,570,200; for the year 1886 to \$9,570,200." That the Southern Pacific Railroad Company paid the taxes so reassessed for the years 1885 and 1886, and the former receivers of the Atlantic & Pacific Railroad Company, appointed

by this court January 8, 1894, paid to the Southern Pacific Railroad Company such proportion of said taxes as was demanded by the Southern Pacific Railroad Company, and at the time here stated, that is to say:

March 21, 1894.....	\$15,074 10
June 4, 1894.....	15,074 10
January 11, 1895.....	14,870 60
May 13, 1895.....	14,870 60
Total	\$59,889 40

That, of the taxes of the Southern Pacific Railroad Company for the year 1885, the amount apportioned to the Atlantic & Pacific Railroad Company as the taxes of the Mojave Division, by the representatives of the Southern Pacific Railroad Company, on the basis of the original assessment, would have been \$52,517; and that interest on that sum at 7 per cent. per annum to the date of actual payment would amount to \$29,409, making a total amount of \$81,296. That the apportionment for the year 1886 on the same basis would have been, for taxes \$52,517, and for interest \$29,409, making a total of \$81,296, or a total for the two years of \$162,592; while under the reassessment the total amount paid by the Atlantic & Pacific Railroad Company for the years 1885 and 1886 was \$59,889.40. That at the time the taxes for the years 1885 and 1886 were originally assessed, and for many years thereafter the Atlantic & Pacific Railroad Company was a solvent and going concern, while at the time of the reassessment in the years 1893 and 1894 it was insolvent, and in the hands of the receivers.

The findings also show that, of the amount of taxes, attorney's fees, interest, and penalties originally adjudged to be paid by the superior court of the city and county of San Francisco, there was a deduction of interest amounting to \$89,654.91, and of counsel fees amounting to \$6,278.31, upon a review of that judgment by the supreme court of California, which was affirmed by the supreme court of the United States; that the total value of the franchises, roadway, roadbed, rails, and rolling stock of the Southern Pacific Railroad Company in California for the year 1887, as fixed by the state board of equalization, was \$16,500,000; that, of the taxes assessed against the Southern Pacific Railroad Company in California for the year 1887, the former receivers paid to the Southern Pacific Railroad Company, on the 11th day of January, 1895, the sum of \$14,902.86, which sum was paid within a reasonable time after demand made therefor; and that no subsequent demand for payment of any portion of the remainder of the taxes of 1887, as claimed by the Southern Pacific Railroad Company, was ever made until the presentation of the bill here in question.

The special master further found that on the 23d day of May, 1892, the Southern Pacific Railroad Company refunded to the Atlantic & Pacific Railroad Company the sum of \$25,924.39, upon a demand by the Atlantic & Pacific Railroad Company, and upon a

voucher made by the representatives of the latter company, for excessive taxes theretofore paid by the Atlantic & Pacific Company to the Southern Pacific Railroad Company, as follows:

For the year ending June 30, 1885.....	\$ 1,926 66
For the year ending June 30, 1889.....	6,871 29
For the year ending June 30, 1890.....	9,181 17
For the year ending June 30, 1891.....	7,945 27

Making a total of..... .. \$25,924 39

Upon the hearing of the exceptions, it was stipulated and agreed by and between counsel for the respective parties that all papers referred to or mentioned in the exceptions should be considered to the same extent and with the same force and effect as if offered upon the hearing before the master; and that, in addition to the papers mentioned in those exceptions, the petition of the United States Trust Company of New York, filed in this court, praying leave of the court to institute suit against the receivers appointed in this cause, with the bill of complaint attached to that petition, and the order of the court made thereon, should be considered with the same effect as if offered in evidence before the master; and that the petition of the receivers of the Atchison, Topeka & Santa Fé Railroad Company to the court originally appointing them, and the order of that court based thereon, asking leave to disaffirm the contract of lease attached to the petition of the receiver herein, and also the petition of the receivers of the St. Louis & San Francisco Railway Company to the court originally appointing them, and the order of that court based thereon, for like leave to disaffirm the said contract, and also the answer and objections of the United States Trust Company of New York to the application of the receivers for leave to borrow money, which answer and objections were filed in this court on the 14th day of May, 1895, should be considered with the same effect as if offered in evidence before the master. It was further stipulated that none of the parties to the present record were parties to the proceedings in which the attempted disaffirmance took place, nor had any notice thereof; the stipulation, however, reserving any and all objections to the materiality, relevancy, and admissibility of any of such papers and evidence.

It is perfectly evident, I think, not only from the language of the contract which forms the basis of the present controversy, but also from the actions of the parties thereto with respect to its subject-matter, that the contract was not a mere lease of the road. The right of immediate possession and use conferred under the term "lease" was but an incident of the principal contract, which embraced the sale of the line of road described, with its appurtenances, excepting only its equipment, to the Atlantic & Pacific Railroad Company, for the sum of \$7,271,100, the payment of which was not only promised on the part of the Atlantic & Pacific Railroad Company, but guaranteed by the Atchison, Topeka & Santa Fé Railroad Company and the St. Louis & San Francisco Railway Company. A part, at least, of the consideration moving the guarantors (for it is so declared, in effect, in the contract itself), was the securing by them of an entrance into California for the freight and passenger traffic of

their own roads. The Southern Pacific Railroad Company, by reason of an existing mortgage, not being then able to give a clear title to the line of road, and the vendee and guarantors being desirous of securing the evident anticipated advantages offered by the line extending from The Needles to Mojave, the respective parties stipulated for its immediate possession, use, and control by the vendee, for which possession, use, and control the vendee promised to pay the vendor, and the Atchison, Topeka & Santa Fé and St. Louis & San Francisco Companies guaranteed, an annual rental, the sum of which amounted to 6 per cent. on the deferred purchase money.

If anything more be needed to show that the contract of August 20, 1884, was not a mere lease of the line of road in question, with its appurtenances, it is found in the fact that the contract required a cash payment by the vendee to the vendor of \$1,211,850, and in the further fact that the vendee, shortly after the contract, proceeded to mortgage that line of road, with its appurtenances, along with other property, to the complainant in this suit, the Mercantile Trust Company of New York. It was by virtue of that mortgage that the Mercantile Trust Company brought the present suit, and invoked the authority and powers of this court over this particular property; and it is by virtue of the prior mortgage executed by the Atlantic & Pacific Railroad Company to the United States Trust Company of New York, the terms of which covered the after-acquired property of the mortgagor, that the United States Trust Company has any business in this suit. Deriving and asserting their rights under the contract of August 20, 1884, it is very clear, I think, that both of these mortgagees, like the Atlantic & Pacific Railroad Company, are bound by all of the terms and conditions thereof; for surely they cannot be permitted to assert the rights derived by them under the contract of sale and lease, and at the same time repudiate the conditions and obligations imposed by that contract in connection with those rights. Among those conditions and obligations was the obligation on the part of the vendee and lessee to "promptly pay and discharge all taxes and assessments which should thereafter become due upon said property, or any part of it, or which might become in any wise due or owing in respect to the same."

In the order appointing the original receivers this court directed them, among other things, to pay "all amounts now due from the defendant [the Atlantic & Pacific Railroad Company] on its roads or properties constituting part of its system for taxes and assessments upon the property, or any part thereof"; and in the order appointing the present receiver were similar directions. The evidence in the case, as well as those findings of the special master not excepted to, show that the receivers not only paid from time to time every installment of rental that has become due under the contract of August 20, 1884, but also all of the taxes that have become due on the property therein described, except the portion of the taxes for the year 1887 here in controversy; and the evidence also shows that several of these installments of rental were paid with money borrowed by the receivers upon receivers' certificates authorized to be issued for that purpose by this court, upon representations made by the receivers,

not only showing the necessity of borrowing because of a lack of funds, but also showing that the line of road forming the subject of the contract of August 20, 1884, is an essential part of the Atlantic & Pacific Company's railroad system, and constitutes the only western outlet and inlet by rail for traffic moved over that system, and has been in the continuous and exclusive possession, use, and control of that company, and the receivers of its property, from the time that company first took possession of the property under the contract in question. Those representations by the receivers are, in effect, admitted to be true by the various pleadings filed in the cause by the Mercantile Trust Company and the United States Trust Company, respectively. If, therefore, it be conceded that the contract of August 20, 1884, ever admitted of disaffirmance by the receivers, it has been affirmed over and over again by them; and it is now too late for either of the parties to the present suit to here set up any right of election in respect thereto.

The state laws in respect to taxation entered into and became a part of that contract. In respect to railroad property, the constitution of the state, at the time of the tax assessment and levy in question here, provided that:

The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts. Const. 1879, art. 13, § 10.

The statute of California in existence at the time of the making of the assessment and levy in controversy provided that:

The president, secretary, or managing agent, or such other officer as the state board of equalization may designate, of any corporation, and each person or association of persons owning or operating any railroad in more than one county in this state, shall, on or before the first Monday in April of each year, furnish the said board a statement, signed and sworn to by one of such officers or by the person or one of the persons forming such association, showing in detail for the year ending on the first Monday in March in each year: (1) The whole number of miles of railway in the state. * * * (2) The value of the roadway, roadbed, and rails of the whole railway, and the value of the same within the state. (3) The width of the railway. (4) The number of each kind of all rolling stock used by such corporation, person, or association in operating the entire railway, including the part without the state. (5) Number, kind, and value of rolling stock owned and operated in the state. (6) Number, kind, and value of rolling stock used in the state, but owned by the party making the returns. (7) Number, kind, and value of rolling stock owned, but used out of the state, either upon divisions of road operated by the party making the returns, or by and upon other railways. Also showing in detail for the year preceding the first of January: (1) The gross earnings of the entire road, etc. Pol. Code, § 3664, as amended by act approved March 9, 1883 (St. 1883, p. 65).

Section 3665 of the same Code, as amended by the same act, and also in force at the time of the assessment and levy in question, provides as follows:

The state board of equalization must meet at the state capitol on the first Monday in August, and continue in open session from day to day, Sundays excepted, until the third Monday in August. At such meeting the board must

assess the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county. Assessment must be made to the corporation, person, or association of persons owning the same, and must be made upon the entire railway within the state, and must include the right of way, bridges, culverts, wharves, and moles upon which the track is laid, and all steamers which are engaged in transporting passengers, freights, and passenger and freight cars across waters which divide the road. The depots, stations, shops, and buildings erected upon the space covered by the right of way are assessed by the assessor of the county wherein they are situate. Within ten days after the third Monday of August, the board must apportion the total assessment of the franchise, roadway, roadbed, rails, and rolling stock of each railway to the counties, or cities and counties, in which such railway is located, in proportion to the number of miles of railway laid in such counties, and cities and counties. The board must also, within said time, transmit by mail to the county auditor of each county, or city and county, to which such apportionment shall have been made, a statement showing the length of the main track of such railway within the county, or city and county, with a description of the whole of the said track within the county, or city and county, including the right of way by metes and bounds or other description sufficient for identification, the assessed value per mile of the same as fixed by a pro rata distribution per mile of the assessed value of the whole franchise, roadway, roadbed, rails, and rolling stock of such railway within the state, and the amount apportioned to the county, or city and county. The auditor must enter the statement on the assessment roll or book of the county, or city and county, and where the county is divided into assessorial townships or districts, then on the roll or book of any township or district he may select, and enter the amount of the assessment apportioned to the county, or city and county, in the column of the assessment book or roll as aforesaid, which shows the total value of all property for taxation either of the county, city and county, or such township or district. On the first Monday in October, the board of supervisors must make, and cause to be entered in the proper record book, an order stating and declaring the length of main track of the railway assessed by the state board of equalization within the county; the assessed value per mile of such railway, the number of miles of track, and the assessed value of such railway lying in each city, town, township, school, and road district, or lesser taxing district in the county, or city and county, through which such railway runs, as fixed by the state board of equalization, which shall constitute the assessment value of said property for taxable purposes in such city, town, township, school, road, or other district; and the clerk of the board of supervisors must transmit a copy of each order or equalization to the city council, or trustees, or other legislative body of incorporated cities or towns, the trustees of each school district, and the authorized authorities of other taxation districts through which such railway runs. All such railway property shall be taxable upon said assessment, at the same rates, by the same officers, and for the same purposes, as the property of individuals within such city, town, township, school, road, and lesser taxation districts, respectively. If the owner of a railway assessed by the state board of equalization is dissatisfied with the assessment made by the board, such owner may, at the meeting of the board, under the provision of section three thousand six hundred and ninety-two of the Political Code, between the third Monday in August and the third Monday in September, apply to the board to have the same corrected in any particular, and the board may correct and increase or lower the assessment made by it, so as to equalize the same with the assessment of other property in the state. If the board shall increase or lower any assessment previously made by it, it must make a statement to the county auditor of the county affected by the change in the assessment, of the change made, and the auditor must note such change upon the assessment book or roll of the county as directed by the board.

The supreme court of California held in the case of *People v. Central Pac. R. Co.*, 83 Cal. 406, 23 Pac. 303, that it is competent for the legislature to provide the details for the assessment and the apportionment thereof, by the state board of equalization, of

railroad property situated in two or more counties of the state. The scheme thus provided by the laws of California for the assessment of such property so situated is for its assessment by the state board of equalization as a whole, and the apportionment by that board of such assessment among the various counties in which the property is situated in proportion to mileage; and the record in the present suit shows that the assessment for the year 1887 here involved was so made and apportioned, and its validity sustained by the supreme court in an action brought by the state for the recovery of the tax. It was the amount of the tax so assessed and apportioned against the line of road described in the contract of August 20, 1884, that the Atlantic & Pacific Railroad Company thereby agreed to pay. From such amounts, however, the vendor and vendee to that contract subsequently deemed it equitable to deduct a certain percentage, amounting to 14.50 per cent., on account of the rolling stock on that line, which the vendor did not contract to sell or to supply pending the consummation of the sale, and which it did not furnish; and, in accordance with that understanding, the Southern Pacific Railroad Company, in its demand against the receiver, deducted from the amount of the taxes assessed and apportioned by the state board of equalization against the line of road extending from The Needles to Mojave 14.50 per cent. for the rolling stock of that line of road. Of this, neither the Atlantic & Pacific Railroad Company nor either of its mortgagees can complain, since the deduction is in their favor.

Nor does it seem to me that the objections made to the charge for a proportionate share of the penalty, costs, attorney's fees, and interest incident to the litigation concerning the taxes in question are well taken. The evidence shows that Mr. Hazeldine, as solicitor for the Atlantic & Pacific Railroad Company, went with the witness Ryan before the state board of equalization of the state of California, in regard to the assessment for the year 1887, in the endeavor to induce that board to assess the line of road between Mojave and The Needles to the Atlantic & Pacific Railroad Company, and that Mr. Hazeldine submitted an argument in that behalf. There is nothing to call in question the truth of the testimony to that effect, and it finds corroboration in the testimony of Mr. Foulds, one of the attorneys for the Southern Pacific Railroad Company in the tax litigation, to the effect that he had many consultations with Mr. Hazeldine, as the solicitor for the Atlantic & Pacific Railroad Company, in regard to the taxes then in litigation between the state of California and the Southern Pacific Railroad Company, including the taxes for the year 1887. The appearance of Mr. Hazeldine, as solicitor for the Atlantic & Pacific Railroad Company, before the state board of equalization, in respect to the assessment for the year 1887, is sufficient to show his authority to act as solicitor for that company in respect to that matter. The testimony of Mr. Foulds is to the effect that, as such solicitor, Mr. Hazeldine consulted with him, acquiesced in, and consented to, the contest made by the Southern Pacific Railroad Company against the taxes in question. There is nothing in the case tending to

controvert the truth of these statements. Under such circumstances, it cannot be properly held that the litigation by the Southern Pacific Railroad Company in respect to the taxes in question was not, in part at least, by the consent and advice of the Atlantic & Pacific Railroad Company, through its solicitor. If willing to have paid the proportion of taxes apportioned by the state board of equalization against the line of road covered by the contract of August 20, 1884, it could have offered to pay the same, instead of consenting to and advising in respect to the contest, in which event it would, of course, not have been properly chargeable with any portion of the penalty, costs, attorney's fees, or interest incident to the litigation.

The exceptions are sustained, and an order will be entered directing the receiver to allow the amount of the bill in controversy.

AMERICAN LOAN & TRUST CO. v. UNION DEPOT CO. et al.

(Circuit Court, D. Washington, E. D. April 17, 1897.)

1. MORTGAGE FORECLOSURES—WAIVER OF INTEREST—PAYMENTS BY RECEIVER.

When a suit for the foreclosure of a mortgage has been commenced, based on a default in payment of interest, the cause of action does not fail, and the right to maintain the suit is not waived, by the mortgagee's acceptance of interest, paid by a receiver of the property out of its current earnings, while other installments of past-due interest remain unpaid.

2. SAME—DEFAULT IN INTEREST—EFFECT OF PAYMENT.

Under the statute of Washington (2 Hill's Code, § 633), the effect of paying all sums due on a mortgage, pending a suit for its foreclosure, based on a default in interest or installments of principal, while other installments are not yet due, is to entitle the defendant to a stay of proceedings, not to a dismissal of the bill.

3. SAME—FORECLOSURE BY TRUSTEE—DECLARING PRINCIPAL DUE.

A mortgage of certain depot property, to secure an issue of bonds, provided that, on six months' default in interest or principal, the trustee might take possession, operate the property, apply the income to the payment of all sums due, and, if all such sums were paid before foreclosure or sale, restore the property to the mortgagor; or that, with or without entry, the trustee might sell the property, and apply the proceeds to the payment of the principal of the bonds (which should be deemed due at the time of the completion of the sale), with interest; and that the trustee might also bring suit for foreclosure, or employ any other legal remedies. *Held*, that under such mortgage, though the trustee might foreclose for nonpayment of interest, the principal debt could not be declared due, in advance of maturity, at any time prior to the completion of a sale of the mortgaged property.

4. SAME—DECREE OF SALE—RECEIVERS.

In a suit for the foreclosure of a mortgage covering real and personal property, it appeared, on final hearing, that the condition of the property in the hands of a receiver was prosperous and improving; that all arrears due on the mortgage, with costs, etc., could probably be paid out of the earnings in the course of about 18 months; and that there was a creditor of the mortgagor holding a judgment lien subsequent to the mortgage. *Held*, that as, under the rule in *Hammock v. Trust Co.*, 105 U. S. 77, 94, there could be no redemption from a sale under a decree of foreclosure of the mortgage, the court, in consideration for the interests of the judgment creditor and the stockholders of the mortgagor corporation, would provide, by its decree of foreclosure, that no order of sale should issue for

18 months; that during that time any of the parties in interest might redeem by paying all sums due, with costs, etc.; that all available sums coming to the receiver's hands should be applied to the payment of the amounts due; and that, on payment of all such sums, the decree might be vacated.

Suit by the American Loan & Trust Company, as trustee, to foreclose a mortgage upon property of the Union Depot Company of Spokane Falls, given to secure negotiable bonds to the amount of \$500,000, and coupons for interest to accrue semiannually. On final hearing.

Zera Snow, for complainant.

E. M. Carr, for defendant receiver of Seattle, L. S. & E. Ry. Co.

HANFORD, District Judge. The mortgage or trust deed sued upon covers a passenger and freight depot and railroad terminal grounds situated in the city of Spokane. The indebtedness which it was intended to secure is evidenced by negotiable bonds which, by the terms thereof, are to mature in the year 1919, and by coupons for interest payable every six months from July 1, 1889. The mortgage provides that if default be made in payment of any of said bonds, or of any installment of interest when the same shall become due and payable, and if such default shall continue for six months, upon the written request of the holders of one-fourth of the bonds then outstanding, the trustee may take possession of the mortgaged property, and operate the same, and receive the income therefrom, and apply the same to the payment of expenses and compensation of the trustee and taxes and all costs, and then to the payment of the interest in arrears, and then to payment of the principal, if any part of the principal shall be then due; and in case all sums of money for the time being due and payable on the said bonds, and all the said costs, charges, and expenses incurred by the trustee, shall be paid and satisfied before any foreclosure or sale, the trustee shall restore possession of the property to the depot company, and the same shall thenceforth be subject to the mortgage in the same manner as if such entry had not been made; and the trustee after such default may, in its discretion, upon like request, after entry or without entry, sell the property, with the appurtenances and franchises, as an entirety, and the proceeds of such sale shall be used to pay the expenses, costs, and charges, and then the remainder of the fund shall be applied "to the payment of the principal moneys secured by such of the bonds as shall then be outstanding (which principal moneys shall be deemed to be, and shall become, due and payable at the time of the completion of the said sale), and the interest thereon to that time"; and, if the amount be insufficient to make full payment, the moneys shall be applied ratably, or, in case of a surplus, the same shall be paid to the depot company. The mortgage also provides that the above methods of subjecting the security to the uses intended are not exclusive of other legal remedies, and the trustee may, in case of any default, bring a suit to foreclose the mortgage. The mortgage gives no express authority to the trustee or the bondholders to declare the principal due before the specified date of maturity,

except as above recited. After default had been made in the payment of interest coupons, this suit was commenced; but it was not pressed for several months, during which time no payments were made, and other coupons matured. Then an amended bill was filed, and an application was made to the court for the appointment of a receiver to take charge of the property, and manage the business during the pendency of the suit. The application was granted, and the court selected a disinterested receiver, who has been in charge of the property since about the 1st of September, 1894, during which time, from accumulated income over and above all current expenses and taxes and costs of necessary betterments and repairs, he has paid seven installments of interest, which includes all coupons matured up to the time of his appointment. The property is of great and increasing value, and the present outlook for business indicates that, with a continuation of good management, the income will be sufficient to pay, within the next 18 months, all interests on the bonded debt which will have accrued and become due, and it may be reasonably hoped that, after the interest in arrears shall have been paid, the coupons can be taken up as they mature, and funds can be accumulated to pay off the unsecured debts of the depot company. At the time of making application for the appointment of a receiver, it was shown, as one of the grounds for taking that step, that a judgment against the depot company for \$15,000 had been obtained in an action for damages, and that an execution was about to be levied, which would interrupt the business of the company, and cut off its income. The owner of that judgment has since intervened in this cause, by a petition asking this court to order payment to be made out of moneys coming under its control; and upon that petition the court has made an order denying the petitioner's claim to priority over the mortgage debt, but allowing it as an established claim, to be paid out of any surplus moneys which may be left in the hands of the receiver or in the registry of the court after satisfaction of the mortgage. The original bill was against the depot company only, as sole defendant, but by the amended bill the Washington & Idaho Railroad Company and the Seattle, Lake Shore & Eastern Railway Company were brought in as parties defendant, for the reason that these corporations appeared to have an interest in the mortgaged property, evidenced by a contract by which they jointly leased the property for a period of 99 years, part of the consideration for said lease being their agreement to pay the interest as it should accrue on the mortgage bonds of the depot company. The Washington & Idaho Company has demurred to the bill, and the other defendants have answered. The main controversy in the case is as to the right of the complainant to maintain the suit since the bondholders have received and accepted payment of all interest which had accrued up to the time of filing the amended bill, and as to the right to a decree for a sale of the mortgaged property. By their answers, the depot company and the Seattle, Lake Shore & Eastern Railway Company both dispute the right to have a judicial sale of the whole or any part

of the mortgaged property. It is conceded by all parties that the nature of the property is such that it must be sold as an entirety, if sold at all. The case has been argued by counsel for the complainant and for the Seattle, Lake Shore & Eastern Company, and submitted by all parties upon the pleadings, proofs on the part of the complainant, and the whole record; and, by a stipulation, the complainant and the Seattle, Lake Shore & Eastern Company consent to consideration of facts shown by the reports of the receiver on file, for the purpose of estimating the value of the property and income derived and which may be derived from conducting the business of the depot company, and I have gathered the facts of the case as above recited from these sources of information.

My conclusions as to the rights of the respective parties, in view of the facts stated, are:

1. The depot company was in default for nonpayment of interest due when the suit was commenced, and when the amended bill was filed, and it is still in default for nonpayment of installments of interest which have become due since the date of filing the amended bill; and for said defaults the complainant was entitled to commence, and is still entitled to maintain, a suit in equity in this court to foreclose the mortgage.

2. The cause of action has not failed, and the right to maintain this suit has not been waived, by acceptance on the part of the bondholders of interest paid by the receiver out of the net income derived from use of the mortgaged property. In my opinion, the defendants are no more entitled to ask for a decree of dismissal, and to have possession of the mortgaged property restored to the depot company, while installments of interest past due remain unpaid, than they would be to maintain a bill to redeem against a mortgagee in possession, without tendering the full amount due. A statute of this state in force when this mortgage was given, and still in force, and which must therefore be read into the contract, provides that:

"Whenever a complaint is filed for the foreclosure of a mortgage upon which there shall be due any interest or installment of the principal, and there are other installments not due, if the defendant pay into court the principal and interest due, with costs, at any time before the final judgment, proceedings thereon shall be stayed, subject to be enforced upon a subsequent default in the payment of any installment of the principal or interest thereafter becoming due. In the final judgment, the court shall direct at what time and upon what default any subsequent execution shall issue." 2 Hill's Code, § 633.

Under this law, if all the coupons which have matured up to this time were paid, instead of rendering a decree of dismissal, the court would order a stay of proceedings.

3. Although the complainant has the right to foreclose this mortgage for nonpayment of interest, the principal debt is not due, and cannot be declared due, at any time prior to the completion of a sale of the mortgaged property, or the date of maturity specified in the mortgage.

4. The statutes of this state secure to mortgagors and their creditors the right to redeem real estate within one year after fore-

closure sales; but as this mortgage covers personal property as well as real estate, and as it must be sold as an entirety in order to prevent impairment of its value, the case comes within the rule of *Hammock v. Trust Co.*, 105 U. S. 77, 94, in which case the supreme court decided that a foreclosure sale of such property must be absolute, notwithstanding a statute of the state in which the property is situated allowing mortgaged real estate to be redeemed after a foreclosure sale. Therefore, in view of the situation of all the parties, and the condition and value of the property, it would be contrary to the spirit of the law, and unjust, to sacrifice the interests of the intervener, who is a judgment creditor, and of the stockholders of the depot company, by a decree extinguishing the right of redemption in less time than one year; and if a year be allowed for redemption, and the usual time for publishing notice of the sale, then, by the time a sale can be completed and confirmed by the court, and possession delivered to the purchaser, the receiver will probably have collected sufficient funds to pay in full all interest due. At least one year should be allowed for redemption, and I consider that it will be fair and best for all parties to save the unnecessary expense of a sale, by delaying for a sufficient time to enable the receiver to satisfy all just demands of the complainant from the income. By adopting this plan, the bondholders will receive what is theirs; and they cannot well complain of injustice, for the parties to the mortgage contemplated this as one of the methods for collecting interest, and they will be compensated for delay by receiving interest on interest, as stipulated in their bonds and coupons.

In accordance with this opinion, the complainant may take a decree foreclosing the mortgage, but with a provision therein allowing the other parties until September 1, 1898, for redemption, by payment of all interest which shall have become due up to the time of redemption, and all taxable costs, and that an order of sale shall not issue prior to said date; and further providing that the receivership be continued, and that all moneys coming into the receiver's hands available for that purpose be applied to the payment of said interest; and further providing at the foot of the decree that the court reserves the right to vacate or modify the decree at any time, for sufficient cause, and that if the interest and costs, including such allowance as the court may make to the receiver for his compensation, and allowances to counsel entitled thereto, shall be paid before a sale can be actually made, the decree shall be vacated, and the receiver discharged, and the property restored to the depot company, and further proceedings stayed.

GREEN et al. v. TURNER et al.

(Circuit Court, E. D. Wisconsin. April 5, 1897.)

1. MORTGAGES—LIABILITY OF MORTGAGOR'S VENDEE—SUBROGATION.

A grantee of land is not directly liable to his grantor's mortgagee, at law or in equity; and the only remedy of the mortgagee against such grantee is by bill in equity, in the right of the mortgagor and grantor, by virtue of the right in equity of a creditor to avail himself of any security which his debtor holds from a third person for the payment of the debt.

2. SAME—SUBROGATION—DEFENSES BY VENDEE.

Complainants sold a tract of land to M. and H., retaining a vendor's lien for part of the purchase money. M. and H. sold the land to defendants. Subsequently complainants filed their bill against defendants, to which M. and H. were not parties, to obtain satisfaction of a deficiency arising on the foreclosure of their vendor's lien out of the indebtedness of defendants to M. and H. for the purchase money of the land. Defendants, in their answer, set up, as a defense to the enforcement of such indebtedness, false representations made by M. and H. to induce defendants to purchase the land, and notice given by them to M. and H. of a rescission of the contract. *Held* that, as against complainants seeking relief by subrogation to the rights of M. and H., defendants were entitled to avail themselves of such misrepresentations as a defense simply, and were not restricted to presenting the same by cross bill for affirmative relief, to which M. and H. would be necessary parties.

3. SUBROGATION—DEFENSES—DEBTOR'S FRAUD.

Where a creditor is seeking to obtain satisfaction of his claim through subrogation to the rights of his debtor against a third party, the utmost good faith on his own part will not entitle him to prevail, if it appears that his debtor has been guilty of such fraud as to defeat his rights against said third party.

4. VENDOR AND PURCHASER—MISREPRESENTATIONS.

The evidence discussed, and found to show misrepresentation in a sale of mining land.

On final hearing of a suit in equity to charge the defendants, upon their alleged purchase-money indebtedness to the complainants' grantees, with the liability of the latter to the complainants for the deficiency arising upon foreclosure of their vendor's lien on the same property in Virginia, called the "Glade Mountain Iron Ore Property."

The bill alleges substantially the following facts: The complainants owned the Glade Mountain Iron Ore property, and on August 23, 1890, entered into written contract to sell the same to Moore and Hibbert for the sum of \$35,000, payable in installments; a deed to be executed upon payment of the second installment of \$10,666.66, with reservation of a vendor's lien, according to the practice in Virginia. Moore and Hibbert made the first payment of \$1,000, and on November 15, 1890, gave their three promissory notes for the installments subsequent to the second one. Before the payment of the second installment, Moore and Hibbert entered into contract, dated November 12, 1890, to transfer the contract of sale and all rights thereunder to the defendants for the sum of \$55,000; the defendants agreeing to pay to the complainants the full amount payable under the contract of August 23, 1890. On November 22, 1890, a further contract was made between Moore and Hibbert and the defendants, which provided for certain contingent shares of Moore and Hibbert in the venture, and renewed the promise by defendants to pay the amounts due to the complainants. On December 12, 1890, the complainants deeded the property to Moore and Hibbert in accordance with the contract of August 23, 1890, retaining vendor's lien as provided. The defendants paid the second installment to procure such conveyance, and represented that they

had succeeded to all the rights, and assumed and would perform all the liabilities of Moore and Hibbert under the contract with the complainants, and thereupon directed the conveyance to Moore and Hibbert. The defendants entered into possession of the property and began work thereon, under the conveyance made by complainants and a subsequent deed of Moore and Hibbert to them, and became the owners thereof in fee. The complainants have fully performed on their part, and the remaining installments of purchase money, amounting to the sum of \$23,333 and interest, have matured, and no payment has been made thereon, except the sum of \$1,075.22. The answer concedes the making of the several written contracts and the deed by complainants as set forth in the bill, but denies any representations, requests, or promises on their part to the complainants respecting the making of conveyance to Moore and Hibbert, or otherwise. It avers conveyance from Moore and Hibbert to the defendants, after the execution of complainants' deed, by deed dated December 12, 1890, which recites only, respecting the complainants' claim, that it is "subject to vendor's lien thereon to Green, Main, and Brown," and thereupon avers that the previous contracts were merged, and that the contracts between Moore and Hibbert and the defendants were, in effect, for advances to be made by the latter upon a joint venture of both parties. The answer further sets up certain false representations by Moore and Hibbert, upon which the defendants relied, and which induced the making of these contracts for the sole purpose of mining for iron ore; that they expended \$25,000 in endeavors to develop the property for that object; that no body of iron ore existed on the land, and the property was worthless; that immediately upon the discovery of the truth the defendants offered to Moore and Hibbert rescission of the contracts and conveyance, refused to proceed therewith, and immediately abandoned possession of the property; that Moore and Hibbert refused to accept rescission, but the defendants have never since had possession, nor asserted any rights in the premises; and that the complainants subsequently sold the entire property under certain foreclosure proceedings, to which these defendants were nominal parties, but without personal service or appearance. The answer also attempts to raise the question whether relief in equity is not excluded by adequate legal remedies. The evidence, so far as it is deemed material, is referred to in the opinion.

Haring & Frost, for complainants.

Van Dyke, Van Dyke & Carter, for defendants.

SEAMAN, District Judge (after stating the facts as above). Upon each side an objection is raised which must be determined before inquiry is open upon the merits: (1) By the defendants, that equitable jurisdiction is barred, because there is an adequate remedy at law; and (2) by the complainants, that the defenses of false representations or mistake can be heard only upon a cross bill for affirmative relief.

1. The first objection is met by the doctrine, which is established for this court, whatever may be the conflict in other jurisdictions, that:

"The grantee is not directly liable to the mortgagee, at law or in equity; and the only remedy of the mortgagee against the grantee is by bill in equity in the right of the mortgagor and grantor, by virtue of the right in equity of a creditor to avail himself of any security which his debtor holds from a third person for the payment of the debt. *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494; *Willard v. Wood*, 135 U. S. 309, 10 Sup. Ct. 831;" *Insurance Co. v. Hanford*, 143 U. S. 189, 190, 12 Sup. Ct. 437; *Willard v. Wood*, 164 U. S. 502, 519, 17 Sup. Ct. 176.

If, therefore, it be assumed that this point is well presented by the answer, it must be overruled.

2. The second contention, on behalf of the complainants, which

would debar any defense of fraud or mistake in the transaction arising between their grantees and mortgagors and the defendants as succeeding grantees, except through the affirmative and direct relief of rescission under a cross bill, for which Moore and Hibbert are indispensable parties, is, in my opinion, untenable. The authorities cited to that end would be applicable in an action of foreclosure by Moore and Hibbert, and it may be that their actual presence as parties here would authorize such course. But they are neither present, nor within the jurisdiction of the court. On the other hand, the complainants are in a court of equity, seeking subrogation to the rights of Moore and Hibbert, and no relief can be granted unless it accords with the principles of equity, which are "founded in benevolence, and administered to promote justice and right." They are strictly limited to such rights and benefits as Moore and Hibbert could enforce against the defendants. *City Mission v. Brown*, 158 U. S. 222, 227, 15 Sup. Ct. 833; *Willard v. Wood*, 164 U. S. 502, 521, 17 Sup. Ct. 176. So considered, the defendants are entitled to the full benefit of the rule which permits defensive relief in equity whereby any fraud or mistake which would defeat recovery as between the contracting parties may be set up by way of defense to defeat the enforcement of the apparent obligation or liability for the benefit of a stranger to the contract, as creditor or mortgagee. 2 Pom. Eq. Jur. § 872; *Tarleton v. Vietes*, 1 Gilman, 470; *Benedict v. Hunt*, 32 Iowa, 27. Rescission may be necessary for complete relief between the contracting parties, but when the creditor or mortgagee of one contractor is permitted to come in for its enforcement against the other party according to equity, he must be subjected to any showing of facts which would prevent recovery in a suit by the contracting party. To deprive the defendants of this right because the necessary party for a decree of rescission has not been brought in would close the doors of equity against the equitable considerations which are of the essence of the jurisdiction. In this view, the answer tenders a valid defense.

The allegations of the answer are, in my opinion, fully sustained by the testimony, as to the representations made by Moore and Hibbert, and the defendants' reliance upon them in entering into the purchase in question. Those representations were made in the written report of Capt. Hibbert, and in the oral statements by Moore and Hibbert, which are shown by the testimony of Timlin, Turner, and Burke. The testimony of Moore and Hibbert is in many respects evasive, and, upon the whole, cannot be regarded as materially contradicting the defendants' witnesses. Moore and Hibbert were well known by the defendants as men of large experience in iron mining; had been prospectors and operators in the Lake Superior mining district for many years; and their reputation in such matters gave good ground for assuming that their explorations would be well conducted, and their information reliable, as to the conditions found. Their representations appear of the following effect: That the property offered for sale consisted of about 1,000 acres, covering 4 miles in length; that on one

portion there was a trench showing an immense body of solid iron ore, 12 feet in width, and, if the trench were continued south, it would show a still greater width, because the ore extended under the ground in that direction; that at another place on the property there was an immense outcropping of manganimiferous ore; that on the eastern end, at the bottom of the creek, there was solid ore 20 feet wide, and running under the earth, being from 150 to 250 feet lower than the exposed ore on the hillside; that on the west end of the property there was a large body of ore, solid and in place, to the width of 100 to 150 feet; that all of the foregoing deposits of ore were in one lead, and covered a distance of 4 miles; that they (Moore and Hibbert) had become familiar with the geological formations existing in Virginia, and assured the defendants that there was a continuous vein of ore in place on the property, of which they had found the foot wall and hanging wall, and the ore in place between them; that there was on the property a permanent deposit of ore of great depth, which had been found by them to be in place; that the iron ores in Virginia were of two kinds,—limonite or drift ore, which lay over the limestone strata, and iron ore in place, or regularly stratified, lying between the sandstone foot wall and the limestone hanging wall; that the deposits upon this property were of the latter class, which were always permanent and of great depth; that 3,000,000 tons of ore were in sight upon the property; that Moore and Hibbert had tested the vein in the creek bottom to the width of 20 feet; that there was a vein of ore 4 miles long, which they had tapped in several places and found continuous and in place; that every test pit upon the property was bottomed on a solid ledge of iron ore in place; that they had made sufficient explorations to establish the fact that the ore was in place between the foot wall and hanging wall, and regularly stratified, and in large quantities,—one end of the vein being at least 20 feet, and the other at least 100 feet,—and they had found and traced the foot wall the entire length of the property. The defendants assert that they entered into the contracts with Moore and Hibbert relying entirely upon these assurances, and there is no evidence which fairly raises a doubt upon this point. It is true that both Timlin and Turner made separate visits to the property before concluding the arrangement, but they were each informed by Moore and Hibbert that the owners had more favorable offers, and would not permit further explorations before purchase, and that the explorations which they had made as the foundation of their assertions could be relied upon for closing the purchase; and the testimony further shows that the inspection upon these visits could not have disclosed the true state of the previous explorations, or their results, without reopening the trenches and pits, for the reason that all of the alleged indications of ore were then covered by surface filling. The representations upon which the defendants relied were of existing facts; of conditions which were discoverable by an expert in the careful and systematic explorations, which were justly presupposed, both from the written report and the oral statements. They are clearly distinguishable in all essential features from the

mere expressions of opinion or judgment, or the justifiable "trade talk," which mark the line of cases cited on behalf of the complainants, of which *Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, and *Tuck v. Downing*, 76 Ill. 71, are examples. Disregarding all estimates of the amount of ore "in sight," or of the daily output promised, the facts stated as to the vein of ore found in place, and of its discoverable extent and depth, if true, would give assurance of a valuable mining property, when taken in connection with the accessibility, and other patent elements. The testimony demonstrates that no such facts existed; that there was no body or vein of ore in place which fulfilled the representations in any substantial particular. Although some iron ore was found, it was largely of so-called "wash ore." There was no considerable body in any place, and none of the evidences were found which Moore and Hibbert specified as showing a body or vein of ore. It further appears from the testimony of Moore and Hibbert, introduced by the complainants, that no such explorations were made, either by them or under their direction, as were clearly implied by their report and were expressed in their oral statements, but that, resting upon assumptions from surface indications and hearsay, they imposed their mere deductions therefrom upon the defendants as facts ascertained by actual explorations.

The complainants urge that the proofs do not show that the property is worthless, in fact, for mining purposes, and that the efforts on the part of the defendants for its development were insufficient. But this objection is without force, as it appears that their actual expenditures to that end amount to over \$16,000; aside from the payments for purchase money; that the work was conducted by mining experts; that it was prosecuted with diligence and skill, and to the utmost extent which could reasonably be required to divulge that there was no ore attainable in substantial quantity, and that the evidences of its existence specified in the representations were not present in the land. The bona fides of the complainants is also asserted as favoring their right to maintain this action, and they earnestly dispute the testimony which is introduced on behalf of the defendants as tending to show conduct on their part in aid of the deceit, and their information of the defendants' reliance upon the false representations; but the right of Moore and Hibbert is the vital issue, and the utmost of good faith on the part of the complainants cannot aid their recovery here, if Moore and Hibbert are without right. As above indicated, my conclusions are in favor of the defendants upon this issue, and the bill of complaint must be dismissed for want of equity. It is so ordered, with costs against the complainants.

TRENTON TERRA COTTA CO. v. CLAY SHINGLE CO.

(Circuit Court, D. New Jersey. April 20, 1897.)

1. REFORMATION OF CONTRACTS—MISTAKE.

A clerical mistake by one party in reducing the terms agreed upon to writing, which is either shared in or known to be a mistake by the other party at the time of executing the contract, is sufficient ground for decreeing a reformation.

2. SAME.

The owner of a patent for clay shingles proposed in writing to give to a manufacturer a license for certain states, and, among other provisions, stipulated that the licensee was to pay royalties upon at least 3,000 squares of the patented shingles each year. After some negotiations, resulting in modifications of other provisions, but without any objection by either party to this stipulation, the licensee by letter authorized the licensor to draw up a contract on the basis of the terms agreed upon. These terms were set forth in the letter, but with a statement that royalties were to be paid, in any event, on 30,000 squares per annum, instead of 3,000. *Held*, on the evidence, that this was a clerical error known to be such by the licensor at the time of executing the contract, and that a reformation should therefore be decreed.

Geo. W. Macpherson and John T. Bird, for complainants.

Linton Satterthwait, for defendants.

KIRKPATRICK, District Judge. This bill is filed to reform a contract entered into between the Trenton Terra Cotta Company, the complainants herein, and the Clay Shingle Company, the defendants, bearing date January 29, 1892. It appears from the evidence in the cause that the defendants, residents of the state of Indiana, were the owners of a patent for the manufacture of clay shingles, and were desirous of having their shingles manufactured and sold on royalty in the Eastern markets. To that end they entered into negotiations with the Trenton Terra Cotta Company, who owned a large plant in Trenton, N. J., suitable for the purpose, and some time in the latter part of the year 1891 submitted a form of agreement, in which it was, among other things, provided that the Clay Shingle Company should give the Trenton Terra Cotta Company the right to manufacture their patented tile at Trenton, N. J., and the exclusive right to sell and use the same in the states of New Jersey and Delaware, and the right to sell and use (not exclusive) in the state of New York; the Trenton Company to pay \$2,000 as an advance on the royalty when the papers were executed. For this advance no condition was imposed as to the amount of tile to be made in 1892, but during every year after 1892 the said Trenton Company was to be required to make not less than 3,000 squares, or pay the royalty on that amount. The said proposed agreement also provided that the price of the tile sold by the Trenton Company should not be less than \$6.50 per square delivered upon the cars or wagons at their factory, and that there should be paid the Clay Shingle Company a royalty of 50 cents per square for each 100 square feet of tiles made at their factory, and sold within the allotted territory. This proposition, as a whole, was not satisfactory to the Trenton Company. In a

letter dated December 30, 1891, they stated their objections to be the payment of \$2,000 for advance royalties, the time when the payment of royalties should begin, and their failure to obtain the exclusive right of sale in the state of New York as well as in the states of New Jersey and Delaware. In this same letter they returned to the Clay Shingle Company the copy of the proposed agreement which had been submitted to them. On January 1, 1892, the Clay Shingle Company, replying to the letter of the Trenton Company of December 30, 1891, receded from their demand for the \$2,000 for advance royalties. They say they do not care about the Trenton Company binding themselves to a fixed royalty inside of two years, provided they will agree to make all the tiles necessary to supply the demand, and use business facilities to create a demand; and they have no objection to giving the exclusive right to sell and use in New York, as well as in New Jersey and Delaware, if they (the Trenton Company) would supply the demand. In fact, they would be glad to have the Trenton Company take all the New England states as well upon the same terms. Nothing was said in this correspondence by either of the parties as to the other terms of the proposed contract except that Mr. Elder, speaking for the Clay Shingle Company, says:

"If I had about two hours talk with you, I think I could convince you that there is nothing in the agreement but what is just and right, giving you ample rights in the manufacture and sale of tile, and guarding our interests in a way that is right and proper."

Up to this point in the negotiations it will be observed that no suggestion had been made that the number of squares which the Trenton Company should manufacture each year or pay the royalty upon should exceed the 3,000 squares provided for in the original proposition, either by the Trenton Company as an inducement that the modification of the agreement insisted upon by them should be granted, or by the Clay Shingle Company as a consideration for enlarging the concessions of their grant. On the contrary, the terms of the contract seem to have been satisfactory to both parties except as to the disputed matters above referred to. On January 13, 1892, the Trenton Company wrote to the Clay Shingle Company:

"Draw up your lease, leaving out the advance royalty, and make no restrictions as to amount of shingles we must make during '92 & '93. After '93 you can make it 30,000 squares, and give us the exclusive right, as I stated in my first letter, for N. Y., N. J., & Del. The clause binding us not to manufacture other shingles we will concede to now."

This letter deals with all the disputed questions, and settles them, and, in addition, changes the minimum quantity to be paid for in each year from 3,000 squares to 30,000 squares, thereby raising the amount to be paid annually from \$1,500 to \$15,000. The complainants charge in their bill that this was the result of a mistake, and it is this mistake they ask to have rectified by the court, so that the contract may conform to the intention of the parties.

When an instrument is drawn which is intended to carry into effect an agreement previously entered into, but which by mis-

take does not fulfill that intention, equity will correct the mistake. *Wintermute v. Snyder*, 3 N. J. Eq. 489. A careful consideration of the evidence leads me to the conclusion that the offer of the Trenton Company in the letter of January 13, 1892, to pay each year after 1893 a royalty on 30,000 squares was the result of a clerical error or mistake on the part of the Trenton Company, either shared in by the Clay Shingle Company, or known to be a mistake by the Clay Shingle Company at the time it executed the agreement. If that be so, the contract should be reformed in that respect. *Kerr, Fraud & M.* (2d Ed.) 498. I cannot believe that the Trenton Company, having refused to accept a license from the Clay Shingle Company for the manufacture and sale of tile because required to pay the small sum of \$2,000 for advance royalties, and be bound to pay royalties on a minimum of 3,000 squares per annum, should voluntarily and without solicitation have agreed to bind themselves to pay royalty on ten times the amount of tile which the patentee had asked for. Nor can I conceive it possible, in the light of the correspondence, that the Clay Shingle Company could have expected them to do so; the advantages to be derived by the Trenton Company from the change of terms in regard to the payment of advance royalties, the deferred time when payment should begin on minimum amount sold, and the extension of exclusive territory not being at all commensurate with the obligation to pay \$15,000 a year instead of \$1,500. It is now contended on the part of the Clay Shingle Company that the extension of the exclusive privilege to sell in New York was sufficient inducement for the increased minimum output, but a perusal of the letter of January 1, 1892, will show the small value then put upon that concession by the Clay Shingle Company. It was surrendered willingly, and apparently the Clay Shingle Company would have been glad to have the rights to New England go with it; the sole condition being that the Trenton Company would make all the tile necessary to fill the orders. It cannot be questioned that, if the letter of January 13, 1892, had been silent in regard to the minimum number of squares to be paid for in each year beginning January, 1894, that 3,000 would have been the number inserted in that clause of the contract, because up to that time no other number had been mentioned. It was the number in the minds of both the contracting parties. It was one of the provisions of the contract about which no question or objection had been raised. When the disputed matters had been agreed upon, it was just as natural that the clause in the original contract in relation to the 3,000 squares as the number to be paid for each year should be inserted in the agreement as it was that the clause in relation to the price at which the tile must be sold by the Trenton Company should remain. We must assume that, in the absence of any reason for a change in the minds of the parties, they had no intention to make one, and that, if the contract now calls for the yearly payment on 30,000 squares instead of 3,000 squares, it was the result of a mistake which was mutual, in that it was not in the contemplation of either party at the time the agreement was signed. For a mutual mistake, shared

in by both parties, equity will afford relief. *Paget v. Marshall*, 28 Ch. Div. 255. Courts of equity will relieve against mistakes, and will correct and reform deeds and instruments of the most solemn character to grant such relief. 1 Story, Eq. Jur. § 152. The only conditions to granting such relief are that the mistake must be mutual, and clearly proved. It seems to me that no one can read the history of this negotiation and the correspondence between the parties without coming to the conclusion that 3,000 squares was the number which both parties intended to insert in the contract, and that the insertion of the larger number was the result of a mutual mistake or a mistake on the part of the Trenton Company, known to be such by the Clay Shingle Company at the time the contract was executed. The complainants are entitled to the relief prayed for, and decree should be entered accordingly.

MOORE v. AMERICAN LOAN & TRUST CO. et al.

(Circuit Court, D. Minnesota. October 16, 1896.)

1. **INSOLVENCY—PREFERENCES.**

Under the Minnesota statute declaring void conveyances by "any insolvent debtor or a debtor in contemplation of insolvency, within 90 days of making an assignment," it is necessary, beyond the fact of insolvency, to show an intent to give a preference, and also that the creditor knew or had reason to know of the insolvency.

2. **SAME—EVIDENCE.**

A mortgage given by a manufacturing and trading corporation a short time before its failure, not at the request of its creditors, but on its own motion, and for the purpose, not of affording greater security, but of releasing other securities in possession of the creditor as collateral, and procuring an additional loan, *held*, under the circumstances and on the evidence, not to have been given in contemplation of insolvency, or to have been received with reasonable cause on the part of the creditor to believe that the debtor was insolvent, within the meaning of the Minnesota statute.

This was a suit in equity by A. B. Moore, receiver of the Great Western Manufacturing Company, against the American Loan & Trust Company of Boston and others, to set aside a mortgage as void, on the ground that it was made in contravention of the insolvent law of Minnesota.

Cotton, Dibbell & Reynolds, for plaintiff.

Washburn, Lewis & Bailey, for defendants.

LOCHREN, District Judge (orally). In this case, if there were any question as to the sufficiency of the complaint at this time, the evidence has been presented and the case tried upon the theory that it is an action to set aside this mortgage to the American Loan & Trust Company, on the ground that the same was a preference in favor of the electric corporation, and contrary to the insolvent laws of the state; and, if there were any defect in the complaint (which I do not determine), I think an amendment ought to be allowed, so as to present the case in the pleadings as the parties have chosen to present it in their evidence and in the argument before the court.

I think that counsel for complainant is correct in his position that this is not in any sense an action to rescind the conveyance, but to have it declared void upon the ground that it was made in contravention of the provisions of the state insolvent law. It is brought by the receiver, representing and in the interest of the creditors; and he is not obliged, as a condition for obtaining the relief sought, to place the other party in statu quo, nor to return the money or securities which were parted with in making this conveyance. It seems that the Great Western Manufacturing Company commenced business in the beginning of the year 1893; and in December, 1894, its business came to an end by an entire collapse or failure, accompanied at the time with attempts to give preferences to certain creditors,—a Mrs. Lamb, in whose favor judgment had been confessed, and a Chicago creditor, to whom securities were turned over at the time. Therefore it is not strange that the creditors should look with suspicion upon a mortgage of this kind, given so recently before the failure, and in favor of a corporation which had been a creditor of the Great Western Manufacturing Company to a considerable amount. The conveyance, being executed so near the time of the collapse of the mortgagor, would naturally raise a suspicion as to the character of the conveyance itself. The question now before the court is as to the character of this conveyance, in view of the evidence in the case, which appears to be very full and exhaustive. Our statute, as cited in complainant's brief, recites that:

"Conveyances and payments made and securities given by any insolvent debtor or a debtor in contemplation of insolvency, within ninety days of making an assignment, as provided by section one of this act, with a view of giving a preference to any creditor upon a pre-existing debt, or to any persons under liability for such debtor, over another, shall be void as to all creditors or persons receiving the same, who shall have reasonable cause to believe that such debtor was insolvent." Gen. St. Minn. 1894, § 4243.

In order to determine the character of the conveyance which is attacked in this suit, it is necessary to consider the condition of the parties, the negotiations between them, and the circumstances under which these negotiations were had. It appears that the Great Western Manufacturing Company was engaged in the manufacture of goods connected with the use of electricity, and was also trading in similar goods purchased from other manufacturers or dealers, and sold by the company in its stores in Chicago, St. Louis, and perhaps Duluth; so that it was to a certain extent a trading, and not exclusively a manufacturing, concern, and it is possible, therefore, that the law referred to by counsel as to technical insolvency would apply to a corporation of this kind,—that is, it would not be necessary that it should not have sufficient assets to pay its liabilities in the ordinary course of business if they were carefully administered, but insolvency would occur where there was an inability to pay its debts as they matured and were demanded. That would be an act of insolvency in the case of a trader, and possibly in a case of this kind. The evidence does show that this corporation was, perhaps, during the entire negotiations resulting in this mortgage, or, at any rate, before the execution of the mortgage, technically insolvent in the latter

sense, and also that the same was known to the agent of the electric corporation, the beneficiary of the mortgage, before the negotiations were completed. It is necessary, beyond the fact of insolvency, to show that the creditor had reason to know of the insolvency; and, further, it is necessary to show an intent to give a preference to the creditor. It is argued on the part of counsel for complainant that it is only necessary that this should be the motive actuating the mortgagor, and that it is immaterial that the creditor for whose benefit the mortgage is made had any such purpose, intention, or knowledge. It would be rather extraordinary that a debtor should give a preference to a creditor without the knowledge and consent or participation of the creditor. But I hardly think that in a case of this kind it would make much difference. It might possibly do so where the creditor was a relative of, or where confidential or personal relations existed between him and, the debtor, so that the latter might have a peculiar regard for the creditor, and, without consulting him, do an act for his benefit which the creditor might not have adopted. But that is something beyond the ordinary course of business in matters of this kind; so that, in determining whether this mortgage was given by the debtor, the Great Western Manufacturing Company, for the purpose or with a view of giving a preference to this particular creditor, we have to consider the relation of the parties, and the circumstances of the transactions at the time they occurred. There is nothing in the relations of these parties, as disclosed by the evidence, which would show a probability that the debtor would act in the manner I have indicated, as might be done in case of relationship, or something that might cause the debtor to feel a more than ordinary interest in the affairs of the creditor. In this case the evidence discloses nothing more than the ordinary relation of debtor and creditor, and no particular reason why the debtor should favor this particular creditor more than any other creditor, aside from business reasons.

Ordinarily, in cases of preference, the creditor is the one who urges the giving of the security; is anxious that it be given hastily, and the contract be made immediately, so that the matter may be closed up and got out of the way. This case does not seem to have any of these characteristics about it. It does not appear that at the time of these negotiations there was any apprehension on the part of the creditor with respect to the indebtedness, although it does appear there was an indebtedness of some \$52,000, \$24,000 of which was due, and that at the time Mr. Johnson came to Chicago, and had a conference with Mr. Gilman on the subject, he was informed that the company was not prepared to make a payment of that amount at that time, or any part of the debt. But this does not appear to have created any anxiety on the part of Mr. Johnson. The debt of the electric company at that time was not unsecured, but was secured by the indorsement of the directors of the Great Western Manufacturing Company. It was also secured by the bonds of the Fond du Lac Company, and I think there is nothing in the case which shows that the electric corporation did not at that time feel itself entirely safe and secured. There does not appear to be anything in the action of the company that Mr. Johnson then represented, and Mr. Bartlett later, which dis-

closes any anxiety on that point. It appears that the electric corporation's business, or, at any rate, a considerable portion of it, was making loans to concerns interested in manufacturing or handling electric goods, and also dealing in the securities of electric companies; and the proposition which resulted in the making of this mortgage, which is now attacked, does not seem to have come from the creditor, the electric corporation, but from the debtor, the Great Western Manufacturing Company. The object as expressed in the negotiations between the parties was not, as far as the testimony discloses, for the purpose of giving the creditor greater security than it already had, but rather with the purpose of releasing a portion of the creditor's securities which it then held in its hands, so as to make the same available to the Great Western Manufacturing Company, for the purpose of raising other moneys to be used in the continuation of its business. It was stated that Mr. Gage, a banker in Chicago, would make a loan to a considerable amount upon these securities if they could be gotten from this electric corporation; and there was also in view the expected sale of the Fond du Lac property, for which, as was represented to the agent of the electric corporation, the Great Western Manufacturing Company had a standing offer of \$100,000 (which, as all parties then understood it, would place the company in easy circumstances as far as cash was concerned); but the company desired to hold on to the property with the hope of realizing \$150,000 from it. Under these circumstances, one object of the Great Western Company was to obtain control of these securities held by the electric corporation. The proposition was that the electric corporation should increase its loan by \$30,000, and instead of keeping the security which it then had upon these Fond du Lac assets, which, if surrendered, could be promptly used by the Great Western Manufacturing Company, the latter should place a mortgage upon all its machinery, implements, plant, and real estate at Duluth, to cover the indebtedness of \$52,000, and an additional loan of \$30,000, which was requested of the electric corporation, and also cover \$20,000 more of bonds, the sale of which would enable the mortgagor to realize something near that amount in ready money for its use. There does not seem to have been any haste in this matter made by the creditor, as in the ordinary case where he is seeking a preference, or where either of the parties are expecting insolvency. These negotiations commenced early in August, and extended until the 13th day of November, when the mortgage was finally executed. I believe it did not pass for some days later than that. In the meantime a statement of the affairs of the Great Western Manufacturing Company was made by Mr. Gilman, and transmitted to Mr. Bartlett, at Boston, who then represented the electric corporation, presenting the affairs of the company, as appears from the testimony, substantially as they were presented to Mr. Johnson. I do not see anything in the case from which I am convinced that the electric corporation regarded the affairs of the Great Western Manufacturing Company as being different from what they were represented to be in this communication to Mr. Bartlett, and by the personal representation made by Mr. Simonds in connection therewith. It does not appear to me that the evidence discloses

anything which would fairly give Mr. Johnson reason to apprehend that there was a crisis pending in the affairs of this company at that time or in the near future. They had representations from Mr. Gilman that the Great Western Company could get \$100,000 from the Fond du Lac Company at any time it chose to take it; that they had a standing offer for that amount; but, if they allowed that to stand in abeyance, and if these negotiations were carried out, they were to have \$28,000 additional from the electric corporation, and they were to have \$20,000 of bonds. There was an agreement by the creditors at Duluth that they would furnish \$15,000 of other money. There was also a statement made by Mr. Gilman, with respect to the outstanding indebtedness, that much of it would not be pressed, but could be renewed, and was in the nature of permanent obligations, not pressing at the time.

It seems to me that this conveyance was not one which was asked by the creditor. It was one to which the creditor consented after a careful, painstaking examination of all the facts; and the purpose of it was not, as far as the creditor, and, I think, as far as the debtor, was concerned, to add to the security of the creditor, nor to give a preference, nor with the idea that the company was about to close up, but was made for the purpose of getting from the same creditor an additional loan,—getting from the same creditor certain securities which it had, and which the debtor supposed could be used in connection with its business, and from which, if the security could be changed, other moneys might be realized by the debtor. That, in my opinion, was the purpose of this negotiation. It was not carried on with any idea of closing up the business of the company, or of giving any preference at the time this conveyance was made. At the time this mortgage was given, I think that there was nothing that would cause to either of the parties apprehension of the collapse of the Great Western Manufacturing Company, although that occurred very soon after the conveyance. Perhaps it was hastened by the fact that the mortgage was made, when, being placed upon file, it came to the knowledge of the other creditors. Times then were so panicky that I do not know but the court ought to take notice thereof with regard to the apprehension which a conveyance of that kind might convey to other creditors,—a mortgage made for the security of a corporation known to have been a creditor to a considerable amount of the Great Western Company, without knowledge of the real facts in the case, without knowledge of the fact that other securities had been surrendered, which were more available to the debtor, and perhaps without knowledge that additional cash had been placed in the hands of the debtor by means of this arrangement. Whatever the reason was, the collapse came. It seems to me that it could hardly have been, and I do not think it was, anticipated. I am of the opinion, from this testimony, that it is not shown that this mortgage was made with a view of giving a preference, and judgment will be entered for the defendant. Ordered accordingly.

SANFORD et al. v. SAVINGS & LOAN SOC. et al.

(Circuit Court, N. D. California. October 3, 1893.)

1. RESULTING TRUSTS—REDEMPTIONS FROM FORECLOSURE SALE — EVIDENCE AS TO ADVANCES.

Testimony and circumstances held to show that certain moneys furnished by a savings bank to aid in effecting the redemption of real estate from foreclosure and tax sales were in fact a loan to the original owner, and that the legal title which became vested in the bank after redemption was held merely as security and in trust for such owner, so that his personal representatives were entitled to redeem it.

2. CONSTITUTIONAL LAW—TAXATION OF MORTGAGES—TRUST DEEDS.

Const. Cal. art. 13, § 4, requiring the interests of mortgagors and mortgagees to be separately assessed, and making void any contract by which the debtor is bound to pay the tax of the mortgage interest, applies to a trust deed intended as a mortgage.

3. SAME—RETROSPECTIVE EFFECT.

The provision of the constitution requiring separate assessment and taxation of the respective interests of mortgagor and mortgagee applies to mortgages made before the adoption of the constitution, where the only stipulation was for interest at a fixed rate.

4. MORTGAGES—REDEMPTION FROM SALE—TAXES.

Where a mortgagee, holding under a trust deed, claims the entire ownership, and returns the entire property in his own name for taxation, the mortgagor, on being decreed to have a right to redeem, will be charged only with the taxes properly assessable against his equity of redemption.

5. TENDER—ACTS EXCUSING TENDER.

Under Civ. Code Cal. § 1511, subd. 3, two things are necessary to excuse a tender: (1) An act of the creditor, intended or naturally tending to induce the debtor not to make it, and (2) the effect thereof in actually inducing him to withhold it; and, if the debtor was not prepared to make a tender, the creditor's act does not excuse him.

John A. Stanly, Garrett W. McEnerney, George R. B. Hayes, and T. L. Bergin, for complainants.

A. N. Drown and Philip G. Galpin, for respondents.

McKENNA, Circuit Judge (orally). In this action the complainants claim the right to redeem a piece of land in Contra Costa county, called "Los Meganos," or "Marsh Ranch." The respondents have the legal title, but complainants allege it was received in trust for James T. Sanford, and now held in trust for complainants, as his legal representatives. To quote from Mr. Stanly's argument: "The record, bill, answer, and proof show that long prior to the connection of any party to this suit with the subject-matter the title had become so vested that $\frac{91}{100}$ undivided parts belonged to one set of owners, and $\frac{9}{100}$ belonged to another owner or owners." All parts, however, became vested in James T. Sanford prior to July 3, 1872, and afterwards passed from him, dividing again for a while, and afterwards uniting again in the respondents; and complainants, counsel says, therefore are affected by different states of facts and different rules and principles of law. The $\frac{99}{100}$ parts came to Sanford by deed dated November 1, 1871, the deed being from Charles P. Marsh, and Alice F. and William Cameron. The deed recited that it was subject to a mortgage for \$259,333 of the purchase money, and two deeds of trust

made by Marsh to E. W. Burr and B. D. Dean. The mortgage was duly foreclosed, and the property bought in by Alice F. Cameron and Charles P. Marsh. The first, and, I think, the material, controversy, is about the redemption from this sale, and the parties by whom and the character in which the money was furnished. However, on the 3d of July, 1872, Sanford conveyed all of the property to the Brentwood Coal Company, and the latter gave him a mortgage to secure \$90,000 of the purchase price. This mortgage was assigned by Sanford to one Bowdoin on the 12th of May, 1873, "upon the terms and conditions contained in a certain agreement between the parties hereto, bearing even date herewith." This agreement shows that the assignment was in trust to secure the payment of a certain number of promissory notes made by Sanford to various parties, all of which were made April 1, 1873, and to become due at various dates in 1874. By the agreement recited they were made and delivered on the day of the agreement, to wit, the 12th day of May, 1873. The agreement recites that Sanford delivered the mortgages to secure the payment of the notes severally, as they should fall due, and Bowdoin accepted the mortgages for such purpose, and, if they should be paid as they fall due, he will, upon the request of Sanford, deliver up and satisfy the first-mentioned mortgage, and reassign to him the second. If the notes be not paid when due, Bowdoin, at the request of any holder of them, shall proceed to collect the whole and all of them, by foreclosing said mortgages, or by such other legal process as may be lawful for that purpose in the state of California, and the property described in the first mortgage was to be sold first, and, if a surplus remained, it to be paid to Sanford, and the Brentwood Coal Company's mortgage reassigned to him. If the sale should not produce sufficient to pay the obligation, the premises in second mortgage to be sold, and the surplus, to the extent of \$90,000, to be paid to Sanford, and the balance, if any, to the Brentwood Coal Company. If all the premises should not realize sufficient to pay the obligations, the amount realized to be divided proportionately. The Marsh-Cameron mortgage was foreclosed, as I have said, and the property bought by Alice Cameron and Charles Marsh for the sum of \$199,183.80. It was redeemed on the 26th day of July, 1875, in the name of George S. Bowdoin. The certificate reciting the right to redeem was based on the mortgage made by the Brentwood Coal Company to Sanford, and assigned by him to Bowdoin, both of which have been described above. This certificate he assigned to E. W. Burr as security to the Savings & Loan Society for \$150,000, which the corporation had advanced, and which sum was used in part to effect the redemption. To whom this sum of \$150,000 was advanced is one of the contentions of the parties; the complainants contending it was advanced to Sanford, the respondent contending it was advanced to Bowdoin, and that he furnished the balance of the money. I think the evidence shows it was advanced to Sanford, and that he furnished the balance of the money. It is too conclusive to admit of doubt.

The redemption was made on the last day allowed by law. Bowdoin made no movement to redeem. It was first intended to redeem in Sanford's name. Afterwards, and almost at the last moment of time, it was resolved to redeem in Bowdoin's name. Bowdoin's testimony is conclusive of it. He made no movement to redeem, and on application of Sanford allowed his name to be used, expressly agreeing to subordinate the rights he had as trustee to the lien of the money required for redemption, and with extreme care stipulated against liability of himself and those he represented. In his deposition he testified that he authorized the redemption of the property, but not for the parties he represented. "It was redeemed in my name," he said, "but I did not furnish the money, or borrow it. I came to make the redemption, because Mr. Sanford said, through my counsel, that if I redeemed he would furnish the money; and my object was that, in the event that the property realized more than Sanford paid, he would be able to meet the balance of the notes which I still held against him, he having already paid the first maturing notes. I did not authorize the borrowing of the money from the Savings & Loan Society for the purpose of making the redemption, and I did not authorize the borrowing of any money from any person or corporation." As to the assignment of the certificate, he testified he first assigned it by telegraph, and afterwards in writing, but neither borrowed nor authorized the borrowing of any money on it, "and the assignment, I presume, from what my counsel told me, was on behalf of Mr. Sanford." This testimony shows conclusively that Bowdoin did not borrow from the Savings & Loan Society the \$150,000 as claimed by it. The testimony further shows that the balance of the redemption money was furnished by Sanford by drafts from New York, and by sums raised here on his credit.

These facts establish a trust in favor of Sanford to the extent of the interest conveyed by the assignment of the certificate of redemption. *Hidden v. Jordan*, 21 Cal. 92. This redemption, and the relations established by it, become the test of the case, and explain all that took place afterwards. By the foreclosure and sale of the $\frac{11}{100}$, the balance, $\frac{9}{100}$, was left subject to the mortgage from the Brentwood Coal Company to Sanford, which we have seen was assigned to Bowdoin in trust. The Brentwood Coal Company was adjudged bankrupt by the district court of the United States of the Southern district of New York, and one George H. Carey was duly appointed assignee of the estate, and was duly authorized to sell, and did sell, the estate of said company in said $\frac{9}{100}$ of said rancho free and clear of any lien thereon, of the mortgage of the company to Sanford; the lien to attach to the proceeds of the sale; and George S. Bowdoin became the purchaser thereof. The court subsequently authorized the said assignee to take the receipt of Mr. Bowdoin for \$45,000 in payment for the property; that is, to accept his receipt, which was virtually the receipt of Sanford for that much of the debt of the coal company to him. There are a number of other transactions in which Sanford conveyed interests in the rancho after the redemption from

the foreclosure sale, and there were sales for taxes, and sales under a judgment obtained against him by F. A. Eaton, who had advanced part of the money for the redemption from the Marsh and Cameron foreclosure sale. These interests were purchased by the Savings & Loan Society.

On whose account they were made, as well as the purchase of the $\frac{9}{100}$ of the rancho from Bowdoin, is the second contention of the parties. Sanford, immediately after the redemption of the foreclosure sale of the Marsh mortgage, went into possession of the land, made leases to others, and disposed of its rents and profits; and it is claimed that in consideration of the surrender of the agricultural portion to the bank, he retaining the house and certain grounds, the bank was to advance to him funds sufficient to purchase said claims and pay off certain enumerated indebtednesses. The agreement was afterwards modified, it is further claimed, to include the surrender of the house and grounds; and in lieu of their retention Sanford was to receive a certain monthly sum. This is denied by the bank, but I think it is supported by a fair preponderance of the testimony. The oral testimony is conflicting, but there are circumstances in the case which cannot be accounted for on any other supposition. The value of the property supports it. It was sufficient to make the bank secure. Interlocutory decree for complainant, with reference to the master for an accounting.

(February 23, 1897.)

MCKENNA, Circuit Judge. The controversy in this case was as to the status of certain tracts of land described in the bill,—whether the respondent society was the owner of them, or whether they were held in trust by it for Sanford to secure the sum of \$150,000 and interest, and certain advances and disbursements. The interlocutory decree determined the latter. Upon what facts and reasoning, is set out with sufficient explicitness in my decision rendered October 3, 1893. The interlocutory decree referred the cause to E. H. Heacock, Esq., master in chancery, to take and state and report to this court a full, just, and true account between the parties complainant and defendant herein. The terms of the decree, as far as necessary, will be given hereafter. In pursuance of the decree, the master took the account, and made his report January 9, 1896, to which each party has filed exceptions on various grounds, the principal and most important of which are the expenditure of the defendant for taxes and the claim and allowance of interest. As to the taxes the report is as follows:

"The mortgage interest of the Savings & Loan Society in the Los Meganos Rancho has never been separately assessed; but the Savings & Loan Society has from year to year had the entire property, except the lots sold in the town of Brentwood, assessed to itself, as the owner thereof. The decree directs: 'That in taking and stating said accounts, allowance be made by said master * * * to the defendants herein for all sums expended by them * * * for taxes or assessments upon real property, or any part thereof, or the appurtenances thereof, except taxes on, or representing the mortgage interest of the defendant the Savings & Loan Society, or in the redemption of said property, or any part thereof, from sales for taxes or assessments, or in the acquisition of tax titles thereto (unless such tax sales or titles are founded on

taxes representing the mortgage interest of the defendant the Savings & Loan Society).’ A mortgage is declared by section 4, art. 13, of the constitution, for the purpose of assessment and taxation, to be an interest in the property affected thereby. The property is assessed, which assessment necessarily includes the mortgage interest. The assessment creates a lien upon the property, and gives the basis for taxation. The tax is levied. The owner of the mortgage must pay the tax upon the mortgage interest; the owner of the property must pay the tax upon the excess. No reassessment is required; it is only necessary to apportion the amount of the taxes between the parties. Since November, 1878, the Savings & Loan Society has been continuously in the possession of the property, and under section 8 of article 13 of our constitution it was its duty to make and deliver annually to the assessor, under oath, a statement setting forth all real and personal property owned by it or in its possession or under its control; and section 3629 of our Political Code requires the assessor to exact from each person a statement in writing, including, among other things, ‘all mortgages, deeds of trust, contracts and other obligations by which a debt is secured, and the property in the county affected thereby.’ The fact that the law likewise required Sanford to make such statement does not excuse the Savings & Loan Society from so doing. Sanford had placed the Savings & Loan Society in the possession of the property. It thereby became the steward and bailiff of Sanford, and thus undertook to faithfully do and perform all and every act necessary to be performed to protect the property, and Sanford might well have relied upon the Savings & Loan Society in the matter of the assessment of the property, as well as the paying of the taxes levied thereon, and all other matters pertaining thereto.”

On the argument of the exceptions to these conclusions of the master a great many things have been urged which do not seem to me to be relevant. The question is the simple and direct one,—what has either party paid or received on the account of the other? What (to confine the inquiry directly to respondents) legal obligation of complainants have they discharged, which either at complainant’s request or by right of law they did discharge? In answering this as to the taxes, two periods must be regarded,—that before the new constitution took effect, and that after it took effect. In the first period there was no mortgage tax. That on the land was its owner’s burden, without diminution for anything, and hence there was no division of interests. It was all Sanford’s,—ownership and burden,—and hence, as to this period, the master found no embarrassment, and counsel have made no complaint. In the second period the constitution makes a division of interests,—divides them into that of the mortgagor, who is the owner, properly so called, and into that of the mortgagee; and under the constitution the interests are assessed to their respective owners (article 13, § 4), and any contract made after that time, by which the debtor (mortgagor) is obligated to pay such tax, shall, as to such tax, be null and void (Id., § 5). It is objected to the application of these provisions that they do not apply to a deed intended as a mortgage; that they only apply to a mortgage, in form such, to a deed of trust, in form such; and it is urged further in support of this construction that the machinery of the law is inadequate to assess any other but formal mortgages or deeds of trust. I do not think either proposition is tenable. Not the first, because it is manifest that sections 4 and 5 should be taken together, and were intended to include all forms by which money could be se-

cured; and it would have been of little avail to have avoided a contract by which a debtor obliges himself "to pay any tax or assessment on money loaned, or any mortgage, deed of trust, or other lien," if the result could be produced by the easy and not uncommon form of a deed. Not the second, because the machinery of the law provides for not only what the records may show, but for the disclosures of the parties under oath,—as adequate a method as can be applied to men, and, as far as the state is concerned, completely adequate, the value of the visible land being the basis of taxation, whether as one interest or as two interests.

It is further urged that the complainants have alleged that the \$150,000 was borrowed by Sanford and advanced by the Savings & Loan Society to him "upon the understanding that the same was to bear interest at the rate of 1 per cent. per month," which means (counsel urge), "as a matter of course, without any diminution or deduction." And, further, "No mortgage tax could have been contemplated by either party, or even thought of, for none existed." The same comment is made upon the reduction of the interest in March, 1878, from 12 per cent. to 10 per cent. The business habits and the practice of the profession (of which the court may take judicial notice) oppose this view. It was the universal practice in mortgages, where such was the contract, to insert a provision for payment by the mortgagor, not only of the tax on the land, but on the money loaned. It was not considered that this result was secured by the rate of interest. But, further, in the case of *Hay v. Hill*, 65 Cal. 383, 4 Pac. 378, the supreme court of California held that under a mortgage made before the new constitution the mortgagor was entitled to be paid after the new constitution for the taxes he paid on the mortgagee's interest. The court said:

"There was no contract between the mortgagor and mortgagee by which the former agreed to pay the taxes upon the mortgaged premises, the obligation of which was impaired by the provisions of the new constitution. It is said that, to hold that the mortgagor is to be allowed the sum by him paid for taxes assessed against the mortgagee is to relieve him from the payment of a part of the money which he agreed to pay. But a power superior to both has relieved the mortgagor of a part of the taxes he was previously bound to pay, and has imposed upon the mortgagee a tax upon property previously not taxable. The mortgagor never owed the mortgagee any money for taxes. Under the former system he owed the state the taxes assessed upon the whole valuation of the property; under the present system he owes the state primarily the tax upon the value of the property, less the mortgage debt, and the mortgagee owes the tax levied on the mortgage interest. The mortgagor, having paid an amount due from the mortgagee to the third party,—the state,—is entitled to recover the amount so paid. *McCoppin v. McCartney*, 60 Cal. 371."

We are hence brought back to the inquiry of the rights and relations of the parties. The master found that the respondent society was the agent or steward of Sanford, and as such was charged with the duty of giving a statement to the assessor, with the interests of itself and Sanford separately described. There is some reason for so concluding, but I do not think it is necessary. The society undoubtedly claims to have been the owner of the property, and it might not be wholly unreasonable to charge it, as a con-

sequence of the claim, with the payment of taxes, without the right of reimbursement at all. But, at any rate, its interest was to the extent of the money loaned and advanced; Sanford's interest was the balance of value. Confounding them in one assessment did not alter them or enlarge them. The society had a right of reimbursement only, not of relief from obligation. Its right of reimbursement came from what it paid for Sanford; this, and nothing more; and it paid only what Sanford was liable for, to wit, the taxes on the value of the land, less the value of the security. These were the relative rights of the parties, and the master has adjudicated them with care and accuracy, disregarding form and doing substantial justice.

As to interest, the master, in his report, states as follows:

"The most important questions involved in this accounting are those relating to the charges for interest. This arises from the lapse of time since the transactions involved in the accounting occurred, the original loan of \$150,000 having been made on the 26th day of July, 1875, and the major portion of the subsequent advances having been made in the years 1878, 1879, and 1880. This action was commenced on May 1, 1882. By whose fault, if fault there has been, it was not long since determined, does not appear. The questions involved in the accounting were finally submitted to the consideration of the master upon written arguments on the 31st day of May last. The Savings & Loan Society, in stating its accounts, has, during the entire time from the date of the original loan, on the 26th day of July in each successive year charged interest on the original loan of \$150,000 at the rate of 12 per cent. per annum, and upon all subsequent advances and disbursements at the legal rate from the date of each of such payments; and has, on the 26th day of July in each of such years, charged interest at the legal rate on the total amount of the accumulated interest remaining unpaid of previous years upon the original loan and the subsequent advances and disbursements. The interlocutory decree herein is wholly silent as regards interest; nor does it direct the master, in stating the account, to make any rests whatever."

The master held that the defendant bank was entitled to interest from the date of the loan, to wit, the 26th day of July, 1875, to the 1st day of April, 1878, at 12 per cent. per annum, and from the latter date to final judgment at the rate of 10 per cent. per annum. Plaintiff excepts to this finding, and urges that the defendant should, in no event, be allowed interest on the sum of \$150,000 loaned by it to the original complainant at the rate of 12 per cent. per annum for any period of time except from the date of the loan (26th of July, 1875) down to the 1st day of April, 1878; nor should it be allowed interest on said sum at any greater rate than that of 10 per cent. per annum from the said 1st day of April, 1878, nor for any longer time than down to the 1st day of April, 1879; nor should it be allowed interest on said sum at any greater rate than 7 per cent. per annum from the 1st of April, 1879, nor for any longer period than down to the 1st day of October, 1881. The original bill contains the following allegations:

"That at the time said Savings & Loan Society advanced said sum of \$150,000 to said James T. Sanford, as aforesaid, no written evidence of such indebtedness was given by said James T. Sanford to said Savings & Loan Society by way of promissory notes or otherwise, owing to the fact that at that time said James T. Sanford was absent from the state of California, and in the city of New York, and the expiration of the time for redemption of said property from said execution sale was then imminent, and did not admit

of delay; but said money was advanced, as hereinbefore stated, upon the understanding that the same was to bear interest at the rate of 1 per cent. per month; but in the month of March, 1878, said Savings & Loan Society agreed to reduce the rate of interest from 12 per cent. per annum to 10 per cent. per annum."

The interlocutory decree finds affirmatively "that each, every, and all the allegations in the original bill of complaint * * * are true." This is very general, and the tenability or nontenability of complainants' contention must be determined by the agreement or understanding of the parties as established by the evidence. It is very clear what the original agreement was,—very clear that there was an agreement to reduce the interest to the rate of 10 per cent. per annum after the 1st of April, 1878. The plaintiff, however, contends that the debt became matured at this time, or, at the furthest, one year thereafter; and hence, that from either of these times the interest should be 7 per cent. This view is attempted to be supported by the following cases: *Brewster v. Wakefield*, 22 How. 127, *Burnhisel v. Firman*, 22 Wall. 176, and *Holden v. Trust Co.*, 100 U. S. 72. But it is fairly disputable if the law of California, as expressed in its statutes, and declared by its courts interpreting them, is not the other way. This, however, is not necessary to be decided. I think, as the master did and found, that the agreement of the parties was, at first, that the original loan should bear interest at 12 per cent. until the debt was paid; that the only alteration of this agreement was that the interest should bear, after April, 1878, 10 per cent. until the principal loan, advances, and disbursements should be paid. If the testimony needs confirmation, it finds it in the universal understanding and practice of the state.

This brings us to the proposition, should interest extend "for any longer period than down to the 1st of October, 1881?" That it should not, plaintiffs' counsel contends, because Sanford, in September of that year, requested an accounting of the bank, and the latter refused the request, and denied his rights,—asserted an absolute ownership of the property. The bill alleges as follows:

"That the annual income derived from the farming of the same [that is, the rancho] on shares, as the same has wont to be farmed, has at times exceeded \$40,000, and at other times has not been equal to that amount. That from the fall of 1876 up to about November, 1878, said James T. Sanford was in the actual possession of said Rancho Los Meganos, and on or about the last-named date, at the request of said Savings & Loan Society, he surrendered possession thereof to said Savings & Loan Society, and from thence hitherto said Savings & Loan Society, by itself and tenants thereon, has been, and still is, in possession of the same, and in receipt of the income arising therefrom. That up to on or about the month of September, 1881, said Savings & Loan Society recognized and admitted that it held possession of said lands, and all title thereto held by it in its name or in the name of any one else for its benefit, merely as security to secure repayment of the indebtedness of said defendant James T. Sanford to said Savings & Loan Society. But on or about the month last mentioned said defendant for the first time repudiated and ignored the rights of complainants therein, and refused to render any account to said Sanford of his indebtedness to said Savings & Loan Society, of the rents, issues, and profits of said property, of the disbursements attending the same, or of any matters pertaining thereto; then claiming to be the absolute owner of said property, and disavowing any right, title, or in-

terest therein in the complainants herein, or either of them. That at the time said Savings & Loan Society advanced said sum of \$150,000 to said James T. Sanford, as aforesaid, no written evidence of such indebtedness was given by said James T. Sanford to said Savings & Loan Society by way of promissory notes or otherwise, owing to the fact that at that time said James T. Sanford was absent from the state of California, and in the city of New York, and the expiration of the time for redemption of said property from said execution sale was then imminent, and did not admit of delay, but said money was advanced, as hereinbefore stated, upon the understanding that the same was to bear interest at the rate of 1 per cent. per month; but in the month of March, 1878, said Savings & Loan Society agreed to reduce the rate of interest from 12 per cent. per annum to 10 per cent. per annum. That said Savings & Loan Society has from time to time in divers ways made advances for account of and to said James T. Sanford, made disbursements and assumed liabilities on like account, but when and what the amounts thereof were these complainants are unable to state. That they have applied to said defendant for said statement of account, but defendant wholly refuses to render the same, or to in any way recognize their rights in the premises. That these complainants are ready and willing to pay, and they hereby offer to pay, to said Savings & Loan Society, such sum as may, upon a just and proper accounting, be ascertained to be due by said James T. Sanford to said Savings & Loan Society."

These allegations were answered by denials and admissions, some of which only we are now concerned with. The denial of the demand for accounting was as follows:

"And this defendant Savings & Loan Society further severally answering, saith it denies, and these defendants Albert N. Drown, E. W. Burr, and George Mearns severally believe such denial to be true, that said Savings & Loan Society has refused to render any account to said James T. Sanford of the rents, issues, and profits of said property, or of the disbursements attending the same, or of any matter pertaining thereto; and they severally admit that it then claimed and now claims to be the absolute owner of said property, and then disavowed and now disavows any right, title, or interest therein in the said complainants, or either of them; and that at the time said Savings & Loan Society advanced said sum of \$150,090.34, as is hereinbefore stated, no written evidences of indebtedness therefor were given by said James T. Sanford to said Savings & Loan Society, by way of promissory notes or otherwise."

From the act of refusal to account, as alleged, and the offers of the bill, complainants contend that Sanford was excused from a tender or offer of performance under the Code of California, and that they are entitled to the benefits which would result from an offer and refusal; and one of the benefits, it is claimed, was that the interest stopped running on the obligations. To support this contention the following sections of the Civil Code of the state are cited: Section 1504, also sections 1511, 1512, and 1515. It is objected by defendant that (1) these provisions are not applicable to a suit in equity when the party claiming them is plaintiff; that they are only available in defenses; and (2) only apply to bilateral contracts, of which, it is claimed, the transaction between Sanford and the bank is one. But the first contention seems to be answered by the case of *Chielovich v. Krauss* (Cal.) 11 Pac. 781, in which the court said:

"The mode of offering prescribed in the chapter of the Civil Code headed 'Offer of Performance' (section 1485 et seq.) applies as well to offers of performance which operate a redemption (Civ. Code, § 2905) as to other offers to perform. Such offers must be made with 'intent to extinguish the obligation,' since the lien can be extinguished only by extinguishing the obligation. Sec-

tion 1500 provides that an obligation to pay money is extinguished by a due offer of payment 'if the amount is immediately deposited in bank,' etc. It follows that an offer to pay by one who seeks to redeem from a mortgage must be made in the same way. When Kortright v. Cady, 21 N. Y. 343, was decided, there was no New York statute which prescribed the mode in which an offer to perform must be made."

The case is not elaborately reasoned, but it may have been thought by the court that the meaning of the statute was obvious enough not to need much explanation. However, in the case at bar, there is no question of an offer of performance, or of tender of performance. Neither was done, and this is attempted to be excused by the acts of the respondent bank. The stress of the controversy is on the meaning and application, under the facts of the case, of section 1511. Sections 1512 and 1515 do not apply. They depend on other facts than disclosed in the present case. Section 1511 is as follows:

"Sec. 1511. The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:

"(1) When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse:

"(2) When it is prevented or delayed by an irresistible superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary; or,

"(3) When the debtor is induced not to make it, by any act of the creditor intended or naturally tending to have that effect, done at or before the time at which such performance or offer may be made and not rescinded before that time."

The two first subdivisions cannot be claimed to obtain in this case. In the third there are two elements: (1) The act of the creditor, (2) its effect on the debtor. The latter must have been induced by the other; the other must have been intended or naturally tended to have that effect. That the act of the bank was intended to prevent an offer of performance cannot be claimed; and if we may assume, as a matter of law, it naturally tended to that effect (which is certainly very doubtful, as we shall see hereafter), the inquiry remains, was it the inducement of Sanford's want of action? This is, certainly, almost wholly a question of fact, and, I think, should be clearly made out. The testimony is not very certain. Sanford was asked:

"Q. 194. Will you state when you first heard or learned that the bank set up any adverse claim or denied your right to the property? A. About the 7th of September. Q. 195. Of what year? A. About the 7th of September, 1881. About that time is the first positive denial by the bank. On the 7th of September I demanded an accounting of Mr. Brickell, the president. He referred me to the board. Q. 196. Previously, you say, when the arrangement was made? By the way, you have not fixed that. Was that in March, 1878, that that arrangement took place? A. Yes, sir; March, 1878."

And this is the whole of his testimony on direct examination. It was not a positive refusal even of an account. He was referred to the board, but does not appear to have done anything further. On cross-examination he further testified as follows:

"Q. 788. You say that you first learned that the bank set up any claim to the property adverse to yourself on or about the 7th of September, 1881?

A. Previous to writing the letter to Mr. Brickell. I was in the bank after you had left [Mr. Drown was examining him, and the answer was addressed to Mr. Drown], and I was not satisfied with the manner in which he received me; and that is the first treachery that I suspected, really. Q. 789. You say you had not met Brickell before in the matter? A. Before when? Q. 790. Before he became connected with the bank as president. A. But that letter was written to him as president. Q. 791. How, then, do you call it treachery on his part, he not being familiar with it, not having taken part in the transaction with you? A. What date did you say? Q. 792. September 7, 1881. A. He was president of the bank then. I had had conversations with him previous to September, 1881. Q. 793. What difference was there in September, 1881, from what had been previous to that? A. Then I put the question to him. I made the demand for an accounting. I first applied to you to give me the account, and you said you would. You then told me the bank refused to do it. Then I went down and demanded an accounting of him, and he refused; referred me to the board. He then denied that I had any interest in the ranch. He said he did not understand that I had any interest there at all. Q. 794. Had he ever said that he did understand that you had any interest there? A. In conversations that I had had with him before I supposed he understood precisely how the matter rested between us. He denied it then."

This testimony does not justify the rigorous conclusion which complainants draw from it. There is not a syllable in it which justifies the inference that Sanford was induced to make no formal offer of performance by the reply received by him. There is nothing in the testimony to show that at that or any subsequent time prior to the commencement of the suit he had the ability to perform, and, interpreting the pleadings, there is nothing in them to indicate that in Sanford's opinion any precedent act of his had excused him from the fullest performance of the contract as he admitted it to be, or excused the payment of any part of the interest. Pleading an offer of performance or an excuse for it would seem to have been (if not necessary in law) very natural, and its omission is significant of how Sanford regarded his relations with the bank. That an offer in the bill to perform has not the effect to stop interest, was decided in *Randall v. Duff*, 101 Cal. 82, 88, 35 Pac. 440. The master based his opinion of the liability of the complainants for interest on the equitable rule that seeking equity they must do equity,—a maxim not always easy to apply. It would seem, in the abstract, that if one had rights under the law it would not be offensive to equity to assert them. But a distinction has become very firmly fixed by the cases, and based on considerations of equity, that there are rights available to a defendant which may not be to a plaintiff. This is illustrated by the law of tender, by the defense of usury, and by that of the statute of limitations. In *Kortright v. Cady*, 21 N. Y. 343, it was held that the tender of the money due upon a mortgage at any time before foreclosure discharges the lien, though made after the law day, and not kept good. The action was to foreclose a mortgage, and the tender as a defense by Cady, who was a subsequent grantee of the equity of redemption. But in *Tuthill v. Morris*, 81 N. Y. 94, it was held that, to entitle a mortgagor to maintain an action to extinguish the lien of his mortgage because of a tender of the amount due and a refusal to accept it, the tender must be kept good, basing this upon the rule that he who comes into

equity for affirmative relief must himself do equity. *Kortright v. Cady* was not referred to. In *Nelson v. Loder*, 132 N. Y. 288, 30 N. E. 369, the distinction between these cases was observed, and the court, by Mr. Chief Justice Follett, affirmed *Kortright v. Cady*, but said:

"If a debtor wishes to extinguish his liability for subsequently accruing interest, or demands some affirmative relief, he cannot retain the money, subject to his own use, but must devote it to the specific purpose of paying the debt, and put it within the power of the creditor to receive it at any time. He must keep his tender good. *Tuthill v. Morris*, 81 N. Y. 94, 100; *Harris v. Jex*, 55 N. Y. 421, 425; *Gyles v. Hall*, 2 P. Wms. 378; *Bishop v. Church*, 2 Ves. Sr. 371; *Garforth v. Bradley*, Id. 675; *Stow v. Russell*, 36 Ill. 18; *Jones, Mortg.* § 892; *Thomas, Mortg.* § 399; *Coote, Mortg.* (4th Ed.) 885. A subsequent lienor's right to redeem a prior security is derived from the owner of the mortgaged premises, and he is in this respect in no better position than the owner; and his tender, if he wishes to stop interest, or compel an assignment of the prior lien, must be as absolute and specific as that which the owner is required to make as a ground for affirmative relief or to stop the running of interest."

See, also, *Werner v. Tuch*, 127 N. Y. 217, 27 N. E. 845.

Illustrations of the different effects of the plea of usury and of the statute of limitations as it may be urged by a plaintiff or a defendant might be given, but it is unnecessary, because the effect of the equitable maxim in this case is not necessary to decide. Nor is it necessary to consider how far the case of *Mattingly v. Pennie*, 105 Cal. 520, 39 Pac. 200, applies or controls. It may not be easy to define meaningly what is and what is not a bilateral or unilateral contract from the definitions of the books. In ultimate analysis all contracts have bilateral obligations, and the distinction between those which are expressed and those which are implied is a vague test. And, query, if a loan of money is a unilateral contract, as the definitions seem to make it, is a pledge of property such a one? But, as I have already said, I am free from the embarrassment of answering the query, my decision being placed upon another point.

There were two exceptions which I disposed of at the oral argument, but which I may now repeat: That to the salary of an assistant superintendent of the rancho, and that to the failure of respondent to charge itself with \$4,000 received for the River property. The first is disallowed. I think the charge for the assistant superintendent is a proper charge. The second is allowed. While the River property was no part of the rancho, it was of the security, and the amount realized by its sale is a proper credit. Let a decree be entered accordingly.

NEW YORK LIFE INS. CO. v. BEARD et al.

(Circuit Court, D. Kansas. May 3, 1897.)

CORPORATIONS—DOUBLE LIABILITY OF STOCKHOLDERS—UNPAID SUBSCRIPTIONS—ENFORCEMENT.

Gen. St. Kan. c. 23, § 32, makes corporate stockholders liable for an additional amount equal to their stock, and provides that a judgment creditor of the corporation, on return of execution unsatisfied, may, on motion in the same action, procure an execution against any stockholder for an amount equal to his stock, or may "proceed by action to charge the stockholders with the amount of his judgment." *Held*, that the latter provision contemplates a proceeding either at law or in equity, as the facts may require, and that, while the liability is a severable one against each stockholder, yet to avoid a multiplicity of suits a bill in equity may be maintained by judgment creditors against a number of the stockholders to enforce this double liability, and at the same time their liability for any unpaid stock.

This is a bill in the nature of a creditors' bill, on behalf of the complainant and such other creditors of the defendant corporation as may desire to join the complainant in this suit.

The complainant avers that on the 4th day of February, 1895, it recovered a judgment in this court against the Wyandotte Loan & Trust Company, a corporation organized under the laws of this state, for the sum of \$12,249.44 and costs; that said judgment has never been reversed or modified, and that the same still remains unpaid and unsatisfied; that said defendant corporation is wholly and hopelessly insolvent. Complainant further avers that on the 4th day of April, 1895, it caused to be issued out of this court, in due form of law, an execution upon said judgment against said defendant corporation, and that on the 12th day of April, 1895, said execution was duly returned by the proper officer of said court wholly unsatisfied. Complainant then proceeds to charge that each of said defendants was and is a stockholder in said corporation, and that each was liable for a certain amount upon unpaid subscription to its capital stock, and that each of said defendants was also liable and chargeable under the statutes of Kansas for an amount equal to the amount of stock subscribed by him, and praying that an accounting may be had against said defendants; that said defendants may be ordered, adjudged, and decreed to pay to complainant the amounts still due and unpaid on said stock subscriptions, as also the amount of their liability as stockholders, as fixed and determined by the par value of the stock owned by them as hereinbefore set forth; and that judgment be rendered accordingly.

Several of the defendants have filed demurrers as follows: "(1) That it appears by the complainant's own showing that it is not entitled to the relief prayed for by the bill against this defendant, and is not entitled to any relief in equity. (2) That it appears by said bill that the cause of action set out in said bill is not a cause of action existing at common law, but is conferred wholly by the statutes of the state of Kansas, and is cognizable in a court of law only, and not in a court of equity. (3) That the said pretended cause of action set forth in said bill of complaint is not a cause of action which can be maintained jointly and unitedly against all of the defendants thereto, but, if maintainable at all, is a separate cause of action as against each and every one of said defendants. (4) That the said bill of complaint is multifarious in this: that it seeks to collect of said defendants unpaid subscriptions to the capital stock of the said the Wyandotte Loan & Trust Company, and also to recover from said defendants an amount equal to the stock held by each of them in said corporation for their statutory liability under section 32 of chapter 23 of the General Statutes of 1889 of Kansas. (5) That the said bill of complaint is multifarious in that it combines in one section an equitable claim for unpaid subscriptions and a legal claim for the statutory liability of stockholders." It is contended by the defendants in support of their demurrers that the liability of stockholders in a corporation for an additional amount equal

to their stock is a special liability imposed by the statute of Kansas (section 32, c. 23, Gen. St.), and that there is a special remedy prescribed by the statute for enforcing this liability, and that complainant must pursue the remedy therein given. By reference to said section of the statute, it will be seen that provision is made for a judgment creditor of an insolvent corporation upon the return of an execution unsatisfied against the corporation to obtain upon motion and order of the court an execution against any stockholder for an amount equal to the stock owned by him, together with any amount unpaid thereon.

Austin & Austin, for complainant.

D. S. Alford and Samuel Maher, for demurring defendants.

FOSTER, District Judge (after stating the facts as above). It is a well-settled principle of law that when a statute gives a new right, and prescribes the remedy for its enforcement, that the remedy is exclusive, and must be strictly followed. *Morley v. Thayer*, 3 Fed. 737-741, and cases cited; *Pollard v. Bailey*, 20 Wall. 527. Section 32 of chapter 23 of the General Statutes, based on section 2 of article 12 of the constitution, gives a new right to creditors of corporations, and also gives the creditor his choice of procedure to enforce it. He has a special remedy by motion in the same court where the judgment is obtained, or the right to resort to his general remedy in any court having jurisdiction. The statute says: "Or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment." It is fair to presume that the right here given to charge the stockholders by action contemplates a proceeding at law or in equity, as the facts of the case might justify. "The capital stock of an incorporated company is a fund set apart for the payment of its debts. * * * The creditors have a lien upon it in equity." *Morgan Co. v. Allen*, 103 U. S. 508; *Hatch v. Dana*, 101 U. S. 205; *Sawyer v. Hoag*, 17 Wall. 610; *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56; *Webster v. Upton*, Id. 65. The proper mode to reach this fund is by bill in equity. See cases cited; also, *Hawkins v. Glenn*, 131 U. S. 319-334, 9 Sup. Ct. 739; *Patterson v. Lynde*, 106 U. S. 520, 1 Sup. Ct. 432; *Pollard v. Bailey*, 20 Wall. 520; *Leucke v. Tredway*, 45 Mo. App. 507; *Ogilvie v. Insurance Co.*, 22 How. 380; *Holmes v. Sherwood*, 3 McCrary, 405, 16 Fed. 725. There is a severable liability imposed on each stockholder, and doubtless the creditor could proceed at law against any single stockholder; but it does not follow that this remedy is necessarily exclusive, and I do not understand that the supreme court of Kansas has so held in *Abbey v. Dry-Goods Co.*, 44 Kan. 415, 24 Pac. 426, or in *Howell v. Bank*, 52 Kan. 133, 34 Pac. 395. If a party has a plain and adequate remedy at law, equity will not interfere. Among the reasons, however, which justify a resort to equity, is that it prevents a multiplicity of suits at law. *Insurance Co. v. Bailey*, 13 Wall. 621; *Preteca v. Land-Grant Co.*, 1 C. C. A. 607, 50 Fed. 674; 1 Pom. Eq. Jur. § 245; *Louisville, N. A. & C. Ry. Co. v. Ohio Val. Imp. & Cont. Co.*, 57 Fed. 42; *Pennefeather v. Steam-Packet Co.*, 58 Fed. 481; *Apgar v. Christophers*, 10 Fed. 857; *Chase v. Cannon*, 47 Fed. 674; *Valentine v. Richardt*, 126 N. Y. 272, 27 N. E. 255; *Lynch v. Railway Co.*, 129 N. Y. 274, 29 N. E. 315; *Railway Co. v. Dyer*, 1 Sawy. 641, Fed. Cas. No. 2,552; *Brooks v. Stolley*, 3 McLean, 523, Fed. Cas. No. 1,962; *Plummer v.*

Insurance Co., Holmes, 270, Fed. Cas. No. 11,232. I can see no good purpose to be served where a stockholder is indebted for subscriptions to stock in a bankrupt corporation, as well as for his double liability under the statute, to put the creditor to a double proceeding to reach the funds and assets to which he is entitled in payment of his judgment. It is a rule in equity that the court being properly in possession of a cause for the purpose of equitable relief will, to prevent a multiplicity of suits, proceed to determine the whole matter. *Gormley v. Clark*, 134 U. S. 338-349, 10 Sup. Ct. 554; *Ferson v. Sanger, Davies*, 252-263, Fed. Cas. No. 4,751; *Harding v. Fuller*, 141 Ill. 308, 30 N. E. 1053; *McGean v. Railway Co.*, 133 N. Y. 16, 30 N. E. 647. The demurrers must be overruled.

STILLWELL-BIERCE & SMITH-VAILE CO. v. WILLIAMSTON OIL & FERTILIZER CO.

(Circuit Court, D. South Carolina. April 19, 1897.)

1. CHATTEL MORTGAGES—FORECLOSURE—EQUITY JURISDICTION.

Equity has jurisdiction to foreclose a chattel mortgage when the actual sum due is in dispute, the remedies at law being then inadequate.

2. FEDERAL COURTS—JURISDICTIONAL AMOUNT.

When the amount claimed exceeds the jurisdictional amount, but defendant sets up a payment reducing the sum below that amount, the court has jurisdiction if, in order to ascertain the amount actually in controversy, it must consider conflicting testimony, or decide disputed questions of law.

3. SAME—VALUE OF PROPERTY MORTGAGED.

In a suit to foreclose a chattel mortgage, the amount in controversy, as affecting the jurisdiction, is not determinable by the value of the property mortgaged.

4. FORECLOSURE OF CHATTEL MORTGAGE—APPOINTMENT OF RECEIVER.

In a suit to foreclose a chattel mortgage, a receiver will not be appointed where it appears *prima facie* that the mortgagor company is solvent.

Julius H. Heyward, for complainant.
Tribble & Prince, for defendant.

SIMONTON, Circuit Judge. The bill is for the foreclosure of a mortgage of personal property. The property mortgaged consists of machinery in an oil mill. The bill alleges that the defendant gave its promissory note in writing in the sum of \$3,000, bearing interest at the rate of 6 per cent. per annum, with provision that in case of default at maturity attorney's fees were to be paid; and that the note was not paid at maturity. To secure this, a mortgage of the personalty was given, estimated to be worth some seven or eight thousand dollars. The bill, in addition to the prayer for foreclosure, prays also for the appointment of a receiver. Upon filing the bill, a rule was issued against the defendant to show cause why a receiver be not appointed as prayed for. The defendant has filed a return to the rule. In this return the jurisdiction of the court is challenged upon two grounds: First, because the complainant has a plain, adequate, and complete remedy at law; and, second, because, before suit brought, defendant had paid upon this note the sum of \$1,500, thus reducing

the claim below the jurisdictional amount. The return also sets up a failure of consideration of the note, out of which, as a set-off, defendant has a claim for some \$1,900 and upward. This last suggestion demonstrates that the remedy at law is not plain, adequate, or complete. Nominally, the mortgagee of a chattel on condition broken can enter and take possession of the chattels mortgaged, sell the same, and account for the surplus; or, in case of refusal on the part of the mortgagor to surrender the chattel, the mortgagee has his action for claim and delivery. But the ease and simplicity and adequacy of these remedies is destroyed when the actual sum due on the mortgage is the subject of contention, investigation, and trial.

The difficult question is as to the jurisdictional amount. The payment of the \$1,500 is admitted by the complainant. Its legal effect is denied. The defendant insists that it paid the money, and appropriated the payment to the note. The complainant contends that the sum was remitted because of the note, which, however, with the knowledge of defendant, was not in its possession, but had been discounted with a bank; and that, crediting the defendant with the sum on general account, there still remains a balance due in excess of \$2,000, besides interest and costs. I take it that the rule is this: Whenever, by an inspection of the complaint,—perhaps of the whole record,—it appears that the amount claimed is within the jurisdictional limit, or that, being apparently beyond it, the statement is collusive, or a fraud on the jurisdiction, the court must dismiss the cause. But when it is necessary, in order to ascertain the amount involved in controversy, to consider conflicting testimony, or to decide disputed questions of law, this necessity alone gives the court jurisdiction. The court, under such circumstances, must hear the case, and reach its conclusion judicially; in other words, must take jurisdiction. Nor is it enough that there appears to be a valid defense to a part of the claim (*Schunk v. Moline, Milburn & Stoddart Co.*, 147 U. S. 505, 13 Sup. Ct. 416), nor that the judge should be under a personal conviction, however strong, that the amount really in controversy is within the limit prescribed for the court. The facts made distinctly to appear in the record must create a legal certainty of the conclusion based on them. *Barry v. Edmunds*, 116 U. S. 559, 6 Sup. Ct. 501. The bill states that complainant holds the note of the defendant in the sum of \$3,000, with interest at the rate of 6 per cent. per annum from December 1, 1895. It then states that on that note there is now due and owing \$2,040, exclusive of interest and attorney's fees. The defendant, in its return, claims to have remitted to the plaintiff \$1,500, and that this sum had been appropriated towards this note. In reply, complainant denies that this appropriation could be made, and alleges that the sum was received and carried to the general credit of defendant, resulting in a balance in complainant's favor of \$2,040, as by the account filed. The amount in controversy is this sum of \$2,040. And upon it several questions arise. These questions are part of the controversy. So the case at bar, and the contention of the parties therein, raise a question as to the amount really in controversy. The conclusion cannot be reached until evidence has been taken, and its result ascertained. *Prima facie*, the original demand is \$2,040. It

may be reduced by set-off and payment. It may be shown to have no foundation. In the meantime the court has jurisdiction. It is on this principle that *Barry v. Edmunds*, 116 U. S. 559, 6 Sup. Ct. 501, and *Smith v. Greenhow*, 109 U. S. 669, 3 Sup. Ct. 421, were sustained. In these, for an alleged illegal taking of personal property worth \$100 or \$200, the plaintiff in each case brought his action in tort for \$6,000 damages. The court sustained the jurisdiction. The same course was followed in *Scott v. Donald* by the supreme court, at the present term. 17 Sup. Ct. 265.

Counsel for the complainant have urged that the jurisdiction can be justified because of the value of the property mortgaged. I think, however, that this is not sound, agreeing on this point with Judge Green in *Werner v. Murphy*, 60 Fed. 769.

The bill also asks the appointment of a receiver. From the return and the affidavits it clearly appears *prima facie* that the company is solvent, and that no necessity for a receiver exists on this ground. It is not denied that the defendant is in possession of chattels mortgaged to complainant, and that the condition of the mortgage has been forfeited, thus restoring the legal title in complainant; at the least giving it claim for the relief of an equitable execution by the appointment of a receiver. But this will be a harsh measure, not justified by the present appearance of the case. It is therefore ordered that the defendant enter into bond, with sureties to be approved by a judge of this court, conditioned that the defendant abide by and perform such decree as the court may finally render herein. Let the complainant or its attorneys have notice of the names of the proposed sureties on the bond, and reasonable notice of the time when the bond will be presented for approval. Let the penalty of the bond be \$3,000.

HUNT v. AMERICAN GROCERY CO.

(Circuit Court, D. New Jersey. April 30, 1897.)

1. PRIVATE CORPORATIONS—APPOINTMENT OF RECEIVERS.

A receiver will not be appointed for a solvent private corporation at the instance of individual stockholders, on the ground that its officers and directors have changed its business from a large wholesale grocery business to a comparatively small specialty business, and have otherwise mismanaged its affairs, in the absence of evidence showing usurpation, fraud, *ultra vires*, gross negligence, or breach of trust.

2. SAME.

All questions of policy respecting the management of the business of a private corporation must be left to the sound discretion of the directors, and their acts done in good faith, if within the powers of the corporation, and in furtherance of its purposes, cannot be called in question in judicial proceedings by individual stockholders.

H. Aplington, for complainant.

Washington B. Williams and Arthur L. Livermore, for defendants.

KIRKPATRICK, District Judge. This bill is filed by David Hunt, a stockholder in the American Grocery Company, on behalf of himself and such other stockholders as may desire to become parties to

the suit, praying for the appointment of a receiver, and an injunction restraining the officers and directors from continuing in the management of the business. The intervention of the court is not asked upon the ground of the insolvency of the corporation, but it is alleged in the bill that, the defendant corporation having succeeded to the large wholesale grocery business formerly conducted by various partnerships and corporations, "has recently, in violation of law, unlawfully, without the consent of its stockholders, and through its officers and directors, changed the nature of its business from a large wholesale grocery business to a comparatively small specialty business." In support of this allegation the bill sets out a notice sent by the American Grocery Company to the trade, which is in these words:

"New York, April 2, 1897.

"We beg to call the attention of the trade to our special lines of roasted coffees, ground spices, teas, cigars, farinaceous goods, French goods, and canned goods. Handling only these lines, enables us to better meet the wants of dealers. Price list mailed on application."

The bill also alleges upon information and belief that the business is being grossly mismanaged by its officers and directors; that the company has sold a certain number of its trade-marks, and has discontinued the use of a large number of others; that it has reduced the number of its employés; that it has discontinued the sale of a large number of staple articles, in which there was a large profit, and has sold large quantities of staple goods at less than cost; that it has not taken an account of stock since August, 1896, and that for his personal account the president has purchased certain of the stock of the defendant corporation at less than its par value, and is anxious to buy more if it can be had at a low figure.

The affidavits read in support of the bill enter into no details. The affiants set out that they are acquainted with the character of the business heretofore conducted by Thurber, Whyland & Company and that now being carried on by the American Grocery Company, and that they are not of the same general character, and that the business now carried on by the American Grocery Company is not, in their opinion, a wholesale grocery business. The only knowledge developed on the part of deponents to any of the specific matters set out in the bill is that contained in the affidavits of Corsa, who swears that Marsalis, the president of the defendant company, has sold and offered to sell staple merchandise at prices less than the market price of same; not stating quantity; and Alexander Wiley, who knows that Marsalis has sold and is now offering for sale "large blocks" of staple merchandise at prices much below the market value of the same. There is no proof of the sale or discontinuance of the use of any trade-marks; the staple articles, the sale of which the bill charges has been discontinued, are not enumerated; and there is nothing in the affidavits from which the court can come to the conclusion that any large loss of profit has resulted to the company by the decrease of business which is said to have taken place. If staple goods have been sold, or offered for sale, at less than market prices, the bill charges that it has been done with the sanction and approval and under the direction of the board of directors, who were elected to administer

the affairs of the company. In the absence of proof to the contrary, the court will assume that the directors have acted in good faith, and for the best interests of the company, and that assumption will not be overcome by the mere assertion of opinions to the contrary by those whose judgment may be founded on ignorance or warped by prejudice.

It does not appear from any verified statement that the defendants are performing any act which is not within the scope of the authority conferred by the articles of their incorporation, nor that the president and board of directors, in limiting the number of articles in which they will deal, have not been actuated by honest motives. To cut off from sale articles in which there is found to be no profit is clearly within the discretionary powers of the board of directors, and, unless the complainant has clearly demonstrated that the directors in so doing were controlled by a fraudulent or dishonest purpose, he has no case. *Elkins v. Railroad Co.*, 36 N. J. Eq. 241. All questions of policy respecting the management of the business of a private corporation must be left to the sound, honest discretion of the directors; and their corporate acts, done in good faith, if the same are within the powers of the corporation, and in the furtherance of its purposes, cannot be called in question in judicial proceedings by individual stockholders. The answering affidavits which have been read deny all the material allegations of the bill, both those which are verified and those which are stated to be upon information and belief. The court should not take the conduct of the business out of the hands of those who have been chosen by a majority in interest of the stockholders for that purpose, except upon clear proof of usurpation, ultra vires, fraud, or gross negligence. *Thomp. Corp.* § 4483. "The appointment of a receiver is a discretionary power, to be exercised only upon good cause shown, upon circumstances disclosed by the proof which show the need of the interference of the court for the protection of creditors or stockholders from breaches of trust by the directors in the performance of their duties." *Construction Co. v. Schack*, 40 N. J. Eq. 222, 1 Atl. 23; *Rawnsley v. Insurance Co.*, 9 N. J. Eq. 95. This case presents no such grounds as above set forth for the interference of the court, and the dissatisfied stockholders must redress their grievances by ordinary methods. The application for a receiver must be denied.

HUGHEY v. SULLIVAN.

(Circuit Court, S. D. Ohio. March 10, 1897.)

No. 4884.

1. STATE STATUTES—NEW TRIAL—RULE OF PROPERTY.

Rev. St. Ohio, § 5306, providing that "a new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, nor in any other action where the damages equal the actual pecuniary injury to the plaintiff," cannot be read as a proviso to section 6134, giving a right of action for the unlawful killing of another, and is therefore not a rule of property binding on the federal courts in an action under the latter section.

2. RULES OF PRACTICE—WHEN BINDING ON FEDERAL COURTS.

Rev. St. § 914, providing that the practice and modes of proceeding in the federal courts shall conform as near as may be to the practice in the courts of record of the state within which such courts are held, does not disturb the settled law of the federal courts with respect to granting or refusing new trials, and a state statute providing that a new trial shall not be granted on account of the smallness of damages is not binding on a federal court.

3. CONSTITUTIONAL LAW—STATUTE IMPAIRING RIGHT OF TRIAL BY JURY.

A state statute providing that a new trial shall not be granted on account of the smallness of the damages is, if applicable to the federal courts, in violation of the seventh amendment to the federal constitution, which provides that "the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

Motion to Vacate Order Granting a New Trial.

Sidney G. Striker, for plaintiff.

Coppock & Gallagher, for defendant.

HAMMOND, J. In this case, which is an action for the wrongful killing of another, a new trial was granted, because, in the opinion of the court, the damages assessed by the jury were inadequate. The defendant now moves to vacate that order, upon the ground that section 5306 of the Revised Statutes of Ohio forbids it. That section reads as follows:

"A new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, nor in any other action where the damages equal the actual pecuniary injury to the plaintiff."

The argument submitted in favor of the motion is that this is a rule of property prescribed by the legislature of Ohio; that, inasmuch as an action for the wrongful killing of another is purely statutory, the plaintiff must be bound by the limitations placed upon it. It is contended that this section of the statute is to be read in connection with section 6134 of the Revised Statutes, giving the right of action in cases of this character, and operates as a proviso thereto, so that it shall read: "Provided, that the plaintiff in such action shall not have a second trial by reason of inadequacy of damages." The trouble with this argument is that the legislature itself has not proceeded upon that theory, nor has it confined the restriction to that class of actions which are purely statutory, and particularly it has not placed it upon that provision of the statute giving damages for the wrongful killing of another. The section 5306, forbidding new trials, first applies to all classes of injuries to the person or reputation, and then a sweeping clause includes every other action where the pecuniary injury has been compensated. It seems to be somewhat a prohibition against giving another opportunity for punitive damages. Neither counsel has cited any adjudication by the courts of Ohio construing this section, and I shall not take time to look up the cases, but it is not impossible that the courts might hold that it does not apply at all to the action for the wrongful killing of another. In its terms, it is descriptive of "an action for an injury to the person or reputation." Of course,

in one sense the killing of another is an injury to the person, but it is not the injury to the person for which the statute of Ohio gives the damages for the killing. The new action is confined to the pecuniary loss sustained by the surviving relatives who are entitled to it. It does not proceed from the person killed, but as a direct grant to the relatives, and possibly this action cannot be at all brought within the prohibitory section concerning new trials; or, if so, it falls within the last clause of that section, and not the first; and then since, in the opinion of the court, the damages given by the jury do not "equal the actual pecuniary injury to the plaintiff," a new trial is not prohibited. Again, the attention of the legislature of Ohio was directly concerned in placing a limitation upon the amount to be recovered for the wrongful killing of another, and the maximum was fixed at \$10,000. If the legislature had intended to fix a minimum limitation, or rather to lower the maximum under certain conditions, that was the place to do it; and we may assume that it had no such intention from the fact that it did not. This section 5306 is a rule of practice, and is found in the practice part of the Code, being intended to regulate the action of the state courts in the matter of granting new trials; and any limitation that it may place upon the amount of damages to be recovered for personal injuries is purely incidental. It is a mere closing of the courts after one trial, somewhat like the operation of the statute of limitations. The section is not in *pari materia* with the other statute giving the right of action, and therefore is not within the rule requiring them to be construed together. One is an act establishing the right of property, and is upon an entirely different subject from the other regulating the practice of the courts. As a practice act, it is not binding on us, not being within the purview of Rev. St. U. S. § 914.

Mr. Justice Gray, speaking for the supreme court and of the federal courts, says:

"In regard to motions for a new trial and bills of exceptions, those courts are independent of any statute or practice prevailing in the courts of the state in which the trial is had." *Missouri Pac. Ry. Co. v. Chicago & A. R. Co.*, 132 U. S. 191, 10 Sup. Ct. 65.

Previously, the same learned justice, speaking for the circuit court of the United States, and quoting section 914 of the Revised Statutes of the United States, had said, in *U. S. v. Train*, 12 Fed. 852, that:

"The object of the former section was to assimilate the form and manner in which the parties should present their claims and defenses in the preparation for and trial of suits in the federal courts to those prevailing in the courts of the state. It does not include state statutes requiring instructions to the jury to be reduced to writing, or permitting such instructions and certain papers read in evidence to be taken by the jury when they retire, or requiring the jury to be directed, if they return a general verdict, to find specially upon particular questions of fact involved in the issues. *Nudd v. Burrows*, 91 U. S. 426; *Sawin v. Kenny*, 93 U. S. 289; *Railroad Co. v. Horst*, Id. 291; *West v. Smith*, 101 U. S. 263. It does not apply to motions for a new trial, nor, whatever may be the rule prescribed by the statutes of the state upon that subject, does not control or affect the power of the federal courts under the judiciary act of September 24, 1789 (chapter 20, § 17), and under section

726 of the Revised Statutes, to grant or refuse a new trial at their discretion. *Railroad Co. v. Horst*, above cited; *Newcomb v. Wood*, 97 U. S. 581." U. S. v. *Train*, 12 Fed. 852.

It was also ruled, but upon another point of practice, by Mr. District Judge Brown (now Mr. Justice Brown, of the supreme court of the United States), that this conformity practice act does not "disturb the settled law of the federal courts with respect to granting or refusing new trials." *Osborne v. Detroit*, 28 Fed. 385.

It was also said by Mr. Circuit Judge Brewer (now Mr. Justice Brewer, of the supreme court of the United States) that:

"The effect of the statutes of congress, as interpreted by the decisions of the supreme court, is that this matter of new trials in civil cases, depending upon the discretion of the trial court, is something which is settled by the law of congress, and cannot be affected by any state law." U. S. v. *Molloy*, 81 Fed. 19, 23.

This was said in overruling a motion for a new trial, which the statutes of Missouri directly required should be granted under similar circumstances in the state court.

In the case of *Railway Co. v. Putnam*, 118 U. S. 545, 553, 7 Sup. Ct. 1, 2, Mr. Justice Gray, again speaking for the supreme court of the United States, denied the right of the legislature of the state to regulate the conduct of the trial judge in instructing the jury, saying: "The powers of the courts of the United States in this respect are not controlled by the statutes of the state."

So it is everywhere. The courts enforce that construction of this act of congress which does not permit it to operate as a limitation upon the independence of the federal courts, by what might sometimes be designedly obstructive, if not capricious, legislation by the states, that would seriously impair the efficient administration of the jurisdiction confided to them, and follow the indications established by the supreme court for its application only to the forms of pleading and practice, and not to the conduct of the federal tribunal in the exercise of its powers and duties under those forms of state practice and pleading to which they conform. And so it was held in *Nudd v. Burrows*, 91 U. S. 426, 442, in respect of a prohibition by the state legislature of oral charges, and forbidding comments upon the proof, that the administration of the judge in the discharge of his separate functions is neither practice, pleading, nor a form or mode of proceeding, within the purview of this act of congress; and in *Railway Co. v. Horst*, 93 U. S. 291, 301, that the determination of motions for a new trial is not within the conformity act, and cannot be affected by any state law upon the subject.

There is another view of this subject to which it may be well to call attention. It may be doubtful if this Ohio statute, prohibiting the granting of new trials for inadequacy of damages, could be held constitutional if it were binding upon the federal courts. Our federal constitution, by the seventh amendment, provides that:

"The right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

This does not mean only and barely that there shall be a verdict of 12 men under any conditions that may be prescribed, but that there shall be a trial by jury as understood at common law. The control of the court over the verdict after it is given is as much a part of the trial by jury as the giving of the verdict itself, and the right to have the issues tried by a second jury, or even a third jury, when the verdict of the first jury is affected by some infirmity for which the common law required the trial court to set that verdict aside, is as much a right of "trial by jury" preserved by the constitution as the first trial.

It was said in *Newcomb v. Wood*, 97 U. S. 581, 583, that:

"It has long been the established law in the courts of the United States that to grant or refuse a new trial rests in the sound discretion of the court to which the motion is addressed and that the result cannot be made the subject of review upon a writ of error."

It was also said in *Mattox v. U. S.*, 146 U. S. 140, 147, 13 Sup. Ct. 50, that the allowance or refusal of a new trial rests in the sound discretion of the court, and cannot be made the subject of review by a writ of error. This and other considerations attending the subject show the importance of the part that is taken by the trial judge in the process of a trial by jury. He alone can, on the application for a new trial, correct the errors that are made by the jury; and, if legislation may control his judgment or prohibit him in the exercise of it, the right of trial by jury is to that extent impaired and restricted, and not preserved as it was known at common law. Congress clearly has no plenary power to thus impair, restrict, or destroy the right of trial by jury in any of its parts; and what congress cannot do surely the legislature of the state cannot do in the application of their legislation to the federal courts. This may have been one of the conditions that the late Mr. Justice Matthews had in mind in his very elaborate and able judgment in the case of *Erstein v. Rothschild*, 22 Fed. 61, where, in commenting upon section 914 of the Revised Statutes of the United States, which we have just been considering, known as the "Practice Conformity Act," and also in commenting upon the decisions of the supreme court construing that section, he said:

"It must be held that the body of the local law thus adopted in the general must be construed in the courts of the United States in the light of their own system of jurisprudence, as defined by their own constitution as tribunals, and of other acts of congress on the same subject. It can hardly be supposed that it was the intent of this legislation to place the courts of the United States in each state, in reference to their own practice and procedure, upon the footing merely of subordinate state courts, required to look from time to time to the supreme court of the state for authoritative rules for their guidance in those details. To do so would be in many cases to trench in important particulars, not easy to foresee, upon substantial rights, protected by the peculiar constitution of the federal judiciary, which might seriously affect, in many cases easily supposed, the proper co-relation and independence of the two systems of federal and state tribunals."

It was distinctly ruled in *Railway Co. v. Winter's Adm'r*, 143 U. S. 60, 75, 12 Sup. Ct. 356, and in *Railway Co. v. Charless*, 2 C. C. A. 380, 51 Fed. 562, 580, that the question whether the damages given

by a jury were excessive could not be reviewed on a writ of error; and, of course, the same rule applies to the question of inadequacy. This is because the federal constitution has prohibited the re-examination of facts tried by a jury in any other way than "according to the rules of the common law," and by the trial judge or the other judges who may perform his functions in that behalf. How, then, can the legislature prevent any re-examination at all, or forbid any re-examination as to particular facts found by the verdict, without impairing the right of trial by jury? If a statute should be passed requiring the minority of a jury to conform their judgment to the majority, and return a verdict accordingly, it would be conceded everywhere that this would be an impairment of the right of trial by jury, because it would be imposing by law upon the jury a rule of judgment not known to the common law. So, when the trial judge comes to receive the verdict, and, on proper motion, to inspect it, and determine whether or not it is affected by any infirmity which would authorize the court to set it aside, would it not be just as much impairment of the right of trial by jury if the legislature should say that he should either set it aside, or let it stand, upon some rule that it should prescribe to control his judgment? While the legislature may prescribe any rule of property or any rule of pleading or any rule of practice or any form of procedure, it cannot invade the domain of judgment either of the jury or its presiding judge, and direct what that judgment shall be, in the discharge of the respective or joint functions of either. These must remain under the federal constitution, at least, to the government of the common law. It may be inconvenient, and sometimes, possibly, oppressive, that this restriction exists. Originally, the federal constitution did not contain it as to civil cases, and it was subsequently inserted by the amendments with other similar restrictions upon legislative power; but, wisely or unwisely, it has fixed the common-law trial by jury as that to which we are bound, and only that. If, therefore, this Ohio statute should be held to be a rule of practice or form of procedure, I should say that it was inconsistent with the constitution of the United States, and not, therefore, binding on us. As a rule of property, it cannot be imposed by this unauthorized and impossible interference with a common-law jury trial, but should have been fixed as a limitation on the statute creating the cause of action for a wrongful killing of another, directly, as the maximum limitation was fixed in other cases. The court thinks, however, that it is neither rule of property nor a mode or form of proceeding nor a rule of practice, but a statutory rule of judgment or direction to the courts of the state, by which they are required to govern their action. But in no event is it within the power of the legislature of Ohio to impose that rule of judgment upon the federal courts. The motion is overruled.

EDMUNDS v. ILLINOIS CENT. R. CO.

(Circuit Court, N. D. Iowa, W. D. April 21, 1897.)

1. **ASSIGNABILITY OF CAUSES OF ACTION—STATE AND FEDERAL LAWS.**
The question whether the beneficial interest in a chose in action created by an act of congress is assignable is controlled by the federal law, independent of the state laws. But the question whether the assignee may maintain an action thereon in his own name is a question of procedure, depending on the state laws.
2. **SAME—TEST OF ASSIGNABILITY.**
If a chose in action or claim constitutes a property right, which, upon the death of the party, would pass to his legal representative, then, as a rule, it is assignable, so as to transfer the beneficial interest.
3. **SAME—CLAIMS FOR OVERCHARGES UNDER INTERSTATE COMMERCE LAW.**
Claims for damages to recover overcharges, under sections 8 and 9 of the interstate commerce law, constitute property rights, which may be assigned so as to convey the beneficial interest therein to the assignee.
4. **SAME—RIGHT OF ASSIGNEE TO SUE.**
An action brought in a federal court in Iowa to recover damages for overcharges, under sections 8 and 9 of the interstate commerce law, is maintainable in the name of the assignee thereof, under the provision of the Iowa Code requiring all suits to be brought in the name of the real party in interest.

Action, under provisions of interstate commerce act, to recover damages for alleged overcharges. Submitted on demurrer to petition.

Harl & McCabe, for plaintiff.

B. F. Ayer and J. F. Duncombe, for defendant.

SHIRAS, District Judge. This is an action in which the plaintiff seeks to recover damages against the defendant railroad company for alleged overcharges upon interstate shipments of freight, the right of action being based upon the provisions of the interstate commerce act. The first count in the petition seeks to recover damages accruing to the plaintiff upon shipments made by himself, and the remaining counts are founded upon claims accruing to third parties, and by them assigned to the plaintiff. The defendant company demurs to the second and subsequent counts, upon the ground that claims for overcharges, in violation of the provisions of the interstate commerce act, are not assignable, and that the language of the act is such that the right to sue for damages is confined to the person or corporation suffering the damages in the first instance.

It is not questioned that at the common law a chose in action, of the nature of those counted on in this case, is not assignable, so as to enable the assignee to maintain an action at law thereon in his own name; and therefore, to confer the right of action upon an assignee, it must appear that the right is conferred by some statute or rule of law, applicable to the particular case. Thus, in *Glenn v. Marbury*, 145 U. S. 499-509, 12 Sup. Ct. 914, 918, it is said:

"The right which the express company acquired by the defendant's subscription to its capital stock was only a chose in action. It passed by the deed of September 20, 1866, to the trustees Blair, Kelly, and O'Donnell, but subject to the condition that a chose in action is not assignable, so as to authorize the

assignee to sue at law, in his own name, unless the right so to do is given by a statute, or by settled law, in the jurisdiction where suit is brought. This is the well-established rule of the common law, and the common law touching the subject governs in the District of Columbia."

On behalf of plaintiff it is claimed that it is the settled law of the state of Iowa that choses in action are assignable so as to confer a right of action in the name of the assignee, and such seems to be the effect of the rulings of the supreme court of the state. *Weire v. Davenport*, 11 Iowa, 49; *Vimont v. Railway Co.*, 64 Iowa, 513, 17 N. W. 31, and 21 N. W. 9; *Everett v. Railway Co.*, 73 Iowa, 442, 35 N. W. 609.

On behalf of the defendant company it is claimed that the causes of action set forth in the counts of the petition that are demurred to arise solely under the provisions of the interstate commerce act; that jurisdiction to entertain the same is confined to the courts of the United States; that as the cause of action is created by the act of congress, and certain remedies are therein provided for, no other proceeding can be maintained, save those named in the statute; that these are limited, by the express provisions of section 9 of the act, to the right to make complaint to the commission or to bring suit for damages on behalf of the party injured; that neither the interstate act nor the statutes of the United States provide for or authorize the assignment of claims for damages under the interstate commerce act; and that, as congress has legislated upon the mode of enforcing claims for damages arising under that act, that fact prevents recourse to the provisions of state laws upon that subject.

This court has held in this and other similar cases now pending that the state courts have not concurrent jurisdiction with the courts of the United States over actions for damages, based upon the provisions of sections 8 and 9 of the interstate commerce act. See *Van Patten v. Railway Co.*, 74 Fed. 981. In that case it was held that, as the suits were expressly based upon the cause of action created by section 8 of the act, the only remedies available were those provided in section 9, and these were limited to a right to make complaint to the commission, or to bring suit for damages in a district or circuit court of the United States; and the question now presented for determination is whether a claim for damages arising under the act can be assigned to a third party, so as to authorize him to maintain an action thereon in his own name. This question presents two matters for consideration, the first one being whether a claim for damages based upon the provisions of section 8 of the interstate commerce act is assignable, so as to transfer the beneficial interest therein to the assignee; and, second, if the claim is assignable, can the assignee maintain an action at law thereon in his own name?

If the chose in action is of such a character that it can be assigned, so as to transfer the beneficial interest therein to the assignee, then the question whether suit thereon can be maintained in the name of the assignee, or must be brought in the name of the assignor for the benefit of the assignee, is merely a question of the mode of procedure, determinable by the law of the forum; but the question whether the chose in action can be assigned, so as to confer any right or interest

therein on the assignee, is a matter affecting the merits, and is controlled by the law creating the cause and right of action. If the causes of action assigned to the plaintiff in this suit were not entirely creations of the act of congress, but arose under the principles of the common law, and of which the courts of the state would have concurrent jurisdiction with the federal courts, the question at issue might not be difficult of solution. The cause of action, however, and the right of action with regard to these claims for damages are alike created by and based upon the act of congress, and it would seem, therefore, that the question of the assignability of claims of this character is determinable by the federal law, and not by that of the state of Iowa. Thus, in *Pritchard v. Norton*, 106 U. S. 124-130, 1 Sup. Ct. 102, 106, it is said:

"Whether an assignee of a chose in action shall sue in his own name, or that of his assignor, is a technical question of mere process, and determinable by the law of the forum; but whether the foreign assignment, on which the plaintiff claims, is valid at all, or whether it is valid against the defendant, goes to the merits, and must be decided by the law in which the case has its legal seat. * * * It is to be noted, however, as an important circumstance, that the same claim may sometimes be a mere matter of process, and so determinable by the law of the forum, and sometimes a matter of substance, going to the merits, and therefore determinable by the law of the contract."

The question, therefore, is whether claims for damages based upon section 8 of the interstate commerce act, under the provisions of the laws of the United States, are assignable. It will be remembered that the court is considering now only the point whether the property interests represented by the assigned claims are assignable, so as to convey the beneficial interest therein to the assignee; and this does not involve the question whether suit thereon can be maintained in the name of the assignee. The choses in action sued on in this case do not grow out of purely personal torts, which at the common law would lapse at the death of the party injured, but constitute property rights, which would pass to the legal representative upon the death of the original owner thereof.

In regard to choses in action of the latter character, the general rule is, as I understand it, that the beneficial interest therein may be lawfully assigned to another, subject to the exception that, in case the substance of the claim be such that public policy forbids the assignment thereof, then it is not assignable; and of course, if there be an express statutory prohibition against the assignment of a given class of claims, that would except that class from the operation of the general rule. In *Traer v. Clews*, 115 U. S. 528, 6 Sup. Ct. 155, Henry Clews brought an action at law to recover, as damages, the value of 50 shares of the capital stock of the Cedar Rapids Northwestern Construction Company, and the dividends which had been declared thereon. Clews was the original owner of the stock, having subscribed therefor in 1870. In November, 1874, Clews was adjudged a bankrupt, and his property, including the named shares of stock, was assigned to Tappan, trustee of his estate. Subsequently Traer purchased the stock and the dividends declared thereon from the assignee, under circumstances which rendered the purchase a fraud upon the assignee and the rights represented by him. In December, 1877, Tappan, the

assignee, sold all his claims and demands on account of the stock to Clews, who thereupon brought suit for damages. In response to the objection that the transfer from Tappan to Clews was merely of a right to bring an action, which could not be assigned, the supreme court held that "we are of opinion that, so far as the question under consideration is concerned, the assignment of Tappan to Clews was the transfer, not merely of a naked right to bring a suit, but of a valuable right of property, and was therefore valid and effectual." In *Erwin v. U. S.*, 97 U. S. 392, it was held that a claim for the proceeds of cotton captured by the military forces of the United States, and sold by the government, was in the nature of a property right, and, as such, passed by assignment to an assignee in bankruptcy. In *Lewis v. Bell*, 17 How. 615, it was held that a claim against the Brazilian government, growing out of the seizure of a vessel, was assignable, so as to authorize the assignee to demand and receive payment from the secretary of the treasury of the United States of the money paid by Brazil in settlement of the claims. In *Trust Co. v. Walker*, 107 U. S. 596, 2 Sup. Ct. 299, it was ruled that a claim for supplies furnished to a railroad company was assignable, so as to confer upon the assignee the right to require the receiver of the railroad company to pay the assigned claims in preference to the bondholders. These cases and others of like import establish the rule that a naked right of action, like that for purely personal torts, such as for assault and battery, defamation, false imprisonment, or malicious prosecution, cannot be assigned; but if the chose in action or claim constitutes a property right, which, upon the death of the party, would pass to his legal representatives, then it is assignable, so as to transfer the beneficial interest to the assignee. Exceptions to this general rule may be found in cases of executory contracts, wherein the relations between the parties or the subject of the contract are such that it fairly appears that it was the intent of the contracting parties that performance of the obligations assumed should rest only on the original party, in which class of cases the assignment of the contract is not valid, unless assented to by the other party thereto. *Delaware Co. Com'rs v. Diebold Safe & Lock Co.*, 133 U. S. 473, 10 Sup. Ct. 399; *Arkansas Val. Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 8 Sup. Ct. 1308.

In this case we are not dealing with executory contracts, but with a claim for damages, and the rule applicable thereto is to be found in the principle recognized by the supreme court in *Traer v. Clews*, 115 U. S. 528, 6 Sup. Ct. 155, already cited, in which it is held a mere naked right to bring a suit is not assignable, but a right of property is assignable. The claims declared on are based upon the alleged fact that the defendant company charged the shippers exorbitant or unreasonable rates upon the freight by them shipped on defendant's road, and in reality the action is brought to recover back the sums of money, which, it is claimed, the shippers were compelled to pay, over and above a reasonable rate. To illustrate the point, suppose it appeared that there were two shippers who had been overcharged upon certain shipments of freight, the amount of the exorbitant charge in each case amounting to \$100; and it appeared that the one shipper had paid the overcharge in money, and the other had paid the

amount of overcharge in bullion at its market value. The complaint of the latter would be that he had been compelled, in order to secure the shipment of his freight, to part with and deliver or pay to the carrier the bullion of the value of \$100, or, in other words, that he had been wrongfully deprived of property of the named value. Can there be any question that in that case the shipper would have the right to demand a return of the property wrongfully exacted from him, and that it would be the duty of the carrier to return to the shipper the property wrongfully extorted from him, or to account for its value? Clearly, in that case the claim of the shipper would be a property right, and not a mere naked right to bring an action. The test is whether the person's property or estate has been lessened in value by the action of the adversary party. Thus, in cases of assault and battery, malicious prosecution, libel, and the like, the injury is to the person or the character or business standing of the party, and not directly to his estate; and an assignment of a claim of that nature would be a transfer merely of a right of action, not directly associated with a property right. In cases, however, where the wrong act complained of has operated directly against the property or estate of another, thereby lessening it in amount or value, the party injured has a property right to be protected. He may seek to recover back the property of which he has been deprived, or he may seek damages for the injury to his estate. The nature of the claim arising to him, in such a case, is not determined by the mere form of the remedy he may adopt, but is dependent upon the question whether the injury complained of was to his person or to his property or estate. In the supposed case of the payment of the overcharge in bullion, the estate or property of the shipper would be lessened by that amount; and there can be no question that under the rule given us by the supreme court in *Traer v. Clews*, *supra*, a claim arising under such circumstances would be a property right, and, as such, would be assignable. Is there any substantial difference, however, between a case wherein the wrongful overcharge is paid in bullion, or a case wherein the overcharge is paid in money? In each of the supposed cases the wrong act of the carrier is the same, to wit, the illegal exaction of an exorbitant charge for services rendered. The result to the shippers in each case is identical. In each case he is compelled to part with property, in the one case bullion, in the other money, of the same value; and in each case the property or estate of the shipper is lessened to the same extent. In each case the injury caused by the wrong act of the carrier affects, not the person of the shipper, but his estate; and if the claim in the one case is in the nature of a property right, and therefore assignable, the same must be true as to the other.

It is further earnestly contended on behalf of the defendant that, even though the claims in question might be held assignable under the general rules of law governing that question, the terms and provisions of the sections of the interstate commerce act, creating the right of action, are such as to show that it was the intent of congress to limit the right to the remedies provided for in the act to the party originally injured, and it must therefore be held that the act prohibits the assignment of claims for damages based upon section 8 of the

act. In support of this contention, it is assumed that the remedy by way of appeal to the commission can be availed of only by the original shipper or party injured, and hence the same rule should be applied to the second remedy provided, to wit, an action for damages directly against the carrier. To justify an appeal to the commission, it must appear that the party making the application has a right to invoke the aid of the commission in the line petitioned for. Thus, if the aid of the commission is sought for the purpose of compelling a change of an established tariff of rates, as affecting present or future shipments, it must appear that the party seeking action by the commission is or will be affected by the rate sought to be changed. But, where the aid of the commission is sought solely to remedy a past wrong committed in overcharging a party for freight shipped, I see nothing in the act which limits the right of appeal to the commission solely to the person originally injured.

Since the adoption of the act of March 2, 1889, amendatory of the interstate commerce act, the commission holds that, upon proper application and proof, it is the duty of the commission to pass upon the question of damages for past violations of the law. *Macloon v. Railway Co.*, 5 Interstate Commerce Com. R. 84-95. If, therefore, a property right in the nature of a claim for illegal overcharges is owned by A., he being the original shipper, he has the right, as the party in interest, to seek reparation by invoking the aid of the commission, or he may sue the carrier directly in an action at law. This claim, being in the nature of a property right, A. can lawfully assign to B.; and, upon becoming the beneficial owner thereof, no reason exists why the remedies provided for in the act are not open to B., as the real and beneficial owner of the claim. The assignment of the claim defeats no defense existing thereto, nor does it in any way impose any greater burden upon the carrier in meeting the same; and there appears no good reason why a person who holds the beneficial interest in the claim for damages may not invoke either of the remedies provided for by section 9 of the interstate commerce act.

But it is further urged that the use of the words "in his or their own behalf," in section 9, shows that it was the intent of congress to limit the right to institute suits for damages solely to the persons to whom the damages originally accrued. There is plausibility in the argument, but upon consideration of the provisions of the act, taken as a whole, it would seem more likely that these words were used to mark the distinction between the two remedies provided for by the act, the one being the right to make complaint to the commission, thus calling into action the powers and duties imposed upon the board of commissioners, and the other being the right to bring an action at law, in his or their behalf, for the recovery of the damages. In the one case the party seeking relief must apply to the board of commissioners, and it is the board which calls the carrier to account. In that case the shipper or person injured cannot, in his own name or behalf, call the carrier to account by a direct proceeding, but must invoke the action of the commission. If, however, the shipper prefers to seek damages only, then, in his own behalf, and without the aid of the commission, he can sue the carrier in an action at law. In the

one case the commission takes action on behalf of the party complaining; in the other the party injured can, in his own behalf, bring an action for damages against the carrier. The terms used in the act do not expressly declare that the right of property, forming the basis for the action for damages, is not assignable, and no good reason is shown justifying a forced construction of the words used in order to give support to the contention that congress intended to forbid the assignment of claims of this character.

It is also claimed in argument that the assignability of claims for damages, based upon section 8 of the interstate commerce act, should be denied, upon the ground that the same savors of maintenance. If the assignment carried only a mere right to bring an action, and did not convey a right of property, the argument would have force, because, as is said by the supreme court in *Traer v. Clews*, supra:

"The rule is that an assignment of a mere right to file a bill in equity for fraud committed upon the assignor will be void, as contrary to public policy, and savoring of maintenance. But, when property is conveyed, the fact that the grantee may be compelled to bring a suit to enforce his right to the property does not render the conveyance void."

The conclusion reached upon this question of the assignability of claims of the character of those declared on is that such claims constitute property rights; that, as such, they can be assigned so as to convey the beneficial interest therein to the assignee; and that the assignment thereof is not prohibited by any of the provisions of the interstate commerce act, nor is it forbidden by any considerations of public policy.

The claims being assignable, and having been duly transferred to the plaintiff, the next point presented by the demurrer is whether suit thereon at law can be maintained in the name of the assignee. If the rule on this question in force in the courts of the state of Iowa is applicable, there can be no doubt as to the right of the assignee to maintain the action at law in his own name. Code Iowa, § 2543, expressly provides that all suits must be brought in the name of the real party in interest, and the uniform construction of the section has been to the effect that the assignee of a chose in action is the proper party plaintiff, even though the assignment is merely verbal. *Green v. Marble*, 37 Iowa, 95. As already stated, the supreme court, in *Pritchard v. Norton*, 106 U. S. 124-130, 1 Sup. Ct. 102, 106, holds that "whether an assignee of a chose in action shall sue in his own name or that of his assignor is a technical question of mere process, and determinable by the law of the forum"; and, if the rule thus given is applicable to this case, it settles the point under consideration. On behalf of defendant it is urged that this general rule does not apply to actions based upon the provisions of the interstate commerce act, which creates alike the cause and right of action, and that such actions must be excepted out from the operation of sections 721 and 914 of the Revised Statutes of the United States, which enact that the laws of the several states, except where the constitution, laws, or treaties of the United States otherwise require, shall be regarded as rules of decision, and that in law actions the practice, pleadings, and modes of proceeding in the several states shall be followed as near as may be

in the courts of the United States. The purpose of the latter section is to bring about, as far as possible, uniformity in the mode of pleading and practice in law actions in the same state; and there seems to be no ground for holding that congress intended to secure uniformity only in cases arising at the common law, and to require diversity of practice in cases based solely upon the provisions of the laws of the United States. Whenever the substance of the action is such, as affecting the merits, that the adoption of the state practice would work injuriously, the United States courts may diverge therefrom, under the clause of the statute that required conformity to be "as near as may be"; but, unless good and sufficient reason exists, the statute requires the courts of the United States to conform to the settled practice obtaining in the state wherein the federal court is held. That these sections of the statutes of the United States are applicable to causes of action created by the laws of the United States is settled by the ruling of the supreme court in *Campbell v. City of Haverhill*, 155 U. S. 610, 15 Sup. Ct. 217; and it must be held, therefore, that, unless substantial grounds exist for excepting this class of actions from the operation of the section requiring conformity in the rule of practice in the federal courts with that provided for by the state law, the state rule of practice must govern.

The sole difference now contended for is that, upon the claims assigned, the action should be in the name of the original owner of the claim, for the benefit of the present plaintiff, instead of being, as it now is, in the name of the assignee, as the real party in interest. The form of the action in this particular does not in the least affect the merits of the controversy, and there is no sufficient reason shown justifying the court in holding that the merits involved in these claims are of such a nature that they form an exception to the general rule that an action at law, under the settled law of Iowa, can be maintained thereon in the name of the assignee, the claims being of the nature of property rights. The demurrer is overruled.

WRIGHT V. SOUTHERN EXP. CO.

(Circuit Court, W. D. Tennessee, W. D. March 30, 1897.)

No. 3,397.

1. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

A new trial will not be granted upon the ground of newly-discovered evidence, where the party making the application had heard rumors which, if followed up, would have led to the discovery of the evidence before the trial, or where the new evidence would be merely cumulative.

2. INSANE PERSONS—COMPETENCY AS WITNESSES.

Where one who has been adjudged to be insane is offered as a witness, the inquiry for the court on the preliminary examination is limited to his understanding of the obligations of an oath and ability to comprehend the examination as a witness, and, if he can stand this test, the effect of his alleged insanity upon his credibility is for the jury.

3. SAME—NEW TRIAL.

Where there can be no doubt, from what occurred at the trial, that a witness who had been adjudged to be insane would have stood the test

of any examination as to her sense of the obligation of an oath, the court will not grant a new trial merely because there was no such preliminary examination.

4. **TRESPASS—USE OF FORCE TO PREVENT.**

One who is a trespasser undertaking to carry away the property of another cannot complain if the owner lays hold of the property and takes it from him, provided excessive violence is not used; and this is true even though the taking away might have been prevented by detaining the trespasser without the use of any violence or physical force.

5. **PRACTICE—INSUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT.**

It does not follow, because a case ought to be submitted to a jury, that the court should let the verdict stand; and while the time might come when it would be the duty of the court to yield even to the perversities of the jury, and not any longer interfere with their verdict, two verdicts are not ordinarily conclusive of that duty.

6. **SAME.**

In actions to recover damages for personal injuries, the court should exercise the right of inspection of the verdict more readily and freely than in other classes of cases, where the occasion for its exercise does not so often arise; and where the alleged injury is hidden, and the plaintiff depends largely for success upon the bare opinions of medical men employed by him as expert witnesses, the court should be more vigilant than where the injury is obvious.

Action by Florence H. Wright against the Southern Express Company.

This is an action for damages for personal injuries alleged to have been sustained in a struggle between the plaintiff and the defendant's agent over a parrot in its cage, constructed of wooden strips tacked together with nails, such as is commonly used in shipping birds. It had come from Nicaragua, consigned by a brother to his sister, Mrs. Williams. The plaintiff, being a sister of the consigner and consignee, had heard, according to her story, that the bird was to be sold for charges, delivery to the consignee having been delayed by her absence. The plaintiff, appearing at the express office, proposed to buy the bird. Parleying ensued, which resulted in her paying the amount of the charges, executing a receipt on the delivery book, and the consequent delivery to her then and there. She laid her hands upon the cage to send it away by her servant, accompanying her, when the agent was warned by a bystander that the plaintiff was taking the bird as her own through a pretended purchase from him, contrary to his understanding of the transaction, according to his contention, and contrary to the bystander's notion of the agent's right to thus dispose of the bird. Anticipating trouble for himself and his company, the agent forbade the plaintiff to take away the bird, laid his hands upon the cage to prevent her from delivering it to her servant, and thereupon the struggle for its possession ensued. Upon the facts proved, the court peremptorily instructed the jury that the plaintiff was a trespasser and a wrongdoer, or else should have yielded a ready assent to the rescission of the supposed purchase from the agent for the correction of the mutual misunderstanding between them, and left the bird in the express office; that the agent had a right to retain it in the office, and to use such force as was necessary to accomplish that purpose; but that the defendant company would be liable for any unnecessary or excessive violence in defending his possession. Having received such other instructions as the case required, the jury returned a verdict for the plaintiff, assessing the damages at \$3,500. There had been a previous trial of the case, Mr. District Judge Clark presiding, and also a verdict for the plaintiff for \$2,500. The instructions in that case proceeded upon a somewhat different theory of trying the case, not being confined, as in this trial, to the question of excessive violence. That verdict was set aside, and a new trial granted, mainly upon the ground that the evidence did not make it reasonably cer-

tain that the plaintiff had been injured by the struggle in the express office. The defendant, upon this present motion for a new trial, filed an affidavit of newly-discovered evidence, as follows:

"Florence H. Wright versus Southern Express Company.

"In this case G. W. Agee makes oath that he was, when this suit was instituted, and ever since has remained, the superintendent of the Western division of the Southern Express Company, and that as such officer it has been his duty to look after this lawsuit and see to its defense; that he has been actively engaged in its defense since the suit was instituted, and has attended to the preparation of the case for trial and to the two trials which have been had in said case. He further states that during the last trial, in December, 1896, and not until then, did he discover that the plaintiff, Florence H. Wright, had been regularly committed to an asylum for the insane at Utica, N. Y., upon the certificate of Drs. John de Vello Moore and William J. Schuyler, legally qualified examiners in lunacy, approved by the Honorable W. T. Dunmore, judge of Oneida county, New York, this application for commitment to the insane asylum having been made by Miss Florence Wright, of Utica, N. Y., a daughter of said plaintiff, and her brother, Rev. B. F. Cossitt, of Waterville, Oneida Co., N. Y.; and that she had remained there in the insane asylum as a patient from September 11, 1895, until December 11, 1895, when the said Mrs. Florence H. Wright was allowed to leave the hospital for the insane on parole of thirty days, and at the expiration of thirty days she was entered on the books of said asylum as 'Discharged, unimproved.' He further states that soon after the plaintiff left the Utica Insane Asylum, unimproved, that she came to Memphis, Tenn., and this case was brought up for trial in February, 1896, about two months thereafter, at which time the plaintiff was, as he understands the facts, undoubtedly of unsound mind. He further states that he is thoroughly satisfied that she has not recovered from the mental disorder, and that she still was insane, at the time of the last trial, and still is insane; that upon a new trial of the case the defendant will be able to show by the testimony of Dr. G. Alder Blumer, superintendent Utica State Hospital for the Insane, Utica, N. Y., that the plaintiff was and is now afflicted with an incurable mental disorder rendering her insane, and which would either disqualify her as a witness or materially weaken any testimony given by her in this case. Upon the last trial of this case the defendant was not able to make this proof, as it was not aware of the fact that the plaintiff had been committed to an asylum for the insane, and only discovered the fact when a witness in the case, during the progress of the trial, showed defendant's counsel a letter from Dr. Blumer, stating these facts, and it was then too late to obtain the presence of witnesses at the trial or secure his deposition. He further states that he does not know of any negligence or want of care upon his part, or that of any officer of his company, or its counsel, that this fact was not known. In support of the above statement of facts he attaches hereto correspondence which he has had with Dr. Blumer, which correspondence will verify the facts above stated, all of which he respectfully submits to the court. He further states that this application is not made for the purpose of delay, but to the end that justice may be done.

"[Signed]

G. W. Agee."

The two attorneys of the plaintiff filed their affidavits in the absence of their client, which indicate that she herself will swear that she had been unjustly placed in an insane asylum, and had been released therefrom by habeas corpus; that there had been no formal adjudication of her insanity, but an examination by medical men for the purpose of transferring her from a sanitarium or hospital to the asylum; that while the full extent of the information possessed by the defendant company and its counsel before the first trial and before the second trial is not known to affiants, they do know, from conversation with the counsel of the defendant company, that they had some information or had heard some rumor that the plaintiff had been in an insane asylum; and that they were informed by the testimony of Bishop Gailor, and other clergymen having knowledge of the plaintiff, that

she was suspected of being insane. It is not necessary to give these affidavits in full, nor to await the filing of the plaintiff's affidavit, because there is no doubt of the fact that the defendant company and its counsel all the time have had intimations or suspicions of the plaintiff's insanity. They questioned her on the trial about her having been in sanitariums or hospitals, though not upon the subject of her having been confined in an insane asylum or adjudicated insane.

The testimony as to the injury of the plaintiff consisted of her own description of her physical and mental sufferings, and that of medical men who had attended her or examined her, some of them for the purpose of giving their evidence, and some for purposes of treatment. Witnesses testified as to her condition of health, her habits and conduct of life, before and since the occurrences at the express office. This testimony was met by the defendant company with the testimony of medical men speaking to a hypothetical case, or men who had examined her while under treatment, and especially the physician who treated her at home after the altercation at the express office, and such other witnesses as could speak of the plaintiff's physical condition, habits of life, and conduct. Among other incidents of her life, it appeared that she had some years before been thrown from a carriage, and received serious injury affecting her spine, for which she had in the intervening time been often treated. Her own proof, and that of her medical men, was that she had recovered from this injury, she producing, among other testimony, that of a New York physician who had certified to her good health in aid of her application to become a member of the Episcopalian Order of Deaconesses. Around this old-time accident, and the conflict over the bird at the express office, the testimony of the plaintiff was gathered to show that she had entirely recovered from the previous injury, and that all her pain and sufferings were attributable to the violence of the struggle with the defendant company's agent; and on the part of the defendant to show that she had never been a well woman, had never recovered from the former injury, was not at all injured by the quarrel over the bird and cage, and that she was a physically frail woman, with mental disorders that made her irascible, quarrelsome, and unreasonable in her conduct towards other people. There was a motion by the defendant company to direct a verdict, both at the end of the plaintiff's testimony and at the end of all the proof, which motion the court refused to grant, but submitted the case to the jury as hereinbefore indicated.

J. H. Watkins and E. E. Wright, for plaintiff.

Geo. Gillham and F. G. Dubignon, for defendant.

HAMMOND, J. (after stating the facts). Being dissatisfied with the verdict, which on the proof was not expected by the court, and at the same time seriously averse to interfering with the right of trial by jury merely because the court is disappointed by the verdict, the ground of newly-discovered testimony offers a plausible and somewhat tempting excuse to direct a new trial. If, however, that were the only ground, it would be refused, for the proof offered does not at all justify a new trial for that reason, when we carefully scrutinize it. It may be doubtful if there has been any judicial adjudication of the plaintiff's insanity, and probably it was only an administrative determination, with judicial sanction, as between hospitals. The affidavits do not disclose the facts with sufficient fullness to exhibit the technical character of the proceeding; but, suppose there were an adjudication as upon a writ de lunatico inquirendo, it ought to have been produced at the trial. Due diligence is required in all cases, and testimony is not newly discovered, in the sense of the law of new trials, merely because the party did not know of it at the time. There must be more than

this, and it must appear that by due diligence it could not have been discovered, or, rather, that after due diligence it had not been discovered, in time for the trial. There was known to be a question about the plaintiff's sanity, and the fact that it was rumored that she had been in an asylum was well known to the defendant company. It was contented with such proof as was given at the trial, and did not, as it should have done, follow up the plaintiff's life, and discover, as could easily have been done, the facts about the confinement in an asylum; the proceedings, judicial or other, upon which it was had; her release on habeas corpus, if such were the fact; the nature of her malady, and all there was or is concerning it. That this was not done is obviously a want of due diligence, because, in the very nature of it, the facts could not be concealed from ordinary inquiry in and about the places where she had been, and of the persons who knew of her life and its surroundings. In *Carr v. Gale*, 1 Curt. 384, 5 Fed. Cas. 116, Mr. Justice Curtis says that "it cannot be considered as the use of due diligence to suffer a trial to proceed, and after a verdict against him proceed to make the inquiries which he might and ought to have made before." *Price v. Jones*, 3 Head, 84; *Martin v. Nance*, Id. 649; *Shipp v. Suggett*, 9 B. Mon. 5. Moreover, in this case, as in that, the testimony offered is only cumulative. The court can well see how much more potential it would have been if the defendant had proved that the plaintiff had been adjudicated a lunatic, had been in an asylum, and had left it unimproved in the opinion of the asylum authorities, and how much more effective this proof may have been with the jury than the opinions of the clergymen and one of her own doctors that she was "crazy" or "unbalanced," etc.; but still it would have had no other than a cumulative effect in that direction upon the issue of the condition of her mind. It is said that on proof of an adjudication she might have been altogether excluded as a witness on the presumption of law that once insane always insane, until the contrary is made to appear. This is a misapplication of that presumption to the law of evidence. The inquiry for the court on the preliminary examination, when she was offered as a witness, would have been limited to her understanding of the obligations of an oath and ability to comprehend the examination as a witness.

This matter was fully considered in the case of *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. 840, as it had previously been considered in the case of *Reg. v. Hill*, 5 Cox, Cr. Cas. 259, commented upon by Mr. Justice Field in his elaborate judgment. Both Mr. Justice Field and Lord Chief Justice Campbell approved the rule of Baron Parke in an unreported case, that "it is for the jury to determine whether the person so called has a sufficient sense of religion in his mind, and sufficient understanding of the nature of an oath, for the jury to decide what amount of credit they will give to his testimony"; and the lord chief justice said that "the proper test must always be, does the lunatic understand what he is saying, and does he understand the obligation of an oath? The lunatic may be examined himself, and his state of mind may be dis-

covered, and witnesses may be adduced to show in what state of sanity or insanity he actually is. Still, if he can stand the test proposed, the jury must determine all the rest."

On this practice the court would undoubtedly have permitted the plaintiff in this case to go to the jury with her own evidence. Enough was developed by her own conduct at the trial to show that she was then and there of sufficient comprehension to fully understand all that was said to her. Her testimony was intelligently delivered, and if with the artfulness that sometimes belongs to insane persons it was for the jury to determine. As to the obligations of an oath, it was manifest from the developments of the proof, and particularly from the proof of the clergymen who were examined in this case, that she was given to a rather high state of religious feeling; and there can be no doubt from what did occur at this trial that she would have stood the test of any examination as to her sense of the obligation of an oath. So, at last, it is only a technical situation that a preliminary examination upon this subject did not occur; and the court, being now satisfied from what did occur that on a preliminary examination her testimony would have been admitted, and the question left to the jury as to the effect of her alleged insanity upon her credibility as a witness, will not now grant a new trial merely because there was no such preliminary examination. On the whole, this ground for a new trial should be overruled. Neither technically nor on its merits is it sufficient to furnish any just foundation for a new trial.

Also this application for a new trial would be refused if it rested alone upon the objections that have been taken to the sufficiency of the proof to establish the fact that excessive force was used by the agent of the defendant company in recovering possession of the parrot and its cage. I use the word "excessive" advisedly and discriminatingly. It was and is almost incomprehensible to me how the jury could have reached the conclusion that there was any "excessive" force used on this occasion. It would seem that the almost perfect condition of the frail structure of lath and small nails constituting the cage would prevail as a physical circumstance over the mere opinions of witnesses as to the extent of the force used; for it looks as if it would be impossible for any really formidable struggle to have taken place between two persons for the unhanding of such a frail structure without tearing it to pieces. In the light of that fact, the court has been wholly at a loss to conjecture upon what theory the jury could have proceeded to find excessive force, unless it may be that, believing that the plaintiff had been as seriously injured as she claims to have been, they concluded that there could not have been such an injury without a formidable struggle, which the cage withstood notwithstanding its frailty. It must be remembered here that there was no concussion or blow of any kind ensuing from the struggle, and that all of the witnesses describe it as merely a grappling between the two for the possession of the cage, with such physical "wrenching" as the plaintiff claims by her proof took place. It might be reasonable to infer that a "wrench" that would strain the vertebræ of the plaintiff's

spinal column, and seriously injure the spinal cord, would have "wrenched" the bits of wood of which the cage was made from their fragile fastenings. Yet the jury seems to have taken a different view of the importance of this fact, and this they had a right to do, for it is their duty to determine the weight to be given to the testimony. Therefore, if there were not other reasons presently to be mentioned governing the court in this judgment, the verdict would not be disturbed on that account.

It may be mentioned here, however, that counsel for the plaintiff in the argument upon this motion has suggested an altogether probable and satisfactory basis for the verdict of the jury in respect of this question of the force used by the agent of the company in retaining possession of the property. Counsel substitutes the word "unnecessary" for "excessive" force, and thinks the jury proceeded upon what he claims to be an entirely proper and justifiable theory that with a woman, weak and frail as the plaintiff was, no force at all was required to keep possession of the bird and cage; that the agent, instead of taking the cage from her, could have prevented her departing with it by merely obstructing her exit from the room; and so he says that any force was unnecessary, and therefore excessive. It is not at all improbable that this is the true solution of the verdict of the jury. Whatever may be said of its soundness as a legal proposition, it was not the theory of the instructions to the jury upon this subject of excessive force. The court was then, and is now, of the opinion that the agent was not under any legal obligation to resort to the course suggested by this argument of counsel. Undoubtedly, as it turned out, it would have been better if the agent had adopted that plan, and unless a suit had been then brought for false imprisonment probably his company would have escaped any claim for damages. One who is a trespasser and a wrongdoer, undertaking to carry away the property of another, has no just cause to complain if physical force is used to prevent the asportation of the property; and the court is of the opinion that the agent had a right to lay hold of the cage, and take it from the plaintiff's possession while she was undertaking to carry it away from the room, and the only liability for which the company can be held is any violence of physical force or battery, and the theory of the charge to the jury was that they must find in that which the agent did some unnecessary violence of physical action; and, if the jury were misled into adopting the theory suggested by counsel, it was the fault of the court not to have had it more plainly understood what the legal right of the defendant was in that behalf; and this, of itself, might furnish a sufficient ground for a new trial, and possibly it ought to be granted for that reason. But the court prefers to adhere to its original line of action in the trial of this case, and to rest its judgment upon the real objection there is to this verdict.

Notwithstanding there have been two verdicts in this case in favor of the plaintiff, the court is constrainedly of the opinion that the jury may be entirely wrong in its finding that there has been any substantial injury to the plaintiff by reason of that which oc-

curred on the occasion of which she complains. It would be sufficient, and probably it would be best, for the court to go no further than to announce its disapproval of the verdict in this regard; but I think it is due to the parties, if not to the court itself, that some explanation should be made of this dissatisfaction on the part of the court. The information is that the former verdict was set aside by the learned judge then presiding because of a similar discontentment on this point, and there being two verdicts in favor of the plaintiff only adds to the embarrassment that the court now feels in granting a new trial. Notwithstanding this embarrassment, I am not contented to let the verdict stand.

It may be asked, as it was suggested in argument, why the court did not direct a verdict as requested by the defendant company, if it takes the view that the proof was not sufficient to sustain the verdict. Unquestionably this case is not one for the direction of a verdict, but, on the contrary, is distinctly a case which ought to be submitted to a jury. But it does not follow, because it ought to be submitted to a jury, that the court should let the verdict stand, nor even two verdicts, possibly not three or more, if at each succeeding trial the proof should be precisely the same and no stronger for the plaintiff at the last than the first trial. The case of *Railway Co. v. Lowery*, 20 C. C. A. 596, 74 Fed. 463, makes, and was intended to make, this distinction entirely clear, and there could be no more pertinent illustration of the distinction itself than that furnished by the case we have in hand. Here, as will directly appear, there was not only the testimony of the plaintiff herself as to the extent of her injuries, but it was supported by that of the expert physicians introduced in her behalf. It would be a plain usurpation on the part of the court to direct a verdict on such a state of the proof, and yet the duty of the trial judge to scrutinize the proof, and determine, on an application for a new trial, whether the verdict should stand, is just as plain. It is as much a part of the right of trial by jury to have the court exercise this function of inspecting the verdict after it is rendered as it is to have the 12 men hear the testimony and try the fact. The time might come when it would be the duty of the court to yield even to the perversities of the jury, and not any longer interfere with their verdict, but two verdicts are not ordinarily conclusive of that duty. Three verdicts have sometimes been thought sufficient to invoke the duty of noninterference, and by statute in some of the states that has been made the rule of judgment.

The most important cases on this subject of directing a verdict are gathered in the very satisfactory opinion of Mr. Circuit Judge Lurton in the case last cited, and a careful perusal of that which he says will be convincing on this point. "Neither is it a proper standard," says that learned judge, "to settle for a peremptory instruction that the court, after hearing the evidence in the case, would, upon a motion for a new trial, set aside the verdict. The court may, and often should, set aside the verdict when clearly against the weight of the evidence, where it would not be justified in directing a verdict. Neither do we understand this view to be

in conflict with anything decided by the supreme court." It appears very clearly from the cases there cited that the mere "dissatisfaction" of the judge with the verdict is not a sufficient ground for disturbing it, and that phrase is not used to express the notion that he sets the verdict aside because he would have decided on the facts differently; but in determining the question which he has a right to determine, namely, whether the verdict is fairly sustained by the evidence, he must necessarily weigh the testimony very much as the jury does, and therefore the "dissatisfaction" referred to means that he is of the opinion, upon such judicial scrutiny of the proof, that the verdict is one that reasonable men ought not to have rendered. That is the nature of his dissatisfaction, and must be, when he may properly grant a new trial. The difficulty always arises in the application by the trial judge of this process to the particular circumstances he has in hand. It is so easy to glide from the essential duty of setting aside unjustifiable verdicts into the usurpation of the functions of the jury that it is a most difficult task to avoid it. Still it must and should be performed in every case with such conscientious intelligence as belongs to the judge, and that is the best that can be done in any case where he is called upon to discharge that duty. And he alone can perform it. If it be a case that should go to the jury, his action in granting or refusing to grant a new trial cannot, properly, be reviewed on a writ of error; nor can the appellate court indirectly do that thing under any proper exercise of its power to determine whether a verdict should or should not have been directed. However difficult to do it, the line of demarkation must be observed, or there is a re-examination of a fact tried by a jury "otherwise" than according to the rules of the common law. Const. U. S. Amend. 7; *Railway Co. v. Lowery*, supra. Hence the necessity for careful action, on a motion like this, by the trial judge.

My experience in the trial of this class of cases has grown to be quite a large one, through a somewhat long judicial service, and properly I may say that I quite thoroughly agree with some of the views expressed in a recent article in the *North American Review* of February, 1897, as to the alarming increase of favoritism in the jury box towards the plaintiff in litigation of this character. It is not necessary to analyze or descant upon the causes that may exist for this favoritism. That it does exist is beyond question, and the preservation of the right of trial by jury itself is, in my judgment, involved in the duty of the courts to protect the litigants and the jury against the indulgence of an overweening partiality for verdicts giving damages for personal injuries that are not clearly and satisfactorily established by the proof. The trial judge is apt, with the approval of revising courts, to resort to the usurpation of the functions of the jury, and direct a verdict when he should not, thereby depriving the citizen of his right to trial by jury, in order to escape the consequences of such favoritism in the jury box. Hence he should freely exercise the only power there is or can be under our constitutional guaranties to set aside the verdict in this class of cases, whenever he has reason to believe that

the verdict has been influenced by that kind of partiality to which the writer in the North American Review adverts. I should not feel authorized to cite mere lay writing in aid of judicial judgment, were it not for the fact that there is there cited abundant support in expression of opinion from the bench itself. In almost every charge I have given for many years I have adverted to the existence of this favoritism, and sought to guard the jury against it, as I did in this case, but have often felt, when the verdicts are rendered, that there is some foundation for the constantly recurring criticism which we see everywhere arising out of this fact, that the juries cannot be implicitly trusted to do even-handed justice in personal injury cases. I am glad to say that sometimes they do act with the utmost impartiality, but often they clearly do not. I have seen them act unjustly towards the plaintiff, and have set aside their verdicts on that account. There are possibly extremes of criticism on the subject, and the fault is not always with the jury perhaps, so that the difficulty is not entirely blamable to the system. But what I do mean to say on this occasion, as a justification to the action now taken, is that it is my judicial habit in this class of cases to exercise the right of inspection of the verdict much more readily and freely than in other classes of cases, where the occasion for its exercise does not so often arise. The trial judge alone can employ this remedy, and that condition demands at his hands the careful use of the power to meet any extraordinary requirement.

At first, within my judicial experience large verdicts for damages in personal injury cases were confined to those instances where the severity of the injury was manifest on the body itself; to cases where cripples had been made and maiming had been done. More recently there has been a very noticeable increase of cases where apparently there has been the slightest physical disturbance, and the facts disclosed only the slightest causes of injury, and yet there is set up the largest claim for damages, because of some alleged occult injury to the spinal cord or the brain or some other invisible organs or tissues of the body; it being claimed that there has been left as a permanent affliction some "traumatic neurosis," as in this case. I do not know whether it is authentic or not, but I have lately seen somewhere in my reading the statement of a case where a woman had recovered large damages against a railroad company because of a physical injury that made her barren, in the opinion of the expert doctors who were examined as witnesses in her behalf, but, pending long-delayed proceedings, she had given birth to children before the appeal was heard. There are many cases told of crutches thrown away after verdict. This class of personal injury litigation requires at the hands of the court and jury, unquestionably, far more vigilance of treatment than those cases where the injury is obvious. They afford an almost unlimited scope for the exhibition of unreliable, if not false, testimony. They depend largely for success upon the bare opinions of medical men employed as expert witnesses by the party offering them.

The courts and juridical writers have often commented upon the unsatisfactory character of all expert testimony, and many sugges-

tions have been made for mitigating the evils attending it, such as the employment only of official experts, not at all selected by or in any way connected with the parties to the suit. Within a few weeks there has occurred a case in my own experience where the injury claimed was of this hidden nature. The plaintiff's own doctor testified with great fullness to the impoverishment of nerve nutrition, and a consequent permanent disability for physical exertion adequate to remunerative labor. Expert physicians were introduced to support this theory. The railroad doctors, on the other hand, with equal confidence, testified that there had been no serious impairment of the man's physical abilities. In numbers and professional character these doctors on either side were of equal weight. It was suggested by one of the counsel that the court appoint a medical expert independently selected, and it was agreed between the parties that the court should choose two such examiners. The court declined to make any selection, but allowed the parties themselves each to name a medical man. This was done, they made a wholly independent examination of the plaintiff, and both testified that there was no serious or permanent injury then existing. Notwithstanding this, and the corroboration of circumstances showing that the injury done to the body was apparently not serious, and the violence of the fall from the car was apparently not greater than usually attends a fall of five or six feet, the jury gave an enormous verdict for the plaintiff, which, upon a motion for a new trial, I set aside for precisely the same reasons that actuate me in this case, although the negligence of defendant company was clear, if not admitted.

I do not mean to impute to the medical profession any complaisance of professional opinion that does not equally belong to the legal profession and all other professional or quasi professional experts; but with all men, in all employments, benevolence and sympathy with those who seek a mere opinion upon subjects of expert knowledge dominate the judgment that is given. If a lawyer comes to a brother attorney, and wishes him to estimate the value of his professional services, he is almost certain to put the estimate at the most that is possible to meet the views of him who applies, because it is a kind of courtesy of benevolence to think as well of one's services as that one does himself. If a client comes to a lawyer and wishes professional advice, the lawyer is very apt to shape his opinion in accordance with the wishes of the applicant, and not only that, but he is willing to go into the courts to vindicate that opinion, and will vigorously adhere to it after it has been decided against him through all the courts, and by that of last resort. It is a human tendency, and is the weakness of all expert testimony. Doctors of medicine are as much liable to follow this tendency as other experts, if not more, and it is no imputation upon their fairness and their honesty and skill to challenge and scrutinize any opinions that they offer on either side of a controversy like this.

When one is called upon to testify in court as to his observation of facts that are within his perceptive faculties, be he expert or

not, he will rigidly confine his testimony to the exactness of the occurrences he has observed; but when one is called upon to give a mere opinion as to the effect, in any science, of given facts, upon the law of that science, there is a wide scope for the adoption of an opinion that will be pleasing and satisfactory to him who asks it or is willing to pay for it, and then the human tendency which has just been mentioned operates in that direction. Therefore it is that no trier of the fact should accept as the sole basis of his judgment expert opinions merely because they are conscientiously entertained, but should subject them to the test of conformity to the established physical facts and circumstances appearing in the case. A pin scratch may produce death, but ordinarily it does not, and if in the given case any more likely cause for the death appears it would be unreasonable to attribute it to so slight a cause, even though there might be medical opinion to that effect, and if there be medical opinion against the slighter cause producing such an effect it would only add to the unreasonableness of such a judgment. At all events, verdicts for large damages in cases of that character should not be made final until there has been such assurance of justness as would be founded in an adequacy of proof, and not in the mere human sympathy of jurors, which is not always justified by the particular facts. Particularly there is nearly always indiscrimination in this regard where women and other helpless creatures are involved, as against strong and aggressive men, who are often expected to yield more than the law requires to sex or weakness in an adversary. Often the mere sentiment of gallantry to woman dominates the jurors and the judge when it should not. It is this doubtful character of the proof adduced in this case, as to the existence of the plaintiff's injuries, and the presence of the disturbing elements of possibly an undue sympathy on the part of the jurors, that causes me to hesitate about the fairness of this verdict, to doubt its justness, and to feel that it is unreasonable that it should have been found upon the proof in this case.

Being convinced, and having determined as matter of law, to which conclusion I still adhere, that the defendant's agent had a right to lay his hands upon the cage, and forbid the plaintiff to depart with it, and that he might lawfully, with such force as was necessary, take it from her possession when she had shown her perverse determination to carry it away either by her own hands or by those of her servant, I cannot, in considering the question of excessive violence as submitted to the jury, heed the facts and circumstances in the proof in relation to any supposed duty of the defendant's agent to resort to other effective means of detaining the plaintiff in a kind of imprisonment until she should be willing to yield. It is not a question of his reasonable choice of the means of defending his rightful possession, but a question of the reasonable use of those means which he lawfully adopted. In this view I do not see the justification of the verdict by the proof as we have it here. But, as before remarked, if this were all, I should most assuredly hesitate to disturb the verdict of the jury. Still, I think the apparent ease with which the jury reached the conclusion that

there had been any excessive violence on the part of the agent of the defendant company may be considered as an illustration of the complaisance with which they have regarded the proof in favor of the serious nature and character of the injuries which she claims to have suffered, and, taking the two issues together, it shows that the jury might have been dominated by an undue sympathy for an afflicted woman, and too great a readiness to attribute her affliction to the occurrence at the express office. For those afflictions of which she complains there was in this proof a far more abundant cause in relation to the physical injuries suffered in the violent fall she received when thrown from her carriage some time before the conflict over the bird and cage. This is not denied in the consideration of this case, but it is insisted that she had recovered from the effects of that injury. That is very doubtful on this proof; and again I am unable to see how reasonable men, as against all the facts of her subsequent residence in hospitals, and her subsequent conduct and condition as observed by the witnesses in this case, could reach such a conclusion upon the opinion of a doctor in New York, who spoke not only ambiguously, but evidently with slight, if any, attention to the real inquiry we have here, and her own belief that she had recovered, however honestly she may have entertained it. She was not on that occasion seeking medical opinion to sustain a claim for damages or any advantage to come of ill health, but to sustain an application for employment requiring good health, and she got what she wanted. There is in the case something more than a mere scintilla of proof in favor of such a recovery of her health, but it does not seem to me to be of that convincing and preponderating character which a jury ought to accept as conclusive, and it occurs to me to be reasonable to further consider the question of whether or not the injuries of which the medical men testify were a continuation of the old affliction or the result of the conflict over the bird and cage.

As to the medical testimony about the existence of the injury itself, and it being likely to result from comparatively so slight a physical force, even taking as true the plaintiff's own story, and I am not at all convinced that it is reasonable to support the verdict upon it. There was medical testimony against that theory, and particularly that of the doctor who attended her about the time of this occurrence at the express office and afterwards, and whose testimony is so much belittled in argument because he was only a "country" or "blue-mass" doctor. Whatever defects of technical education there may be about this physician, he testified to facts and circumstances in relation to the plaintiff's health history and her conduct on this occasion that do not support the theory that she had been seriously injured at the time, but rather tend to show that the idea of great injury was wholly an afterthought on her part. Every medical man who spoke in favor of the injury being caused by the struggle over the bird and cage, that did not injure the cage at all or only slightly, spoke with evident hesitation to attribute so formidable an injury to so slight an origin, and they mostly spoke from the somewhat exaggerated description of ex-

amining counsel in putting the hypothetical case, rather than from any exactness of comprehension about the facts. Not unnaturally counsel, in stating an hypothetical case, will use language and forms of expression and give out as in argument his own physical indication, as he conceives it, of the violence that was used, which affects the medical man when he is considering the law of cause and effect; and, on the other hand, the same process of examination by the defendant's counsel would belittle the force used, and affect the opinion of his medical man. But these are only indications of the inherent weakness of such testimony, and an illustration of the facility with which it may be procured and the ease with which opinions may be influenced. No one can doubt that it is not impossible for the most serious injury to result from very slight force, and that was the effect of the testimony of the medical men in this case, accompanied by the expression of opinion that, to use their own language, in the absence of any other sufficient cause, they would say that this injury came from this cause; but, after all, their opinion was based upon the acceptance by them of the supposition that she had recovered from the injuries received by the greater cause at the time she was thrown from the buggy. Taken altogether, these opinions of the medical men did not and do not impress me as being sufficiently well founded to justify this verdict. On another trial it may be that the facts and circumstances will show that the plaintiff has been injured by that which occurred at the express office, and I am well aware of the fact that I am assuming a grave responsibility in setting aside a verdict which is the second in the plaintiff's favor; that I am in some danger of trenching upon the right of the plaintiff to have the weight of this proof determined by the jury, and not by me; but the law commits this responsibility to the hands of the trial judge for the very purpose of protecting parties from what may seem to be unjust verdicts; and so I must accept that responsibility, give expression and effect to my decided conviction that the proof does not sustain the verdict, and that it is an injustice to the defendant company to permit it to stand as a reasonable verdict on such proof as we had at the trial. I could not direct a verdict for the defendant, yet I expected the jury on the proof, and the instructions given as to the law, to find for the defendant, and the contrary action was a surprise to me. I mention this merely to show the strength of the conviction I have that the verdict of the jury was not according to the weight of the testimony, and I can see in the case enough of opportunity to be misled by undue sympathy to account for it. It is better to submit the question to another jury. New trial granted.

In re LAWRENCE et al.

(District Court, N. D. California. March 19, 1897.)

1. HABEAS CORPUS—FEDERAL AND STATE COURTS.

The United States courts will not, except, perhaps, under extraordinary circumstances, take jurisdiction, by means of the writ of habeas corpus, over proceedings in state tribunals, even though it is alleged that a constitutional right is involved; and where such a question has been determined by the highest court in the state, upon the general allegation of an illegal imprisonment, the proper proceedings for review are for a writ of error to the supreme court of the United States.

2. SAME.

A United States court will not grant the writ for the discharge of a prisoner in custody for contempt under the resolution of a state senate, upon the ground that his detention is contrary to the constitution of the United States, where there has been an inquiry in the supreme court of the state involving the whole question of the legality of the detention and of the contempt proceedings, which are matters peculiarly within the exclusive jurisdiction of the state.

Knight & Heggerty, Andrew J. Clunie, and Garrett McErnerney, for petitioners.

J. Chas. Jones, for sheriff of Sacramento county.

W. H. Anderson, Asst. Atty. Gen., for the State of California, on behalf of senate.

MORROW, District Judge (orally). It appears from the petition in this case that Andrew M. Lawrence and L. L. Levings, the first the managing editor and the other a reporter of the San Francisco Examiner, are in the custody of the sheriff of Sacramento county, and L. F. Blackburn, sergeant at arms, by virtue of certain resolutions adopted by the senate of the state of California March 10, 1897. The resolution in the case of Andrew M. Lawrence is as follows:

"Whereas, heretofore, this senate, by resolution duly passed, appointed Senators John E. Dickinson, Eugene Aram, and J. H. Seawell an investigating committee to investigate the charges of bribery preferred by the San Francisco Examiner against this senate; and whereas, said committee had A. M. Lawrence, of the San Francisco Examiner, before said committee; and whereas, upon the said A. M. Lawrence being duly sworn to answer questions before said committee, and admitting that he was managing editor of said paper; and whereas, upon said examination the said A. M. Lawrence, as a witness, was allowed counsel, at his request, and upon being asked certain questions, as will be seen by the report of said committee made to this senate, and which said questions being material to the inquiry and investigation being carried on and conducted by the committee, he, the said Andrew M. Lawrence, then and there refused and declined to answer the said questions; and whereas, the said committee reported the said action of the said committee, and the questions propounded the said witness, the said A. M. Lawrence, and that he had contumaciously refused to answer the said questions to this senate; and whereas, upon the coming in of the said report of the said committee the senate resolved that the said A. M. Lawrence be subpoenaed before the bar of the senate to show cause why he should not answer the said questions; and whereas, the said witness, A. M. Lawrence, was duly subpoenaed before the senate, and at eleven o'clock a. m. of the 9th day of March, A. D. 1897, appeared before the bar of the senate; and whereas, the said questions reported by the said committee were then and there propounded to him, the said A. M. Lawrence, by the president of the senate, and he, the said A. M. Lawrence,

then and there again refused and declined to answer the said questions, having no lawful or legal excuse therefor, and having been duly represented by counsel of his own selection, and having the ability and power to answer the said questions, but contumaciously refusing to answer the same: Now, therefore, be it resolved, that the said A. M. Lawrence be and he is hereby declared to be guilty of contempt of the senate; and be it further resolved, that he, the said A. M. Lawrence, be taken into custody by the sergeant at arms of the senate, and that he be committed to the county jail of the county of Sacramento, state of California, until he shall have purged himself of this contempt by answering the questions which were propounded to him under the direction of the senate; that a copy of this resolution, duly attested by the secretary of the senate, be the authority of the sergeant at arms of the senate and the sheriff of the county of Sacramento."

The petitioner L. L. Levings is in custody under substantially the same resolution. In the petition it is alleged that the imprisonment of Lawrence and Levings is illegal, in this:

"(a) That no investigation, proceeding, or matter whatever was or is pending before said senate, or the legislature of said state, in said assistance, or in pursuance of which said questions were asked or put by said senate to said Lawrence and Levings, upon or in respect to which any legislative action or proceeding of any character whatever was proposed or intended, or to or in which the said questions were or are or could or would be relevant, competent, or material. (b) That there was not, at the time said questions were asked and put by said senate, any bill, resolution, investigation, or legislative proceeding whatever, under consideration pending or proposed, in or under, as to or in connection with, which the said questions were or are competent, relevant, or material. (c) That said alleged contempt was not committed in the immediate view and presence of the said senate, and that no affidavit of the facts constituting the alleged contempt was ever made to or was before said senate, and no affidavit whatever was ever presented to said senate of the facts constituting said contempt. (d) That said senate, at the time said questions were asked by said senate and in said senate, for refusal to answer which said senate adjudged said Lawrence and Levings guilty of contempt, had no power or jurisdiction to ask or put said questions, or to require an answer to said questions, or to consider or determine any matter then before said senate as to which said questions were asked, and had no power or jurisdiction to adjudge said Lawrence and Levings guilty of contempt, or commit them to the custody or imprisonment of said sergeant at arms or said sheriff. (e) The said senate had no jurisdiction to make the inquiry to which the questions propounded to said Lawrence and Levings were directed, and said questions were not material, relevant, or pertinent to that issue and inquiry then before the said senate. (f) That said senate was not acting, and had no power to act, upon any matter, proceeding, legislation, or investigation concerning which said questions were asked, or were relevant, competent, or material; nor was there any investigation before said senate, the purpose of which was to enable said senate to act, and concerning which said questions were asked, or as to which said questions, or the evidence to be thereby elicited, were relevant, competent, or material. (g) That the investigation concerning and in which said questions were asked and said alleged contempt committed, and said alleged adjudication by said senate made, and the commitment or resolution under which said Lawrence and Levings were and are imprisoned issued, was of matters judicial in their nature, and which were and are exclusively the subject of judicial inquiry of the courts of this state. (h) The questions asked said Lawrence and Levings were not competent, and did not call for any evidence which would be or was competent, but called for evidence which was, is, and would be hearsay. (i) The said alleged commitment or resolution of said senate under authority of which said Lawrence and Levings were taken into custody and imprisoned does not show or allege that the said questions were or are pertinent, competent, legal, or relevant, or proper, in the proceeding before said senate, or in any proceeding. (j) That said alleged adjudication of said senate, and said commitment or resolution

of said senate under and by virtue of which said officials took into custody and imprisoned said Lawrence and Levings, do not, nor does either thereof, adjudge or find that said Lawrence or Levings was or is, nor does it adjudge or hold them, guilty of contempt of the senate of the state of California. (k) There is no adjudication that the said Lawrence and Levings are or were guilty of contempt, and no judgment, order, resolution, or commitment that they committed or are guilty of a contempt of said senate. (l) That said imprisonment and commitment are without due process of law, and in violation of the provisions of the constitution of the state of California, and of the constitution of the United States, and of the amendments thereto, and particularly are in violation of the fourth, fifth, and fourteenth amendments to the said constitution of the United States; that said Andrew M. Lawrence and said L. L. Levings are and each of them is a citizen of the United States and of the state of California, and a resident within the judicial Northern district in the state of California, and, being such citizens and residents, they claim, and there is hereby claimed upon their behalf, the protection of this court to secure them against a deprivation of their liberty without due process of law, and against and in spite of the provisions of the constitution of the United States aforesaid, which are violated by their imprisonment aforesaid."

To this petition a return has been made by the sheriff of Sacramento county, which recites the proceedings before the state senate, referred to in the resolution; the proceedings before the superior court of the county of Sacramento on habeas corpus, wherein the writ was discharged and Lawrence and Levings remanded to the custody of the sheriff; and also proceedings before the supreme court of the state of California on habeas corpus, which also resulted in the discharge of the writ and the remanding of the parties to the custody of the sheriff. For the purpose of this decision, it will only be necessary to refer to that part of the return which relates to the proceedings in the supreme court of this state. 48 Pac. 124. After setting out in full the order of the supreme court whereby Andrew M. Lawrence and L. L. Levings are brought before that court, the return proceeds as follows:

"That thereupon, and in accordance with said order of said supreme court of the state of California, I released the said petitioners, and each of them, from my custody and control, upon bail in the sum of \$1,000 each, duly approved by a judge of the superior court of the county of Sacramento, state of California. That thereafter, to wit, on the 16th day of March, 1897, and at about the hour of five o'clock p. m. of said day, the said supreme court of the state of California rendered an opinion and made an order, which opinion and order was and is in the words and figures following, to wit:

"Ex parte Lawrence and Levings, on Habeas Corpus.

"By the Court: The senate was engaged in an investigation of the conduct of its members, under a published charge that some of them, whose names were not given, had taken bribes for aiding in the passage of a certain bill. The news editor and one of the reporters of the paper which published this charge were called upon to testify in the matter, and refused to answer certain interrogatories propounded to them, upon the ground that the information sought to be elicited was privileged, and that the evidence, if given, would be irrelevant and hearsay. The questions, in brief, contained a demand that the witnesses should give the names of those from whom they had received information touching the charge of bribery, and the substance of that information. The inquisitorial investigation upon which the senate was engaged was one strictly within its jurisdiction to prosecute. It had the undoubted power to examine into the alleged criminal conduct of some of its members, with a view to their expulsion, or other punishment, if found guilty. Ex parte McCarthy, 29 Cal. 395. Under such an investigation these witnesses, who were shown to have been responsible for the public charge, and who at the

same time disclaimed personal knowledge of the facts, were asked to give the names of their informants. It was a natural and logical method for the senate to follow in its endeavor to arrive at the truth. If the witnesses, first answering that they had no personal knowledge of the matter, were to be justified in refusing to give the names of their informants, the senatorial inquiry must necessarily come to an end. Upon the other hand, if they stated the names of their informants and the nature of their information, the senate could summon those persons, and so trace the charge to a just conclusion. The evidence, then, was relevant and pertinent. The case differs from those presented in courts where the interests lie between conflicting parties, and where improper evidence sought to be introduced in the interests of one must be to the injury of the other. Here the inquiry was inquisitorial, to arrive at the truth concerning the charge of corruption, silent as to names, indefinite as to facts, but specific in its assertion of bribery. There were no parties to this proceeding. The senate was investigating the conduct of its own members, and it was a contempt of its authority for the witnesses to refuse to give the names of those who were responsible for the promulgation of the charge. It cannot be successfully contended, and has not been seriously argued, that the witnesses were justified in refusing to give these names upon the ground that the communication was privileged. The writ is discharged, and the prisoners remanded to the custody of the sheriff of Sacramento county.'"

From this opinion and order of the supreme court, it appears that the alleged illegal imprisonment of the parties has been considered upon all the grounds alleged in the petition; but it is contended that the detention of the parties is contrary to the provisions of the fourth, fifth, and fourteenth articles of the amendments to the constitution of the United States, and that, therefore, an inquiry into the cause of the detention is peculiarly within the jurisdiction of this court. It must be observed, however, that the inquiry in the supreme court of the state necessarily involved the whole question of an illegal detention, and that the contempt proceedings which resulted in the imprisonment were matters peculiarly within the exclusive jurisdiction of the state, and, so far as these proceedings appear by the petition and return, were regular, and the imprisonment was within the power and authority of the state senate to impose. *Ex parte McCarthy*, 29 Cal. 395; *Burnham v. Morrissey*, 14 Gray, 226; *People v. Keeler*, 99 N. Y. 463, 2 N. E. 615. The first and most important question, therefore, to determine is whether this court will further inquire into the detention of the parties, in view of the proceedings that have been taken in the courts of this state. The contention of the petitioners is that they have been deprived of rights guarantied to them under the constitution of the United States and the constitution of the state, but it is as competent for the state court to determine questions of that character as it is for a federal court. The line between state and federal authority, with respect to matters that may be inquired into by the writ of habeas corpus, has been very carefully drawn by the supreme court of the United States. The subject has frequently been under consideration, and has been elaborately considered with respect to all the elements of jurisdiction, and the law with respect thereto clearly established. It only remains for this court to be guided by that law. In *Robb v. Connolly*, 111 U. S. 624, 637, 4 Sup Ct. 544, 551, the supreme court said:

"Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the

constitution of the United States, and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the state courts are required to take an oath to support that constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding.' If they fail therein, and withhold or deny rights, privileges, or immunities secured by the constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the state in which the question could be decided to this court, for final and conclusive determination."

In the case of *In re Wood*, 140 U. S. 278, 11 Sup. Ct. 738, the court say, at page 287, 140 U. S., and page 741, 11 Sup. Ct.:

"The highest court of the state having thus disposed of the case, and the appellant having failed to obtain from the trial court an order setting aside the conviction and granting a new trial, the present effort was made to secure his release by a writ of habeas corpus issued by the circuit court of the United States. The statute under which the appellant was prosecuted is not repugnant to the constitution of the United States, and the court that tried him, we repeat, was competent to guard and enforce every right secured to him by that instrument, and which might be involved in his trial. The petition for the writ sets forth no ground affecting its jurisdiction either of the offense charged or of the person alleged to have committed it. If the question of the exclusion of citizens of the African race from the lists of grand and petit jurors had been made during the trial in the court of general sessions, and erroneously decided against the appellant, such error in decision would not have made the judgment of conviction void, or his detention under it illegal. *Savin*, Petitioner, 131 U. S. 267, 279, 9 Sup. Ct. 699; *Stevens v. Fuller*, 136 U. S. 468, 478, 10 Sup. Ct. 911. Nor would that error, of itself, have authorized the circuit court of the United States, upon writ of habeas corpus, to review the decision, or disturb the custody of the accused by the state authorities. The remedy, in such case, for the accused, was to sue out a writ of error from this court to the highest court of the state having cognizance of the matter, whose judgment, if adverse to him in respect to any right, privilege, or immunity specially claimed under the constitution or laws of the United States, could have been re-examined, and reversed, affirmed, or modified by this court as the law required."

Another case is *Cook v. Hart*, 146 U. S. 183, 13 Sup. Ct. 40. The court held:

"That this court [supreme court] will not interfere to relieve persons who have been arrested and taken by violence from the territory of one state to that of another, where they are held under process legally issued from the courts of the latter state; that the question of the applicability of this doctrine to a particular case is as much within the province of a state court, as a question of common law or of the law of nations, as it is of the courts of the United States."

In the case of *In re Frederick*, 149 U. S. 70, 13 Sup. Ct. 793, the question was very thoroughly reviewed by the supreme court, and it was there said (page 75, 149 U. S., and page 795, 13 Sup. Ct.):

"While the writ of habeas corpus is one of the remedies for the enforcement of the right to personal freedom, it will not issue as a matter of course, and it should be cautiously used by the federal courts in reference to state prisoners. Being a civil process, it cannot be converted into a remedy for the correction of mere errors of judgment or of procedure in the court having cognizance of the criminal offense. Under the writ of habeas corpus this court can exercise no appellate jurisdiction over the proceedings of the trial court or courts of the state, nor review their conclusions of law or fact and pronounce them erroneous. The writ of habeas corpus is not a proceeding for the correction of errors."

To the same effect is the case of *New York v. Eno*, 155 U. S. 89, 15 Sup. Ct. 30:

"Whether an offense described in an indictment in a state court is an offense against the laws of that state, and punishable thereunder, or whether it is made by federal statutes an offense against the United States, exclusively cognizable by their courts, and whether the same act may be an offense against both national and state governments, punishable in the tribunals of each, without infringing upon the constitutional guaranty against being twice put in jeopardy of limb for the same offense, are questions which a state court of original jurisdiction is competent to decide in the first instance; and (its obligation to render such decision as will give full effect to the supreme law of the land, and protect any right secured by it to the accused, being the same that rests upon the courts of the United States) the latter, if applied to for a writ of habeas corpus in such case, should decline to issue it, unless it also appears that the case is one of urgency."

Also, *Bergemann v. Backer*, 157 U. S. 655, 15 Sup. Ct. 727:

"When a state court has jurisdiction of the offense and the accused, under an indictment found under statutes of the state not void under the constitution of the United States, and proceeds to judgment under such statutes, a circuit court of the United States has no authority to interfere with the execution of the sentence by means of a writ of habeas corpus."

These cases clearly establish the doctrine that, except, perhaps, under extraordinary circumstances, United States courts will not, by means of the writ of habeas corpus, take jurisdiction over proceedings in state tribunals, even though it is alleged that a constitutional right is involved, and that, where such a question has been determined by the highest court in the state upon the general allegation of an illegal imprisonment, the proper proceedings for review are by a writ of error to the supreme court of the United States. That being the rule, without going into the merits of this case,—without considering the objections which have been raised to the proceedings taken by the state senate, and so ably argued by counsel,—I think I am authorized, under these decisions, to hold that the writ of habeas corpus should not be granted in this case, and that the petitioners should be allowed to pursue their remedy by the other method pointed out in the cases that I have referred to. The writ of habeas corpus will therefore be discharged, and the petitioners remanded to the custody of the sheriff of Sacramento county.

STERLING REMEDY CO. v. EUREKA CHEMICAL & MANUFACTURING CO.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 298.

1. TRADE-MARKS—SUBJECTS OF APPROPRIATION—INFRINGEMENT.

"No-To-Bac" is an arbitrary term, which may be appropriated as a trade-mark for a medicine designed to cure the tobacco habit, and is not infringed by "Baco-Curo," used with a similar medicine.

2. SAME—TEST OF INFRINGEMENT.

The test of infringement is whether the alleged infringing article is so dressed that it is likely to deceive persons of ordinary intelligence, in the exercise of the slight care ordinarily bestowed in purchasing an article, to mistake one man's goods for the goods of another.

3. SAME—FORM OF PACKAGE.

The form of tobacco box in common use cannot be exclusively appropriated as a package for the sale of a preparation designed to cure the tobacco habit.

4. SAME—SIMILARITIES AND DISSIMILARITIES.

Where tablets or lozenges made and sold by different parties as a cure for the tobacco habit are so prominently dissimilar in color, size, thickness, weight, odor, and lettering, and in the color and appearance of the labels on the packages, that purchasers exercising even slight care would not be likely to select one article for the other, there is no infringement. 70 Fed. 704, affirmed.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

The Sterling Remedy Company, the appellant, filed its bill against the Eureka Chemical & Manufacturing Company to restrain the alleged infringement of a trade-mark, and also upon the ground of unfair competition in trade. The appellant manufactures and deals in a so-called remedy or cure for the tobacco habit, which is sold under the trade-mark "No-To-Bac." The remedy is prepared in the form of a lozenge or tablet, and is contained in an ordinary tin tobacco box. The lozenge or tablet is round, of a light, greyish hue, with the designation or trade-mark of "No-To-Bac" in large raised letters upon one side and forming part of the lozenge. The covering of the box is of a dark red ground, and has printed upon the upper side, in black letters, the following: "No-To-Bac. Trade-mark registered. Is a Positive and Permanent Cure for the Tobacco Habit in every form. It is Nature's Own Remedy. It is entirely harmless, being of vegetable origin. It will build up, fortify, and rejuvenate the weak and unstrung nerves, and eradicate the poisonous nicotine from the system. It will increase the appetite and digestive power, enrich and purify the blood. From ONE to THREE BOXES guaranteed to cure any case, if used as directed. PRICE, \$1.00. Made only by the STERLING REMEDY COMPANY, Indiana Mineral Springs, Warren Co., Indiana. Chicago office, 45 and 47 Randolph St."

On the reverse side is the following:

"Directions for the use of NO-TO-BAC. CURE FOR THE TOBACCO HABIT IN EVERY FORM. Immediately discontinue the use of TOBACCO, and use 7 to 10 tablets a day by placing them in the mouth, and allowing the tablet to gradually dissolve before swallowing. In this way you get the prolonged action of No-to-bac upon the secretive glands of the mouth. During treatment the bowels should be kept open. One or two free actions EVERY day will greatly assist the medicine in expelling the nicotine from the system. CONTINUE THE USE OF NO-TO-BAC until the desire for tobacco and its effects upon the system are completely eradicated. Patients writing about their case and asking advice, etc., must inclose stamp for reply. Address THE STERLING REMEDY COMPANY, Indiana Mineral Springs, Warren Co., Ind. Chicago office, 45 and 47 Randolph St."

This box is sealed with a sealing label of reddish pink, having upon it the complainant's name in script letters, and the following printed thereon: "Not

genuine unless signed by The Sterling Remedy Co. Chicago, New York, Montreal. Laboratory, Indiana Mineral Springs, Ind."

The appellant at one time used a wire rack, adapted to hold three boxes arranged in a triangular form together with a show card; these racks being used principally by retail dealers in the article. It also used and distributed a booklet containing descriptive matter calling attention to the article and to its merits as a cure, and containing fac simile representations in black and white of the box in which the remedy was packed, and of the imprint and of the label for sealing and of the wire rack.

The answer of the appellee admits that since the 1st day of July, 1894, it has prepared and put upon the market and sold a certain other alleged remedy or cure for the so-called "tobacco habit," which preparation is put up and sold in an ordinary tin tobacco box of the same form and size as that of the complainant. The article is also in the form of a tablet or lozenge, of dark brown or black color, somewhat smaller than the lozenge manufactured by the complainant, and of less weight, and without any trade-name thereon. The defendant's lozenge has a strong odor of licorice; the complainant's lozenge is nearly or quite odorless. The imprint of the label upon the defendant's box is green upon a white ground. Upon the top of the box is printed the following:

"BACO-CURO. Trade-Mark. A SCIENTIFIC, RELIABLE, AND HARMLESS CURE FOR THE TOBACCO HABIT IN EVERY FORM. It builds up the system, enriches the blood, tones up the stomach, and increases the appetite and digestive power. It cures tobacco dyspepsia that so many tobacco users suffer with. Makes weak, nervous men strong and vigorous. Good, sound, refreshing sleep and a decided gain in weight and general health follows the first few days' use. We guarantee to cure any case with from one to three boxes. Price \$1.00. Prepared only at the laboratory of EUREKA CHEMICAL & MFG. CO., La Crosse, Wis., U. S. A. Read bottom of box."

Upon the reverse side are the following directions:

"DON'T STOP TOBACCO when you begin taking a cure, AND DON'T BE IMPOSED UPON by buying a remedy that requires you to do so. Any person can stop short on tobacco, and take a piece of gum or a cough drop in his mouth, every hour or two, as a substitute, and by keeping the bowels open, to more quickly work the nicotine out of the system, can practically cure himself, as well as by taking some so-called cures that require this mode of treatment. But it requires a strong will power to stay cured, as you always remember tobacco with a relish, and it will take years to outgrow the desire for it. BACO-CURO does not require you to stop tobacco when you begin the treatment. IT WILL NOTIFY YOU WHEN TO STOP. Your desire for tobacco will cease, and it causes you to remember it with disgust, not a relish, as other so-called cures do. You don't care for tobacco any more than before you commenced using it. BACO-CURO does not rely upon your own will power to cure you, it does its work unaided, and leaves your system as pure and free from nicotine as the day before you took your first chew or smoke. BACO-CURO is compounded after the formula of an eminent German physician, who has prescribed it in his private practice since 1872 to hundreds of cases without a single failure, when directions have been followed. This formula is controlled exclusively by us in North and South America. Prepared only at the laboratory of EUREKA CHEMICAL & MFG. CO., La Crosse, Wis. U. S. A. Directions inside."

The sealing label on the box has the following, the name being in script, but much heavier in design than that on the sealing label of the appellant: "None genuine without *Eureka Chemical & Mfg. Co.* This signature."

There was given considerable evidence tending to show that in the transactions between the defendant and its agents circulars similar in character to those of the complainant were used, and contracts with agents were of a similar nature with those used by the complainant. The hearing was had upon stipulation that the cause should be presented upon bill and answer "and upon such affidavits as the parties might see fit to produce, except that—First, no affidavits or testimony of any kind are to be produced on either side tending to show specific instances of failure to comply with the respective guaranties of the parties; and, second, that no affidavits or testimony of any kind shall be introduced tending to show that either of the remedies, that of the complainant or that of the defendant, is what is called a 'quack medicine,' or in relation to

the character or efficiency of such remedies." Copies of the affidavits were to be served upon the opposite parties by a specified date. At the hearing a large number of ex parte affidavits were presented, and the bill was dismissed upon its merits.

W. D. Tarrant and Thomas Kroushage, for appellant.

G. M. Woodward, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). We entertain no doubt that the term "No-To-Bac" is an arbitrary term which may be appropriated as a trade-mark and that it has been so appropriated by the appellant here. Nor do we doubt that the term "Baco-Curo" is also an arbitrary term, which may be, and has been, appropriated by the defendant. We do not think that these terms are idem sonans, or that the one infringes the other. The test is whether the supposed infringing article is so dressed that it is likely to deceive persons of ordinary intelligence, in the exercise of the slight care ordinarily bestowed, purchasing an article, to mistake one man's good for the goods of another. It is elementary that one may not exclusively appropriate the size and shape of a package. The ordinary form of a tobacco box in common use in many portions of the country was appropriately adopted by complainant for a supposed remedy for the tobacco habit, but the complainant has no right to its exclusive use. The fact of such use by another in the manufacture and sale of a similar compound for the like purpose may be a circumstance which enters into the question of unfair trade, which we are not now considering. The labels here are prominently dissimilar in color, and are not likely to be mistaken by one who has been accustomed to the use of the remedy. The same is true with respect to the tablets or lozenges. They are in marked contrast in color, size, thickness, weight, odor, and lettering. Indeed, there is no evidence in this record, nor is it seriously contended, that any one who had used the one compound had ever been misled, or is likely to be misled, to purchase the other. This is met on the part of the appellant by the suggestion that the article is a guaranteed cure for a particular purpose, and, once employed, it will never be employed again, whether it cures or not; that its use as a remedy, if it be all that is claimed for it, does not conduce to repeated sales to the same person; and that from its nature the public loses the opportunity to familiarize itself with the appearance of the package. This may be true, and yet the fact could not alter the law of trade-marks, in which light we are now considering the case. The distinctions here are so glaring that we are unable to say that a proposing purchaser exercising only the slight care which is required would be likely to select one article for the other. Nor does the evidence establish that a purchaser has been so mistaken.

In *Pillsbury v. Mills Co.*, 24 U. S. App. 395, 12 C. C. A. 432, and 64 Fed. 841, we had occasion to consider at length the subject of unfair competition in trade, and to declare the principle upon which the doctrine rests. We there said that no man had a right to dress himself in the colors adopted by another for the purpose of palming off his goods as the goods of that other. It only remains to determine whether the evidence here brings this case within the principle declared.

It is perhaps unfortunate that this cause should have been submitted by stipulation upon *ex parte* affidavits, which are far from satisfactory. *Standard Elevator Co. v. Crane Elevator Co.*, 9 U. S. App. 556, 559, 6 C. C. A. 100, and 56 Fed. 718. The part of the stipulation so providing does not seem to be characterized with the caution and worldly wisdom which marks the remainder of the stipulation that no evidence should be introduced tending to show that the so-called "remedies" in question are known as "quack medicines," or tending to show the efficiency of these remedies. We have carefully considered the evidence, and are not satisfied that within the doctrine established there can here be said to be unfair competition in trade. Having reached the conclusion that the alleged infringing article is not likely, by reason of similarity in dress, to be taken by an intending purchaser for the tablets sold by the appellant, there remains but little to be said upon this branch of the case, because deception of the public must be present, and is the chief element in the problem. No one, of course, has the right unfairly to appropriate another's business and good will. It is, however, true that competition is the life of trade, and that legitimate competition should be encouraged for the public good. The evidence here establishes that the form of this box is in use in the trade of the druggist for a variety of articles; that the easel or rack which was adopted was likewise in general use for the display of articles, and that the use of it had been discontinued by the complainant. There would seem to have been a few instances of confusion, such as the sending of letters by druggists intended for one party to the other. Such mistakes occur in every business, and are not sufficient to indicate that there was here intentional or actual piracy upon the rights of the complainant. That a retail dealer might supply an intending purchaser, ignorant of the peculiar dressing of either, with the one remedy when the other was demanded or desired, does not establish a case of piracy. That might result from the act, ignorant or willful, of the retail dealer, without the knowledge or concurrence of the proprietor of the article; or it might come about from inattention by the proposing purchaser in respect to the particular manufacture he desired. With respect to articles placed upon the market for sale, it is only when the one article is dressed so as to represent the other, and to deceive a proposing purchaser as being that other, that there can be said to be a case of unfair trade. It would not be profitable to enter into any extended examination of this testimony. It is sufficient to say that both parties have the right to embark in this trade; each has the right to put forth every legitimate effort to increase its sales, even at the expense of its rival, so long as it refrains from representing itself as the rival concern, or from representing its goods as the goods of the rival concern. There is no evidence that the defendant has ever so represented or sold its goods, or that it has "knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchasers." It rests its right to patronage upon the supposed efficiency of its compound, and because of the fact that, in contradistinction to its rival, it insists that during the time of taking the supposed remedy the patient should not discontinue the use of tobacco; the complainant requiring that he should. In this, we think, the defendant has the decided advantage, because

it does not insist upon the exercise of the will, but cures, or professes to cure, in despite of the will. Therein it strikes "a great popular chord," in that it enables one to indulge a habit of which he desires to be rid while partaking of the cure. An easy road to health will always be as popular as an easy road to wealth. This consideration, coupled with judicious advertising, may possibly account for the alleged large sales of the remedy of the appellee and the alleged diminished sales of the remedy of the appellant. At all events, this is a distinguishing characteristic claimed for the remedy of the appellee that brings into bold relief the fact that the appellee is a rival of the appellant, and not a counterfeiter of its goods. We think the court below was not in error in dismissing the bill.

Decree affirmed.

TRUMAN v. DEERE IMPLEMENT CO.

TRUMAN v. HOLMES et al.

(Circuit Court, N. D. California. February 23, 1897.)

1. PATENTS—CONSTRUCTION.

A patentee cannot insist on the construction of his patent which will include what he was expressly required to abandon as a condition of the grant, even if this takes away a part of the real invention.

2. SAME—BREAKING-CARTS.

The Putnam patent, No. 232,207, for an improvement in breaking-carts, is confined by the language of the claim and the patentee's acquiescence in amendments required by the patent office to a cart in which the foot-board is sustained below the shafts by straps passing beneath the axle.

Copy of file wrapper and contents in the matter of the patent granted De Witt C. Putnam, September 14, 1880, No. 232,207:

Department of the Interior, United States Patent Office.

To All Persons to Whom These Presents Shall Come, Greeting: This is to certify that the annexed is a true copy from the records of this office of the file wrapper and contents in the matter of the letters patent granted De Witt C. Putnam, September 14, 1880, Number 232,207, for improvement in breaking-carts. In testimony whereof I, John S. Seymour, commissioner of patents, have caused the seal of the patent office to be affixed this 6th day of September, in the year of our Lord one thousand eight hundred and ninety-three, and of the independence of the United States the one hundred and eighteenth.

[Seal.]

John S. Seymour, Commissioner.

Petition.

To the Commissioner of Patents: Your petitioner, De Witt C. Putnam, of Petaluma, Sonoma Co., Cal., prays that a patent may be granted to him for the invention set forth in the annexed specification. And he further prays that you will recognize Dewey & Co., San Francisco, Cal. (consisting of A. T. Dewey, W. B. Ewer, and Geo. H. Strong), and A. H. Evans, of Washington, D. C., as his attorneys, hereby appointed to alter or amend the said specification, and to receive the letters patent when issued.

D. W. C. Putnam.

Oath.

City and County of San Francisco, State of California—ss.: On this twentieth day of April, 1880, before the subscriber, personally appeared the within named De Witt C. Putnam, and made solemn oath that he verily believes himself to be the original, first, and sole inventor of the breaking-cart herein described; that he does not know or believe that the same was ever before known

or used, and that the invention described and claimed in the annexed specification has not been patented to him, nor with his knowledge or consent, in any foreign country, and that he is a citizen of the United States.

[L. S.]

J. H. Blood, Notary Public.

Specification.

To All Whom It May Concern:

Be it known that I, De Witt C. Putnam, of Petaluma, county of Sonoma, and state of California, have invented an improved breaking-cart, and I hereby declare the following to be a full, clear and exact description thereof:

My invention relates to certain improvements in that class of vehicles known as "breaking-carts," in which young colts are broken to harness.

Erase
&
insert
"A"

Carts of this description are usually provided with very long shafts, and the seat is placed on springs immediately over the axle, or at such a distance back that the driver is not in danger of being kicked by a fractious animal. In this class of vehicles the foot-board is usually secured to the axle, while the seat is on springs, and it is therefore uncomfortable to ride upon, since, while the body of the occupant may move up and down, his feet must remain stationary.

My improvement consists in so attaching the foot-board to the vehicle that it shall move in unison with the seat, the same spring which supports the seat serving as a spring for the foot-board, as is more fully described in the accompanying drawings, in which Fig. 1 is a longitudinal section of my device; Fig. 2 is a bottom view; Figs. 3 and 4 are modifications.

Breaking-carts usually have two wheels A only, and the springs B are secured both to the axle C and the shafts D, said shafts being secured on the springs in the manner shown.

In order to attach the foot-board E to the wheels, I place metallic straps or bands F in a proper position to hold the foot-board, connecting these straps with the shafts and seat, and not with the axle.

In Figs. 1 and 2 I have shown the straps connected with the shafts at the rear ends and forward of the whiffletree-bar.

The seat and foot-board have therefore a corresponding vertical motion, the shafts being connected with the springs, as described.

Figs. 3 and 4 show modifications of my device. In Fig. 3 the straps F have their forward ends secured on the shaft and their rear ends with the seat itself, the straps passing in front of the axle instead of to the rear, as shown in Fig. 1. In Fig. 4 I have shown the strap F in a single piece passing transversely under the foot-board, the two ends being connected with the opposite shafts.

In either case the operation is the same, the foot-board being sustained by the springs, the same as the seat is, and independent, as far as its connections are concerned, from the axle of the vehicle. This relieves the rider from the disagreeable jar incident to this class of vehicles, where the foot-boards are connected with the axles, as is usually done.

Having thus described my invention, what I claim as new and desire to secure by letters patent is—

The improvement in breaking-carts, consisting in suspending the foot-board E by means of straps or hangers F from the shafts, seat, or that portion of the vehicle connected with the springs alone, whereby the seat and foot-board having a common vertical movement substantially as and for the purpose herein described.

In witness whereof I have hereunto set my hand.

D. W. C. Putnam.

Witnesses:

S. H. Nourse.

Frank A. Brooks.

Original Specn.

Cancelled per "A."

(Endorsements:) Patented File. U. S. Patent Office, May 22, 1880.

A. W., 6-2-80.

Department of the Interior.

United States Patent Office, Washington, D. C., June 2nd, 1880.

De Witt C. Putnam,	} Breaking-Cart.
Care A. H. Evans & Co.,	
Present.	

Filed May 22, 1880.

#10,810.

Room No. 87.

The patent of Jesse Winecoff, Oct. 17, 1871, No. 119,956 (Sulkies) substantially answers the claim.

It is therefore rejected.

Sanders, Examiner.

Chandler, Asst. Exr.

(Endorsements:) Office Letter. June 2, 1880. Patented File.

In the matter of the application of De Witt C. Putnam. Breaking-Cart. Filed ——. To the Hon. Comr. of Patents—Sir: I hereby amend by erasing the entire specification and substituting the following:

Amended Specification.

To All Whom It May Concern:

Be it known that I, De Witt C. Putnam, of Petaluma, county of Sonoma, and state of California, have invented an improved breaking-cart, and I hereby declare the following to be a full, clear and exact description thereof:

My invention relates to certain improvements in that class of vehicles known as breaking carts, in which young colts are broken to harness.

Carts of this description are usually provided with very long shafts, and the seat is placed on springs immediately over the axle, or at such a distance back that the driver is not in danger of being kicked by a fractious animal. In this class of vehicles the foot-board is usually secured to the axle, while the seat is on springs, and it is, therefore, uncomfortable to ride upon, since while the body of the occupant may move up and down his feet must remain stationary.

My improvements consist in so attaching the foot-board to the vehicle that it shall move in unison with the seat, the same spring which supports the seat serving as a spring for the foot-board, as is more fully described in the accompanying drawings, in which

Fig. 1 is a longitudinal section of my device.

Fig. 2 is a bottom view.

Breaking-carts usually have two wheels A only, and the springs B are secured both to the axle C and the shafts D, said shafts being secured on the springs in the manner shown.

In order to attach the foot-board E to the vehicle, I place metallic straps or bands F in a proper position to hold the foot-board, connecting these straps with the shafts and seat, and not with the axle. I have shown the straps connected with the shafts at the rear ends of and forward of the whiffletree bar.

It will be seen by this construction that the rear ends of the shafts and the seat are supported upon the spring B, while the straps F pass beneath the axle and are bent up so that their rear and their front ends are secured to the shafts at points behind and in front of the axle, while the central portion does not touch it at all.

The front board E, with its turned-up front portion, is then secured upon the bottom and front portions of the straps F. Being thus entirely independent of any direct connection with the axle, it will have the same movement imparted to it by the action of the spring that the shafts have, and it will have none of the unpleasant jar that a stationary foot-board or one supported from the axle will have, while the arrangement of the straps parallel with the shafts facilitates the attachment of the transverse foot-board and makes a strong construction.

Having thus described my invention, what I claim as new and desire to secure by letters patent is: the braces or straps F, having their ends secured to the shafts before and behind the axle, while the central portion extends beneath the axle and parallel with the shafts, and is adapted to support the transverse foot-board E, substantially as and for the purpose herein described.

I also amend by cancelling the drawing on file and substituting the new drawing filed herewith.

De Witt C. Putnam,
By A. H. Evans, Att'y.

(Endorsements:) "A" July 19, 1880. Amended Specn. Patented File. U. S.
Patent Office, July 19, 1880.

10810

1880.

40

No. 232,207.

Of De Witt C. Putnam,
County of Petaluma,
State of Sonoma,
California,
"Breaking-Cart."

Rec'd May 22, 1880.

Petition " " "

Affidavit " " "

Specification " " "

Drawing " " "

Model Not required

Cert. dep. \$15, May 22, 1880.

Cash

Add'l fee Cert. \$20, Aug. 25, 1880.

" " Cash

Examined July 22, '80, Sanders.

Issued July 23, 1880, Arthur W. Crossley.

Patented Sept. 14, 1880.

Circular July 23, 1880.

Dewey & Co., San Francisco, Cal.
A. H. Evans, Present.

1880.
Contents.

Application papers.

1. Ref. June 2, 1880.

2. "A" July 19, 1880.

21. Carriages and Wagons. Sulkies.

D. S.

Title. Improvement in Breaking-Carts.

Fig. 1.

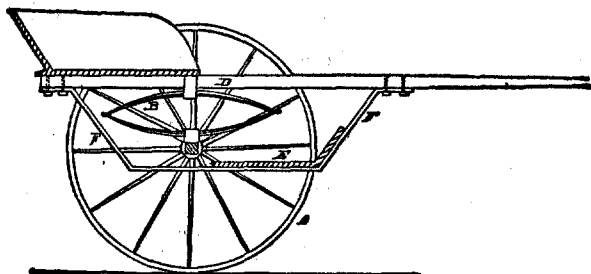
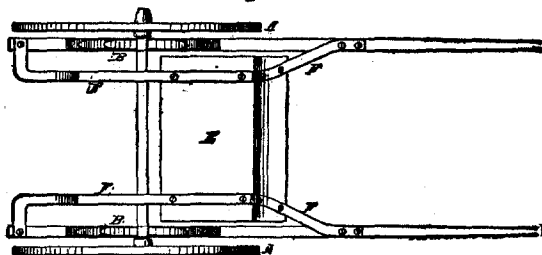


Fig. 2.



United States Patent Office.

De Witt C. Putnam, of Petaluma, California.

Breaking-Cart.

Specification forming part of letters patent No. 232,207, dated September 14, 1880; application filed May 22, 1880. (No model.)

To All Whom It May Concern:

Be it known that I, De Witt C. Putnam, of Petaluma, county of Sonoma, and state of California, have invented an improved breaking-cart; and I hereby declare the following to be a full, clear, and exact description thereof:

My invention relates to certain improvements in that class of vehicles known as "breaking-carts," in which young colts are broken to harness.

Carts of this description are usually provided with very long shafts, and the seat is placed on springs immediately over the axle, or at such a distance back that the driver is not in danger of being kicked by a fractious animal. In this class of vehicles the foot-board is usually secured to the axle, while the seat is on springs, and it is therefore uncomfortable to ride upon, since, while the body of the occupant may move up and down, his feet must remain stationary.

My improvements consist in so attaching the foot-board to the vehicle that it shall move in unison with the seat, the same spring which supports the seat serving as a spring for the foot-board, as is more fully described in the accompanying drawings, in which—

Figure 1 is a longitudinal section of my device. Fig. 2 is a bottom view.

Breaking-carts usually have two wheels, A, only, and the springs B are secured both to the axle C and the shafts D, said shafts being secured on the springs in the manner shown.

In order to attach the foot-board E to the vehicle, I place metallic straps or bands F in a proper position to hold the foot-board, connecting these straps with the shafts and seat, and not with the axle. I have shown the straps connected with the shafts at the rear ends of and forward of the whiffletree-bar.

It will be seen by this construction that the rear ends of the shafts and the seat are supported upon the spring B, while the straps F pass beneath the axle and are bent up, so that their rear and their front ends are secured to the shafts at points behind and in front of the axle, while the central portion does not touch it at all. The foot-board E, with its turned-up front portion, is then secured upon the bottom and front portions of the straps F. Being thus entirely independent of any direct connection with the axle, it will have the same movement imparted to it by the action of the spring that the shafts have, and it will have none of the unpleasant jar that a stationary foot-board or one supported from the axle will have, while the arrangement of the straps parallel with the shafts facilitates the attachment of the transverse foot-board and makes a strong construction.

Having thus described my invention, what I claim as new, and desire to secure by letters patent, is—

The braces or straps F, having their ends secured to the shafts before and behind the axle, while the central portion extends beneath the axle and parallel with the shafts, and is adapted to support the transverse foot-board E, substantially as and for the purpose herein described.

In witness whereof I have hereunto set my hand.

D. W. C. Putnam.

Witnesses:

S. H. Nourse,

Frank A. Brooks.

John L. Boone, for complainant.

Chas. E. Nougues and Dorn & Dorn, for respondents.

McKENNA, Circuit Judge (orally). This is a suit for the infringement of a patent for breaking-carts. The patent was issued September 14, 1880, to De Witt C. Putnam. The original application was made May 22, 1880. It was rejected June 2d, in the same

year, the patent office holding that a patent to one Jesse Winecoff, October 17, 1871 (No. 119,956), for sulkies, substantially answered the claim. This patent has been introduced in evidence, and consists of a two-wheeled vehicle of the sulky order, somewhat high, with a foot-board depending from its body. The foot-board is so attached to the vehicle that it moves in unison with the seat. The inventor, on this action of the patent office, amended his specification and claim, and it is necessary to compare them with the originals to ascertain what he gave up in order to secure his patent. I will not stop to read the original specifications, but will attach a copy of the file wrapper to the opinion. It will be observed upon inspection of the file wrapper that the remaining amendments made substantial omissions from the original. In the original he illustrated his invention in four ways by four figures, and gave descriptions of these figures. Describing 1 and 2, the applicant said:

"In Figures 1 and 2 I have shown the straps connected with the shafts at the rear end and forward of the whiffletree-bar."

Describing the result, he said:

"The seat and foot-board have therefore a corresponding vertical motion, the shafts being connected with the springs as described."

Describing Figs. 3 and 4 of the original specifications, he said:

"Figs. 3 and 4 show modifications of my device. In Fig. 3 the straps F have their forward ends secured on the shaft, and their rear ends with the seat itself, the straps passing in front of the axle instead of to the rear, as shown in Fig. 1. In Fig. 4 I have shown the strap F in a single piece, passing transversely under the foot-board, the two ends being connected with the opposite shafts. In either case the operation is the same, the foot-board being sustained by the springs, the same as the seat is, and independent, as far as its connections are concerned, from the axle of the vehicle. This relieves the rider from the disagreeable jar incident to this class of vehicles where the foot-boards are connected with the axles, as is usually done."

In the amendment to the specifications, Figs. 1 and 2 are retained, but Figs. 3 and 4 are omitted, he stating, "I also amend by canceling the drawing on file and substituting the new drawing filed herewith." Figs. 3 and 4 illustrate different constructions from Figs. 1 and 2. They illustrate the very constructions that are now contended for. The plaintiff, however, contends that those forms were not given up, and that his right to claim them is established by the decision of the court of appeals in the case of *Holmes v. Truman*, decided by the circuit court of appeals of this circuit, and reported in 14 C. C. A. 517, 67 Fed. 542. The case was at law, and was tried before a jury, I presiding at the trial. Among other things, I instructed the jury as follows:

"When a patentee has modified his claim in obedience to the requirements of the patent office, he cannot have for it a more extended construction, which has been rejected by the patent office. A patentee is not at liberty to insist upon a construction of his patent which will include what he was expressly required to abandon and disavow as a condition of the grant. If, therefore, you find from all the evidence that the application for the patent sued upon, as originally filed in the patent office, was rejected upon the ground that said claim was anticipated by the Winecoff patent, defendants' Exhibit 5, and if

you further find that the applicant, D. C. Putnam, acquiesced in the rejection of said claim, and then modified and amended said claim so as to read as it now reads in the patent sued upon, then you are instructed that the plaintiff's patent must not now be construed to include generally the suspending of the foot-board by means of straps or hangers from the shafts, whereby the seat and foot-board have a common vertical movement, but it must be construed to include only the mode of suspension of the straps F described and claimed in the patent."

And again:

"I do not think it is material whether the strap is fastened directly to the shaft, but it must go under the axle."

It is claimed, however, as I have said, that the limitation put upon the claim by these instructions was removed by the court of appeals. The verdict in the case in the circuit court was for the plaintiff, Truman. Holmes took the case to the court of appeals, and assigned as error that the evidence showed that plaintiff's improvement was without invention, and that the court should have so instructed the jury on defendants' motion. Passing on the point, Judge Gilbert, speaking for the court, said:

"Upon the writ of error it is contended that the court erred in refusing, at the conclusion of the testimony in the case, to instruct the jury to return a verdict for the defendants in the action, for the reason that it was conclusively shown that the plaintiffs' improvement was without invention, and that the defendants had not infringed the same. The breaking cart which is the subject of the plaintiffs' patent is a low-bodied cart, in which the springs are supported directly upon the axle, with the shafts placed directly upon the springs. These shafts support the seat or cart body, and a foot-board, upon which the driver rests his feet, is fastened to and supported by a metal strap on each side, which is attached to the shafts in front of the axle, extends downward at an angle, and is then bent so as to pass back underneath the axle, parallel with the shaft, and is then bent upward, and its rear end is fastened to the shafts behind the axle. By this construction the foot-board moves vertically in unison with the seat and shafts. The advantage of this construction is that the seat is low with reference to the axle, and the driver sits easily and quietly, without deranging motion to the body, since the foot-board and the seat move in unison. With reference to this advantage, the evidence is that there were, before the plaintiffs' invention, but two classes of two-wheeled vehicles. One was the common butcher's cart, in which the seat is built high above the shafts, so that the feet of the driver rest on a floor, which is entirely above the springs. It was obviously impossible to construct a low cart in this manner. The other class was one in which the foot-rest was secured upon the axle or the shafts, while the seat was supported upon the springs. In this class of carts the body of the driver would move with the springs, while his feet would remain stationary. The patentee conceived the idea of making a low-seated cart, with the foot-rest supported below the shafts, and the axle between the springs and the seat, so that the axle was placed above the foot-rest, but beneath the springs and the seat. He placed the shafts on the springs, and the seat on the shafts, and supported the foot-rest underneath the axle by his metal straps. The claim of the patent is as follows: 'The brace or straps, F, having their ends secured to the shafts before and behind the axle, while the central portion extends beneath the axle, and parallel with the shafts, and is adapted to support the transverse foot-board, E, substantially as and for the purpose herein described.' It is impossible for the court to say, with reference to the testimony, that the jury should have been instructed that there was no invention in the plaintiffs' cart. The record shows that the cart was novel in construction, that it was useful, and that it went into immediate and general use. Counsel for the plaintiffs in error contend that there was nothing novel in the idea of suspending a foot-board in such a way that its vertical movement would be com-

mon to that of the seat, and that a particular and specific improvement in the means of suspension was all that the patentee could claim; and they argue that the iron strap of the patent as a device for holding the foot-board was not an invention, that the idea of such a strap was old, and that it was well known that two such straps, when hung parallel, would sustain anything laid across them. *This view of the patent leaves entirely out of sight the essence of the plaintiffs' invention, which is not merely the fact that the foot-board was hung beneath the shafts by iron braces, but that a cart was constructed with the seat directly above the springs and axle, thereby securing a low seat, with its advantages in connection with a breaking-cart, and a foot-rest which should move in unison with the same. In other words, it was the arrangement of the foot-board with reference to the other parts which was new.*"

The italics are mine, and I use them because on that portion of the opinion complainant relies for his contention. It is manifest that we may not determine the court's opinion from any particular passage. The whole opinion must be considered, and the question which was passed on. The only question involved was whether the construction of the strap, or its manner of fastening to the shafts, was essential. I held at the trial that it was not, but that the strap must go under the axle, and the court of appeals say:

"But it is a fair interpretation of plaintiffs' patent to say that they are protected in the use of a cart in which the shafts are placed directly upon the springs, and the foot-board is sustained beneath the axle by straps; and it is unimportant whether the straps are attached to any particular place along the shafts or to a cross-bar between the shafts, or whether they are made of one piece or of two or three pieces."

This language defines exactly the invention,—disposes of clearly the unimportant variations from it which were claimed as essential. Counsel for complainant, however, contends that the phrase, "and the foot-board is sustained beneath the axle by straps," means lower than,—nearer to the ground; securing a low cart. But this would certainly not be the ordinary meaning of the word, and may be absolutely an incorrect use of the word "beneath," and cannot be attributed to the learned judge who delivered the opinion of the court. "Beneath," as a preposition, means "lower in place, with something directly over or under." Webst. Dict. It follows, therefore, that the construction of the patent confines it to a cart with straps beneath the axle, and that the carts of the respondent, not being of that construction, do not infringe.

It is complained by complainant's counsel that this construction takes from complainant a part of his invention. Without disputing this, it may be said that it cannot be helped. This is often the result of a defective or insufficient claim. This hardly needs illustration. If so, it will be found in *Cramer v. Fry*, 68 Fed. 201, and cases there cited. In one of these it was said by Mr. Justice Bradley:

"When a claim is so explicit, the courts cannot alter or enlarge it. If the patentees have not claimed the whole of their invention, and the omission has been the result of inadvertence, they should have sought to correct the error by a surrender of their patent and an application for a reissue. * * * But the courts have no right to enlarge a patent beyond the scope of its claim as allowed by the patent office or the appellate tribunal to which contested applications are referred. When the terms of a claim in a patent are clear and distinct (as they should always be), the patentee, in a suit brought upon the patent, is bound by it. He can claim nothing beyond it."

The bill will therefore be dismissed.

I think the same ruling will be applied to the case of *Truman v. Holmes*.

Mr. Boone: Did you honor take into consideration the fact that the testimony shows that they also did make other carts where it did pass under the axle? There is testimony to that effect.

The Court: It is new to me if there is.

Mr. Nougues: There is no testimony to that effect.

Mr. Boone: There is one branch of the case where there is testimony to show they had made carts so.

The Court: I did not so understand it. Look it up, and let me see it. I will reserve my opinion until I see what effect that has.

NOTE. On February 25, 1897, the decrees ordered in the foregoing opinion to be entered were set aside by order as follows:

"McKENNA, Circuit Judge. The decrees in these cases are set aside, because, in addition to the points decided, there are other points in the brief, which, by inadvertence, did not receive the deliberate consideration and judgment of the court."

The orders of submission in both cases were then vacated, and the cases restored to the calendar. On March 26, 1897, both cases were reargued before MORROW, District Judge, and the bill in each case was ordered dismissed.

DIAMOND MATCH CO. v. OHIO MATCH CO. et al.

(Circuit Court, N. D. Ohio, E. D. April 16, 1897.)

No. 5,591.

1. PATENTS—ACTIONS ON SEVERAL PATENTS—MISJOINDER.

A suit can be maintained on several patents only when the inventions covered thereby are embodied in the alleged infringing machine, process, manufacture, or composition of matter; and where the averment is that defendant's machines embody "either the whole, or one or more, of the said inventions" contained in the patent sued on, the bill is demurrable.

2. SAME—MISJOINDER OF DEFENDANTS.

A joinder of defendants alleged to be infringers is bad, unless they are alleged to be joint infringers.

3. SAME—PLEADING.

A bill which fails to show that the invention of the patent sued on was not patented or described in some printed publication in this or some foreign country prior to the patentee's alleged invention thereof is demurrable.

Edwin Walker and Charles Colahan, for complainant.

Kline, Carr, Tolles & Goff and E. A. Angell, for respondents.

SAGE, District Judge. This case is before the court upon three demurrers to the bill. The grounds of demurrer are:

First, that the bill sets up three several letters patent of the United States, relating to several alleged inventions, which are entirely distinct and separate from each other; that the said letters patent contain, in the aggregate, 58 claims, relating to alleged inventions, which are disassociated and disconnected one from the other; that the averment as to infringement in the bill is, in sub-

stance, that the respondents have made, and are using and selling, numbers of the said match machines, embodying in each of them "either the whole, or one or more, of the said inventions and improvements contained in said letters patent Nos. 416,888, 528,457, and 389,435."

The second ground of demurrer is misjoinder; it nowhere being alleged in the bill that the respondents K. A. Young and Charles W. Steele have any connection whatever, as officers or otherwise, with the defendant corporation, or are connected in any way with the other respondents named therein.

These grounds of demurrer are both well taken. A suit may be brought upon several patents, but it can be maintained only when the inventions covered by those patents are embodied in the infringing process, machine, manufacture, or composition of matter. *Seymour v. Osborne*, 11 Wall. 516; *Bates v. Coe*, 98 U. S. 48; and a number of cases decided by the circuit courts, and reported in the *Federal Reporter*, to which reference may be found in note 1 to section 417, *Walk. Pat.* (3d Ed.).¹

The averment in the bill is in the alternative, which is bad. It does not appear upon the face of the bill that the three patents sued upon are embodied in the respondents' alleged infringing machine.

As to the second ground of demurrer, there is an averment that the respondents named infringe, but no averment that they are joint infringers with the other defendants. That objection, therefore, is well taken, and the demurrer is sustained upon both grounds.

The second demurrer is, in substance, the same as the first ground of the first demurrer, and therefore need not be further referred to.

The third demurrer is upon the ground that it nowhere appears in the bill that the letters patent sued upon were not patented or described in some printed publication in this or some foreign country prior to the alleged invention thereof. That objection is well founded, and is supported by *Overman Wheel Co. v. Elliott Hickory Cycle Co.*, 49 Fed. 859; also, by *Hanlon v. Primrose*, 56 Fed. 600; *Goebel v. Supply Co.*, 55 Fed. 825; and *Hutton v. Seat Co.*, 60 Fed. 747. See, also, section 4886 of the Revised Statutes of the United States.

The demurrers will be sustained.

¹ *Telegraph Co. v. Chillicothe*, 7 Fed. 351; *Nellis v. Manufacturing Co.*, 18 Fed. 451; *Lillendahl v. Detwiller*, 18 Fed. 177; *Consolidated Electric Light Co. v. Brush-Swan Electric Light Co.*, 20 Fed. 502; *Griffith v. Segar*, 29 Fed. 707.

BOWERS DREDGING CO. et al. v. NEW YORK DREDGING CO. et al.

(Circuit Court, D. Washington, W. D. March 24, 1897.)

1. PATENT INFRINGEMENT SUITS—PRELIMINARY INJUNCTION—JUDGMENT OF APPELLATE COURT.

On application for preliminary injunction against infringement, a judgment of the appellate court in another action, declaring the patent valid, will be deemed conclusive on the court as to that question.

2. SAME—INVALIDITY OF PATENT—NEW EVIDENCE.

New evidence of the invalidity of a patent which has been declared valid by the appellate court in a prior case, to prevent the granting of a preliminary injunction against its infringement, must be such that, had it been introduced in the prior case, it would probably have produced a different decision.

John H. Miller and Campbell & Powell, for complainants.

R. Percy Wright and E. C. Hughes, for defendants.

HANFORD, District Judge. In the order denying the complainants' application for a provisional injunction, there was reserved to the complainants a right to renew the application upon a further showing, which they have taken advantage of. In support of the new application, it has been shown that since the former hearing (77 Fed. 980) the decision of the United States circuit court for the Northern district of California in the case of *Bowers v. Von Schmidt*, 63 Fed. 572, has been affirmed by the circuit court of appeals (80 Fed. 121), and that a petition for a rehearing has been denied, so that the validity of the several claims of the Bowers patents involved in the present suit have been established by an adjudication and final decree of the court of last resort. The defendants herein still dispute the validity of the claims referred to, on grounds which they allege were not considered in the *Von Schmidt Case*, and the showing in their behalf includes new and additional evidence which they contend is sufficient to prove that the Bowers patents are absolutely void, for the reason that the commissioner of patents had no power to grant the same, and for the further reason that the machinery and apparatus which Bowers claims to have invented was described in patents granted in England, long prior to the date of the alleged inventions of Bowers and of *Von Schmidt*; and they contend that the evidence of anticipation was not introduced in the case referred to, for the reason that in the controversy between Bowers and *Von Schmidt* they each claimed the rights of an original discoverer and first inventor of the machinery for dredging, covered by the Bowers patents, so that both parties were interested in excluding from consideration of the court evidence tending to prove anticipation. I find from the evidence and documents on file that the litigation between Bowers and *Von Schmidt* was carried on in earnest, and, as all the proceedings in the patent office, from the first application made by Bowers until the final issue of the letters patent sued on in this case, were before the court, I must consider that the decision comprehends all questions as to compliance on the part of Bowers with requirements of the patent laws, and the power of the commissioner to issue the

patents in question. Against the defendants in this case that decision is not conclusive, but it strengthens the presumption in favor of the validity of the patents, and as it was rendered by the appellate court for this circuit, which has power to review and reverse the decisions of this court, it is binding and conclusive, until the same questions can be again argued and submitted for decision in that court. In this I wish to be understood to mean that I will not undertake to set up my judgment in opposition to a decision of the circuit court of appeals for the Ninth circuit. If the points were not well argued, nor well understood by the circuit court of appeals, still the only orderly course for persons aggrieved by the decision is to go to the court which rendered it, and show that the decision is wrong, and that it should be overruled.

New evidence in support of the defense of anticipation, to be available in opposition to the granting of a provisional injunction, must be of such force as to have probably produced a different result if it had been introduced in the preceding litigation. I have given due consideration to the showing made by the affidavits and documentary evidence submitted on the part of the defendants, and the voluminous and able arguments by counsel in their behalf, and have been duly impressed; and yet, upon reflection, I regard it as probable that, if the evidence of anticipation had been considered by the court in the Von Schmidt Case as it was by the commissioner of patents, the result would not have been different. Upon the final hearing of this case I will make an analysis of the patents in suit, and the necessary comparisons with the several devices described in the patents and publications which are supposed to be anticipations; but I am not called upon to do so at this time.

The defendants deny that the dredger Oakland, and the apparatus connected therewith, infringes any of the claims of the Bowers patents sued on. They contend that the chief merit of the Bowers machine is in the rotary excavator with inward delivery, which, in operation, loosens and digs up solid material, and also does the work of forcing the material so dug up into the suction pipe, and is, therefore, a carrier as well as a digger; and they claim that the machinery which they are using has an excavator constructed upon principles known long prior to the Bowers invention. Their excavator exerts no force of itself to bring within its own center the material operated upon, or cast it into a receptacle in which to be conveyed to a place of discharge. Here I find the greatest difficulty in the way of a satisfactory decision. The authorities support the rule contended for by the defendants,—that to warrant the granting of a provisional injunction in a patent case, infringement must be proved beyond a reasonable doubt. Now, I am not willing to be convinced of any material fact in the case beyond a reasonable doubt, until the final hearing and a full consideration of the proofs which may be taken according to the methods best calculated to elicit the truth. The practice of having the execution first, and trial afterwards, may simplify proceedings, but must result in hardship to defendants more frequently than otherwise.

I recognize the fact that the time allowed for duration of the Bowers patents is running, and, if he is to have the benefit which the patent laws were intended to confer upon inventors, his rights should be protected during the life of his patent. In a closely contested case several years must necessarily pass before a final adjudication in a court of last resort can be expected. The circuit court of appeals gave to the Bowers patents a broad construction, and held machinery constructed according to the specifications of the Von Schmidt patents to be infringements. In comparing the different machines, it is very difficult for me to find infringement in the Von Schmidt machine, and not in the dredger Oakland. Upon this hearing it has been shown that part of the public work which the defendants have under contract to be done by use of the Oakland, has been completed, and, upon giving a bond for damages, what remains may be completed, so that there is not the danger of serious loss and irreparable injury to the defendants and inconvenience to the public which at the time of the first hearing appeared to exist. It is plain that the complainants are threatened with and likely to suffer irreparable injury by competition in bidding for work during the short time remaining before their rights under the Bowers patents shall expire, if during that time their competitors shall be free to use such a machine as the dredger Oakland. These considerations have led me to the conclusion that justice and equity require the granting of the application for an injunction at this time, with provisions for protecting rights which may be found in the defendants by requiring the complainants to execute a bond with sufficient sureties, conditioned to pay all damages caused by the injunction, if it shall be finally adjudged to have been improvidently issued. The work under contract at Everett and Swinomish slough, however, will be excepted from the injunction if the defendants will give a bond in the sum of \$5,000, conditioned to secure payment of any damages which the complainants, or either of them, may recover on account of said work.

VON SCHMIDT v. BOWERS.¹

(Circuit Court of Appeals, Ninth Circuit. January 4, 1897.)

No. 232.

1. PATENTS—VALIDITY—INFRINGEMENT.

The Bowers patents, No. 318,859 and No. 355,251, for hydraulic dredging machines, construed, and held valid and infringed as to claims 10, 16, 25, 53, 54, and 59 of No. 318,859, and claims 13, 17, and 18 of No. 355,251, by machines constructed under the Von Schmidt patents, No. 277,177, No. 300,333, and No. 306,368. Bowers v. Von Schmidt, 63 Fed. 572, affirmed.

2. SAME—EXTENT OF CLAIMS—PIONEER INVENTION.

The Bowers patents disclose and cover inventions of a pioneer character standing at the head of the art, and their claims are entitled to a broad and liberal construction.

¹ Rehearing denied.

8. SAME—FUNCTIONAL CLAIMS.

Said claims are not functional in form, nor are they claims for results, nor are they limited to any particular form of construction of the elements which make up the combinations, but they are broad generic claims, without any limitation as to the form of construction of the particular elements; and all subsequent machines which employ substantially the same means to accomplish the same result are infringements, notwithstanding the subsequent machine may contain improvements in separate mechanism which go to make up the machine.

4. SAME—AGGREGATION.

The Bowers claims are not mere aggregations, because the result produced is the product of the combination in which each element affects the action of all the others, and all of the elements co-operate in the one result of severing by the forward and side action of the machine the material in place where it is not wanted, and depositing it in another place where it is wanted.

5. SAME—GENERIC AND SPECIFIC CLAIMS.

A pioneer inventor is entitled in his patent to a generic claim, under which will be included every species of the genus; and, in addition thereto, he is entitled in the same patent to make specific claims for one or more species of the genus.

6. SAME—ROTARY EXCAVATOR WITH INWARD DELIVERY.

The terms "inward delivery," in a claim for an excavator, have direct reference to the mechanism itself, and cannot properly be limited to the description or effect of such mechanism. The clear meaning of a claim to "an excavator having inward delivery" or "with inward delivery through itself" is an excavator so constructed as to produce an inward delivery.

7. SAME—VON SCHMIDT EXCAVATOR.

The Von Schmidt excavator shown in his patents Nos. 277,177 and 300,333 is a rotary excavator with inward delivery to a nonrotating suction pipe, within the above definition.

8. SAME—ORIGINALITY OF BOWERS' INVENTION—DATE OF SAME.

Bowers did not derive the ideas contained in his patents from Von Schmidt, or any model or machine of Von Schmidt, but he was the original and first inventor thereof, and the date of such invention is July 13, 1864.

9. SAME—ANTICIPATION—TIME OF.

The defense of anticipation, to be successful, must be established as of a date anterior to the patented invention, not merely prior to the application for or date of the patent.

10. SAME—EARLY DRAWINGS AND MODELS.

As against the defense of anticipation, the patentee may show the fact of invention by drawings, sketches, models, or any other competent proof.

11. SAME—ABANDONMENT—REASONABLE DILIGENCE—STANDARD OF PROOF.

Delay in applying for a patent after an invention is made will not constitute abandonment, where the inventor has used reasonable diligence to perfect the invention, and avail himself of its benefits; and there is no general standard by which such diligence is to be established, but it must be reasonable under all the circumstances of the particular case. Tested by this rule, *held*, that Bowers did not abandon his invention.

12. SAME—FAULT IN ORIGINAL MACHINE.

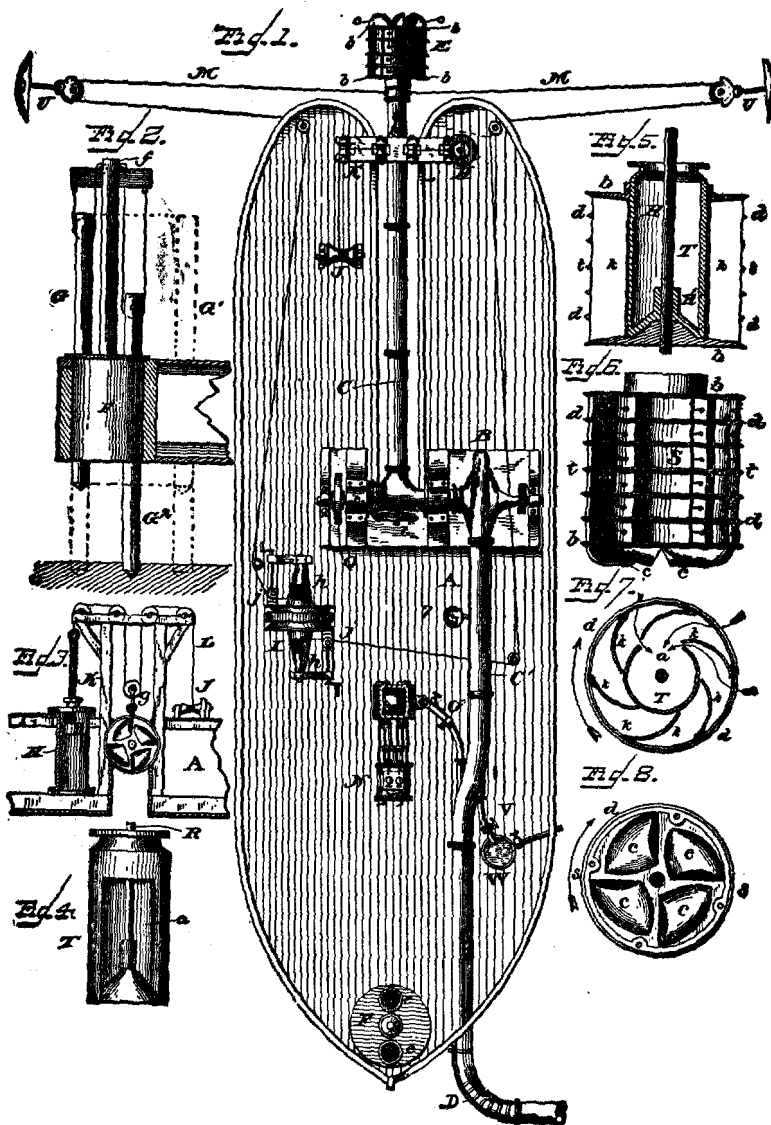
The fact that the first machine built by a patentee, whose patent is sued on, was not successful in operation, is unimportant, and no reason for denying him relief, especially where his subsequent machines have proved successful in practice.

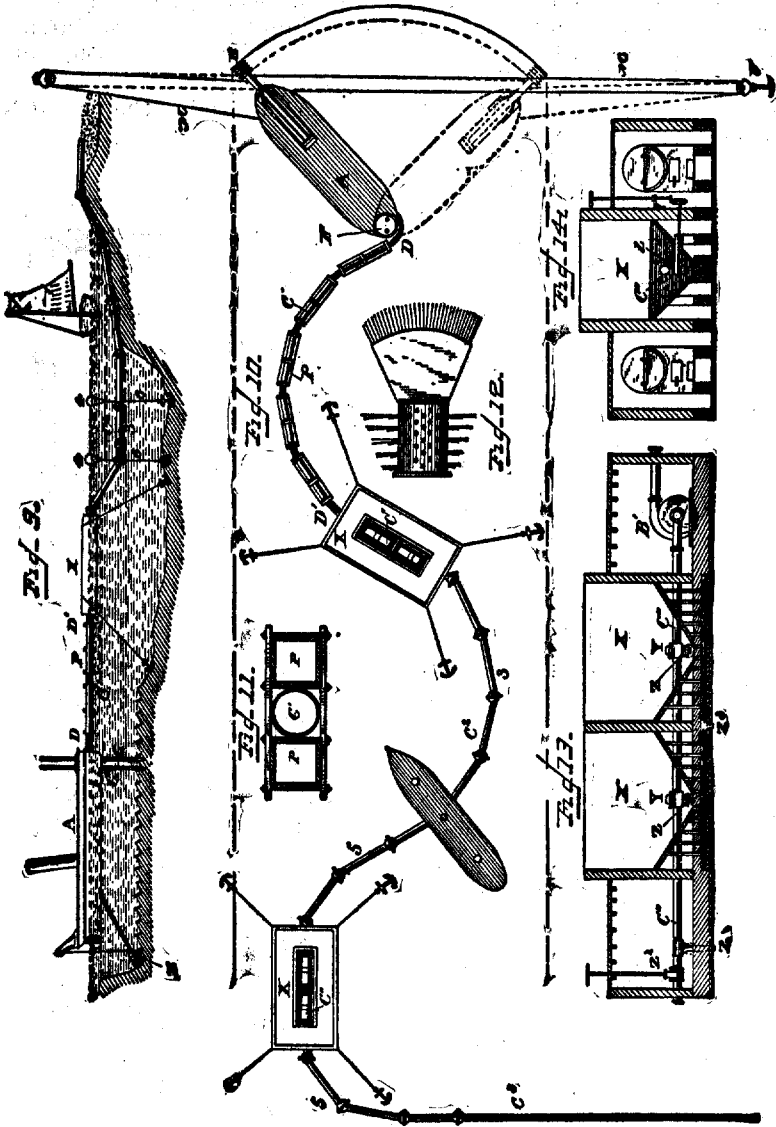
Appeal from the Circuit Court of the United States for the Northern District of California.

This was a suit in equity brought by Alphonzo B. Bowers against Alexey W. Von Schmidt to restrain infringement of letters patent No. 318,859, for "Dredging Machine," and No. 355,251, for "Improvements in Hydraulic Dredging Machines," both issued to Alphonzo B.

Bowers,—the first on May 26, 1885, and the second on December 28, 1886. The lower court sustained both patents, and found infringement of claims 10, 16, 25, 53, 54, and 59 of patent No. 318,859, and of claims 13, 17, and 18 of No. 355,251. 63 Fed. 572.

The following are copies of the drawings annexed to the patent No. 318,859:





The following are copies of the drawings annexed to letters patent
No. 355,251:

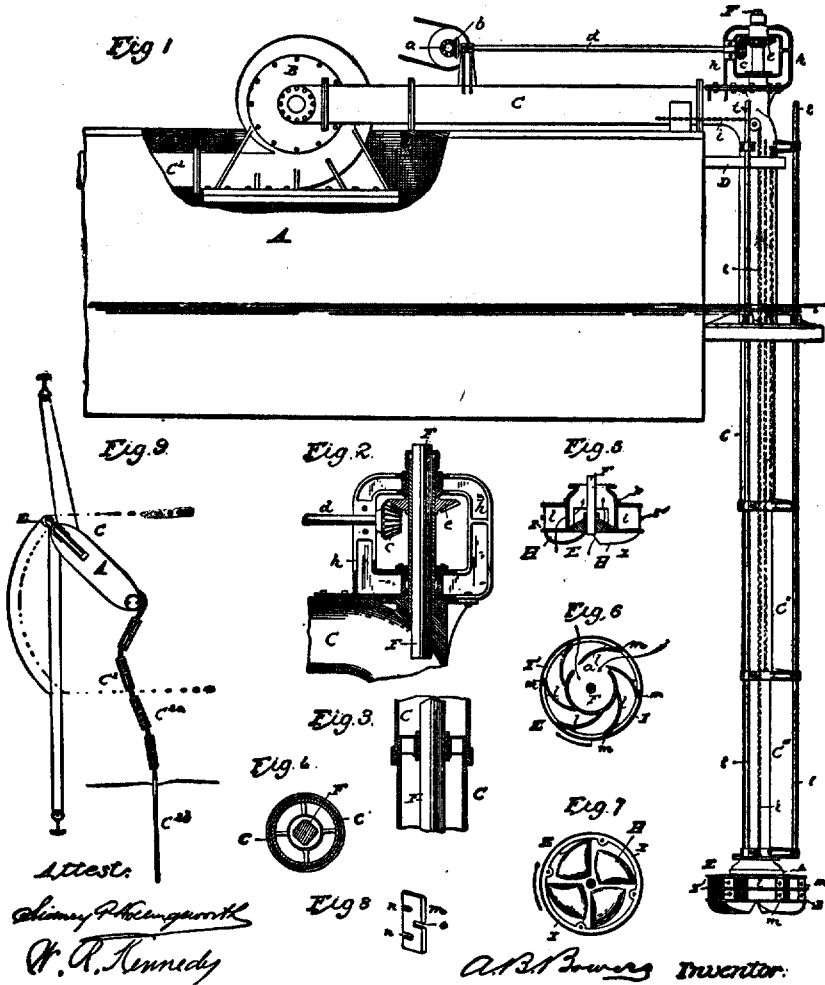
(No Model.)

A. B. BOWERS.

HYDRAULIC DREDGING APPARATUS.

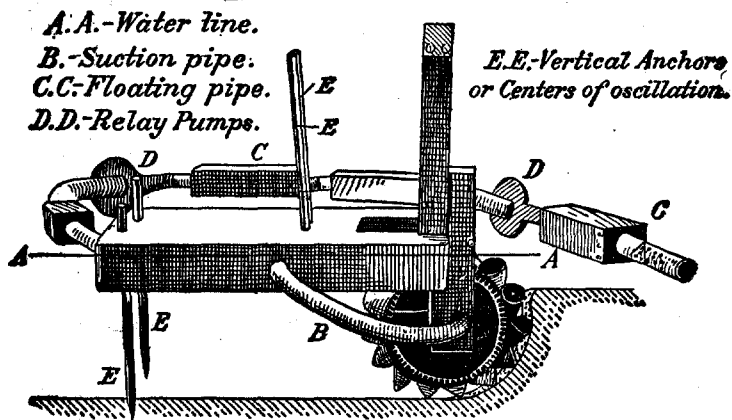
No. 355,251.

Patented Dec. 28, 1886.

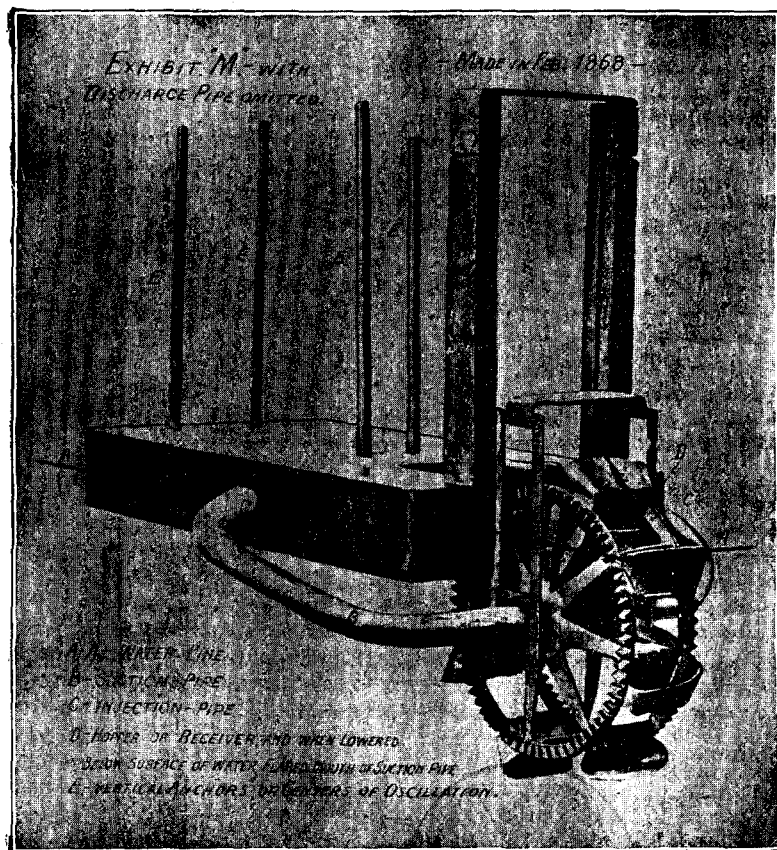


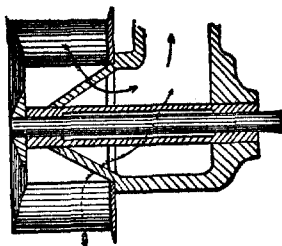
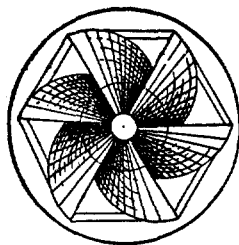
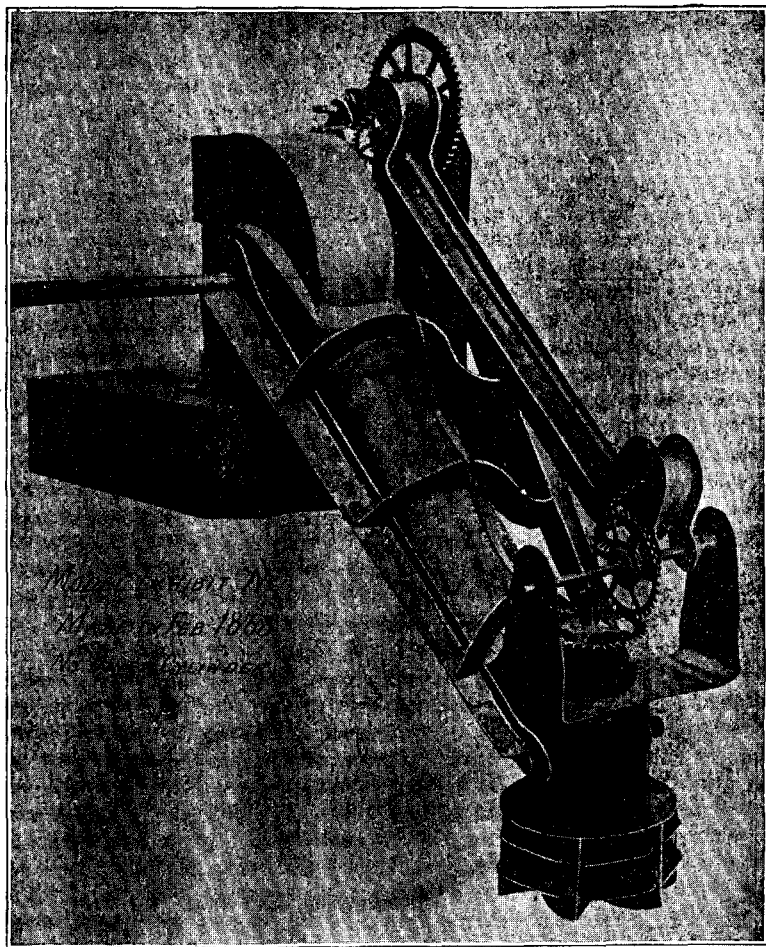
The following are photographic reproductions of Exhibits M², M, N, and II, referred to in the opinion, being photographs of four models made by Bowers in 1868:

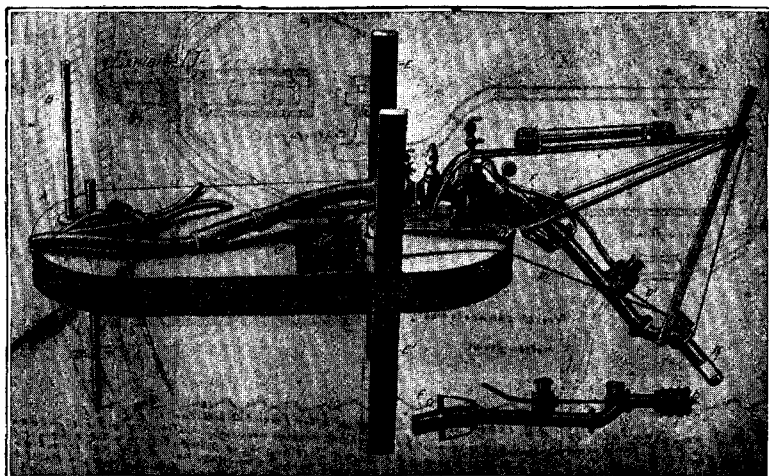
- Exhibit "M 2" -.



Model Exhibit "M 2" made in Feb. 1868.





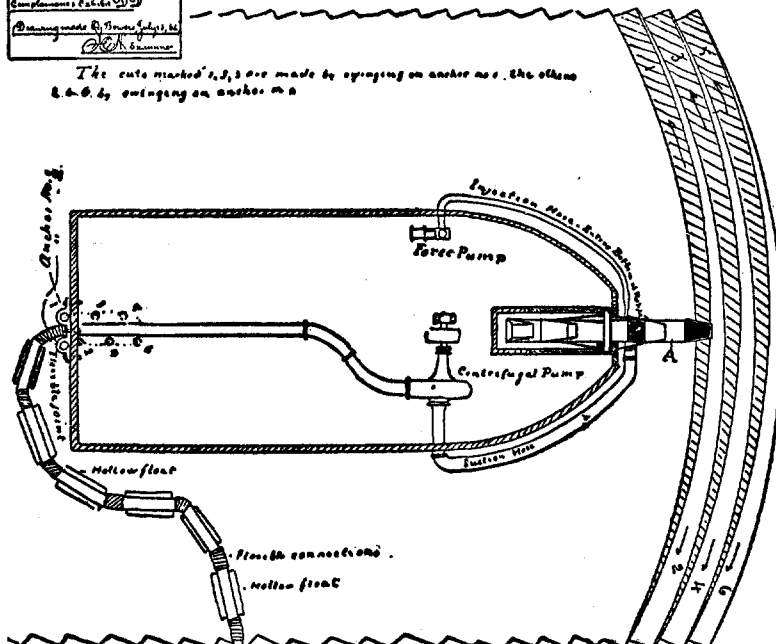


The following are copies of the drawings and memoranda referred to in the opinion as Exhibits DD and EE, being original drawings made by Bowers on July 13, 1864, and July 14, 1864, respectively:

No. 8 Circuit Court, D. C. of Cal.	
Bowers	No. 6198
vs. Schmidt	
Complaints, Exhibits	DD
Drawings made by Thomas J. Galt, M.	
J. H. Bowers	

Exhibit D.D. Stipulated into Cause of Bowers vs. Von Schmidt.

The cuts marked 1, 2, 3 are made by springing on anchor no. 1, the others 4, 5, 6, 7, springing on anchor no. 2



San Francisco July 13,

A. D. 1864. Studied this out after I went to bed last night.

Buckets have no bottoms but revolve around a stationary water-tight drum.

This hopper is curved to form a half circle of the

pipe lead out through the side of the hollow stationary drum, and from this

pipe passes around the bar of the belt and so secured to the suction pipe of a

pump have no valves and coarse substance can pass through them. I believe

age of mud and sand because they take up less back without difficulty. An engine

get through the bottom of the hopper to cut it up if necessary. The buckets

es in a sliding frame between upright guides. I am of the opinion that the suction

because a large amount of water will come up with the mud. And as the hopper is

and water would force the water into the drum from the force pump and thus

The dredging is on a vertical and

swings to make one full cut.

I have the utmost faith in the combination of elements here

of inward delivery to an endless carrier. Perhaps an outward delivery

enough from ditcher to enable me to refrain patent for dredging.

lay this carefully away. I can do nothing with it now but I will

it is the best thing I ever thought of, and I have made this sketch to

prevent me from forgetting it while I am an obliged to attend to

other matters. W. B. Bowers

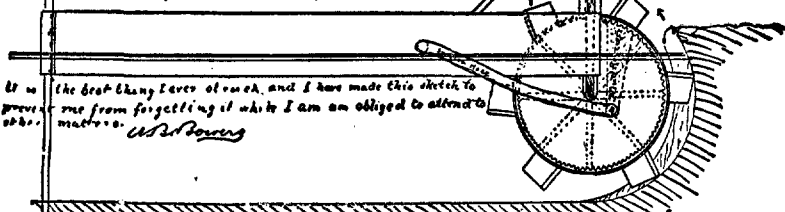
made pencil sketch of bottom hinged to open and close automatic

to day. July 14, 1864, with stationary hopper and screen between two sets of

carries. The hopper is a presser with no in this case, but empty into stationary hollow

only around which the wheel revolves. A. D. Bowers.

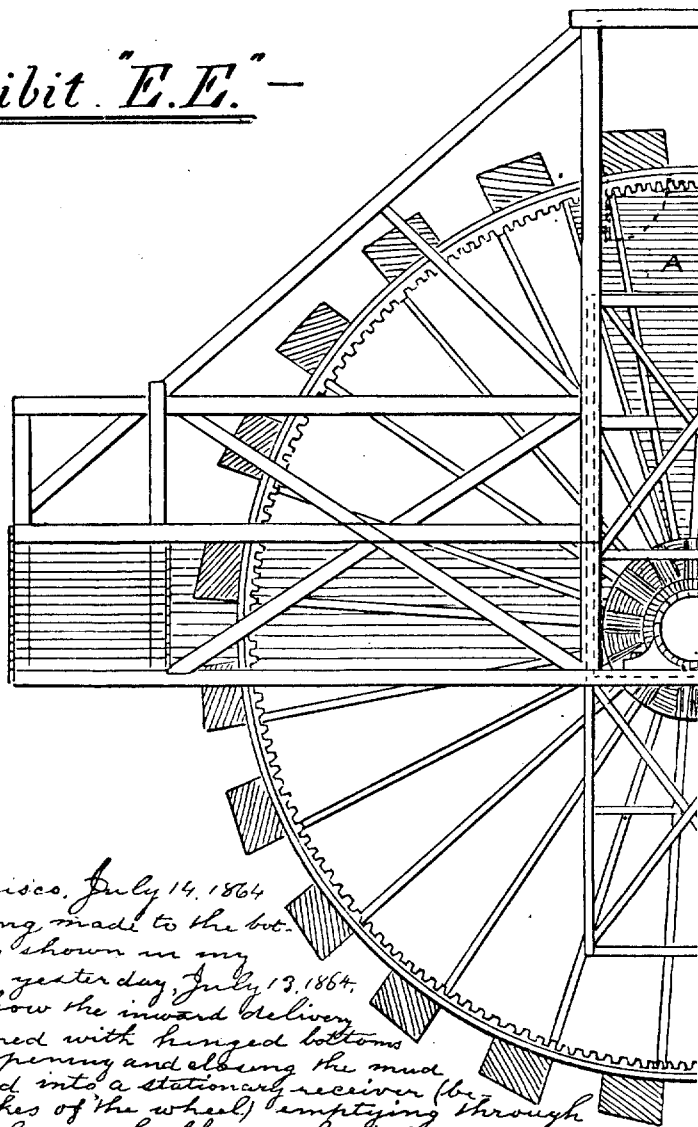
Several persons whom I thought will not handle the mud last can be operated by doing open and shut automatic and as soon as I can will ing machine on this principle for a ditcher. I may be able to do so. In view from Preserve Carefully



- Exhibit "E.E." -

I will should do so at once. I return this sketch to prevent me from forgetting the details.

A. B. Bowery.



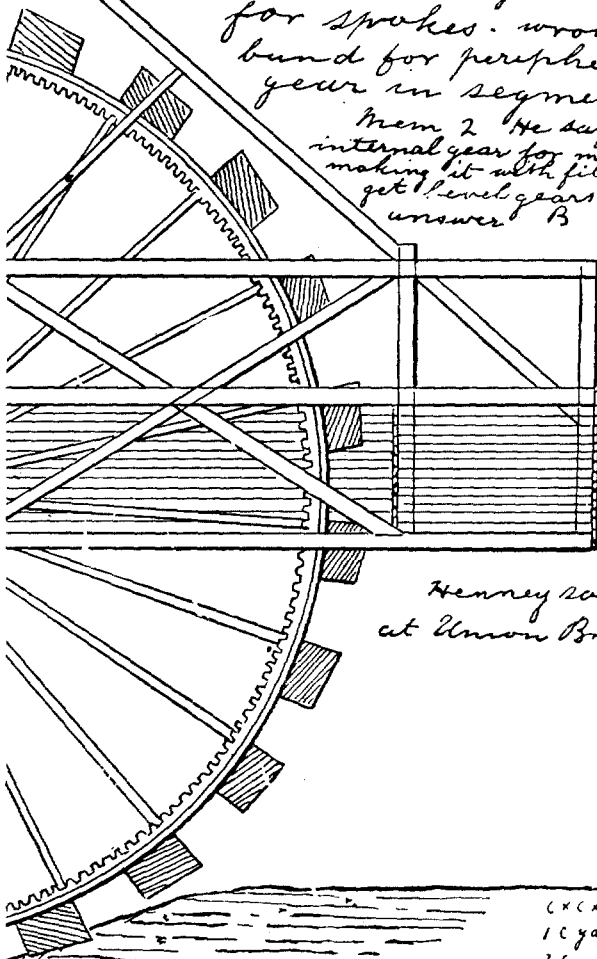
San Francisco, July 14, 1864.
 Objections being made to the bottomless bucket, shown in my sketch made yesterday, July 13, 1864, I here show how the inward delivery may be retained with hinged bottoms automatically opening and closing the mud being dumped into a stationary receiver (between the spokes of the wheel) emptying through a slot in a large hollow axle into one end of a be injected for carrying away the mud without the receiver, A, being high enough above the pipe, or a column to prevent egress of water through the receiver & which a discharge pipe or hose is flexibly connection, as this pump having no valves will allow the passage of spokes, but the same principles may apply to a wheel and I claim the principles involved in these sketches are available and I sh and apply for patent as soon as circumstances will permit.

Mem.

S.F. Dec. 1867

1. tomorrow says use gas pipe
for spokes. wrought iron
band for periphery & make
gear in segments.

Mem 2. He says I can't get suitable
internal gear for model without
making it with file and I will try to
get level gears as they will
answer B



Henney says get gears
at Union Brass Works B.

$$6 \times 6 \times 18 = 648 \text{ ft.}$$

10 yd to bucket

25 - minute

1440 ft in hour

Discharge through hollow
axle.

A stream of water may
it through the pump, the
le to serve as a pressure
the mud into the hollow axle to the other end of
if it is desired to carry mud further than it can be
directed with the discharge pipe for renewed propel.
mud and water. This wheel has two hubs and two sets
of teeth and is in gear with a wheel with bottomless buckets.

M. A. Wheaton, for appellant.
John H. Miller, for appellee.

Before GILBERT and ROSS, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). This was a suit for the infringement of certain claims of certain letters patent. By his amended bill of complaint the complainant alleged that prior to December 9, 1876, he was the original and first inventor of certain new and useful inventions in dredging machines, machinery, and appliances, which were not known or used in this country, nor patented, nor described in any printed publication in this or any foreign country, prior to the inventions thereof by the complainant, nor had they been in public use or on sale in this country for two years prior to the complainant's application for a patent therefor, nor abandoned nor proved to have been abandoned; that, being such inventor, the complainant did, on December 9, 1876, duly and regularly make and file in the patent office of the United States an application for the issuance to him of letters patent for his said inventions, and that such proceedings were had in the matter of his application that on April 18, 1877, his application was allowed, and a patent for his said inventions ordered to be granted and issued to him upon the payment of the final fee to the government of \$20 within six months from the date of said allowance; that the complainant failed to pay the fee within the time stated, by reason of which his application lapsed; that within two years after the said 18th day of April, 1877, to wit, April 16, 1879, under and pursuant to the laws of the United States and the rules of the patent office in that behalf made and provided, the complainant renewed his application in the patent office for a patent for his said inventions, and filed a renewed application therefor, using the original specifications, drawings, and models which had been made and filed December 9, 1876, and which were then on file in the patent office; that both in his original application as also in his renewed application of April 16, 1879, more than one, to wit, several, independent inventions were described and claimed, which, upon examination by the proper examiners of the patent office, were found not to be dependent upon one another, and did not mutually contribute to a single result, by reason of which a single patent could not be issued to cover them; that thereafter, and before the issuance of any patent therefor, and in accordance with the requirements of the patent office, and under and in accordance with the laws of the United States, the complainant did divide his original application, and filed divisional applications for his said several inventions; that one of the inventions described and claimed in his original application of December 9, 1876, and in his renewed application of April 16, 1879, was entitled "Dredging Machines"; that, while his original application was pending, the complainant prepared and filed in the patent office a separate divisional application, describing and

claiming his improvements in dredging machines; that nothing was included in his divisional application which had not been shown and described in his original application of December 9, 1876, and renewed April 16, 1879; that thereafter such proceedings were duly and regularly had and taken in the matter of his application that on May 26, 1885, letters patent of the United States, numbered 318,859, were duly and regularly granted and delivered to the complainant for his said invention, granting and securing to him, his heirs and assigns, for the term of 17 years from that date, the exclusive right and privilege of making, using, and vending the invention therein described throughout the United States and its territories; that one of the complainant's inventions, shown and described in his original application of December 9, 1876, and renewed April 16, 1879, was a certain new and useful invention, entitled "Hydraulic Dredging Apparatus"; that while his original application was pending, to wit, August 3, 1886, the complainant filed in the patent office a divisional application for the issuance of letters patent for said hydraulic dredging apparatus; that nothing was included in his last-mentioned divisional application which had not been shown or described in his original application of December 9, 1876, and renewal of April 16, 1879; that such proceedings were duly and regularly had and taken in the matter of his divisional application for a patent on said hydraulic dredging apparatus that on the 26th day of December, 1886, letters patent, numbered 355,251, were regularly granted and delivered to the complainant for his said invention, granting and securing to him, his heirs and assigns, for the term of 17 years from that date, the exclusive right and privilege of making, using, and vending the invention therein described throughout the United States and its territories, of both of which patents, and of all rights and privileges conferred thereby, the complainant alleged he has since remained the owner and holder, and both of which patents the amended bill alleged the defendant has infringed.

The answer of the defendant to the amended bill of complaint put in issue its material averments, and also pleaded in defense of the suit, among other things, the abandonment by the complainant for more than two years of his original application for a patent, and alleged that the patent office, unlawfully and in excess of its powers, allowed the complainant to renew his application more than two years after such abandonment. The answer further alleged a want of due diligence in the prosecution of the complainant's application, and averred that on June 14, 1882, and October 16, 1884, the complainant struck out all of the specifications in his application on file in the patent office at each of those dates, and inserted in lieu thereof, in each instance, other and different specifications, describing other and different inventions, of which he well knew he was not the inventor, and that he also withdrew from his original application all the drawings filed therewith, and substituted other and different drawings therefor; that the de-

scriptions, drawings, and claims in the patents issued to the complainant were changed from the descriptions, drawings, and claims contained in his original application, for the express purpose of including in and covering by his patents inventions and improvements which were made by and belonged to parties other than himself; that, in accordance with the complainant's original drawings and specifications, no useful or operative dredging machine can be constructed; and that, upon a fair and adequate trial, a machine so constructed has been proven to be useless; and that it is only by reason of changes and modifications and omissions in the drawings and specifications under the complainant's original application, and an appropriation of the inventions and improvements of others, that there can be constructed, if at all, any operative dredging machine in accordance with the divisional applications of the complainant. The answer further averred that the defendant filed an application in the patent office on the 3d day of July, 1876, upon which his patent numbered 185,600 was granted to him December 9, 1876; that he made the plans of his dredger for which such patent was issued to him in the year 1874, and made a model thereof in April, 1875; that in 1875 and 1876 he built a dredging machine, which embraced the inventions described in his patent numbered 185,600; that in 1882 he built the hull of a new dredging machine, and finished the same by using a large part of the machinery which was put into his first dredger; that his second dredger contained the same inventions that were contained in his first; and that these two dredgers are the only dredging machines that the defendant has ever constructed or used or sold in the state of California. The answer further averred that the complainant saw and examined the defendant's model of his first dredging machine, and from that model obtained his (the complainant's) first idea of a suction dredger; that both dredgers made by the defendant were suction dredgers, and were operated by a rotary pump, and a telescoping suction pipe, with a rotary excavator having an internal delivery at the bottom of the suction pipe, and also had connected therewith a floating conveying pipe, through which the spoils were carried and deposited at a distance of a mile from the dredger; that the complainant from time to time examined and studied the defendant's dredger, and its mode of operation, and made sketches thereof, after which the complainant made his new applications for letters patent, and changed his drawings and specifications on file in the patent office, and purposefully framed them so as to cover the dredging machinery and apparatus of the defendant; that in the patent office the complainant was referred to the patent of the defendant, and changed his claims so as not to include the defendant's inventions, and thereby avoided having an interference declared with the defendant in the patent office. The answer to the amended bill also set up various patents and publications as matters anticipating the complainant's alleged invention, and also alleged that the complainant kept the

same on sale for more than two years before his application for a patent therefor, and also averred that the patents issued to the complainant contained a needless multiplication of nebulous claims, thereby rendering the patents void, and also that the claims in each of the complainant's patents purport to cover general combinations which may be included in general definitions and in general terms of description, and also cover what is not described in his specifications.

The foregoing constitute in substance the defenses set up in the answer to the amended bill. Exceptions to certain portions of the answer were sustained by the court below, which rulings constitute the first 23 of the 57 assignments of error filed by the appellant; but as his counsel state in their brief that they "do not insist upon them unless the complainant claims that the material testimony taken should not be considered for want of a pleading," and as there is no such insistence on the part of the complainant, no further reference need be made to the exceptions.

The record in the case is very voluminous, embracing 2,477 printed pages, and including a vast number of exhibits. The arguments of counsel are elaborate and able, and while they have been carefully considered, and all of the points made attentively noted, it is not practicable to make special mention of them all, without extending this opinion beyond reasonable limits. The patent granted to the complainant May 26, 1885, and numbered 318,859, contains 103 claims; and that issued to him December 28, 1886, and numbered 355,251, contains 22 claims. The court below found infringement by the defendant of claims 10, 16, 25, 53, 54, and 59 of complainant's patent 318,859, and of claims 13, 17, and 18 of his patent 355,251. In the specification contained in his first patent, the complainant states that his invention—

"Consists of a rotary bottomless bucket excavator wheel, of moderate size, novel construction, and great capacity, combined with a hydraulic transporting device of equal capacity, by means of which the spoils may be cheaply carried to a distance of several miles over land or water and across navigable channels, without interruption of navigation, together with novel feeding devices, through which the percentages of earth excavated by the cutting wheel and of the water therewith delivered are adjustable to the precise amount of each necessary for most economical working, and by means of which clean work is done, the excavator going twice over no ground, and missing no ground; thus saving much time, and effecting a material reduction in the cost of apparatus, repairs, and cost of dredging and of disposing of the spoils, these being the chief objects of the invention."

And, referring to the accompanying plans and the figures thereon, the complainant thus described his machine and its operation:

"A is a floating vessel that carries the engines, boilers, and dredging machinery. It is shown in this instance with an elongated longitudinal well for the reception of the swinging portion of the suction pipe.

"B is a large pump that draws the spoils from the buckets of the excavator up the suction pipe, and forces them through the discharge pipe to a place of deposit.

"B', Figs. 9, 13, is a relay pump or other auxiliary discharging apparatus, sometimes used in connection with a primary transporting apparatus to carry

the spoils to a greater distance than could conveniently be done by the original agent, power, or pump, or than would be practicable without subjecting the apparatus to a pressure that might endanger some of the parts, or without the use of heavier or more expensive apparatus than would be desirable for ordinary purposes. It may also be used for discharging the receiver, X, and for exhausting water from pipe C' (when said pipe is submerged), for the purpose of raising it, preparatory to floating it into a new position. As many of these pumps may be used as are necessary to transport the spoil to the required distance.

"C is a suction pipe connecting the excavator with the pump B. The swinging portion of this pipe is mounted at the inner end of the well upon strong trunnions, one of which forms an elbow of the pipe, and passes through a stuffing box or other suitable connection into the suction pipe of the pump B. Through the other trunnion passes a shaft that actuates the gears, I, that drive the shaft, R, and bucket wheel, E; and upon these trunnions the shaft, R, suction pipe, and excavator swing as the cutter is raised or lowered to suit the depth at which the work is progressing.

"C' is a discharge pipe. It is provided with a strong flexible section, D, or other suitable joint or mounting, at or near the turntable, F, and other pivot or center of oscillation of the dredging machine or excavating apparatus, and is constructed and arranged to permit said apparatus or machine to swing horizontally upon said pivot or pivots without materially changing the position of said discharge pipe beyond said mounting, flexible connection, pivot, or pivots. When this pipe is several hundred feet in length, I usually support the inner portion by 8 long, narrow, hollow floats, in which case it consists of two parts,—an inner oscillating or swinging section (generally composed of several short sections flexibly joined together and to the dredge boat), and an outer stationary or nonoscillating section, flexibly joined to said inner section. This permits the boat to feed forward, and the oscillating section to swing with the advancing boat (as the work progresses) on the joint connecting the oscillating and nonoscillating sections. The discharge pipe is provided with a pressure gauge, 7, Fig. 1, to give notice of overpressure and danger of choking of pipe from any sudden change in the character of spoil. When pipe C' is above deck, and extends but a short distance from the mounting, D, for discharging alongside, it requires supporting, and is usually suspended from a mast, the claim for which is reserved for another application now on file.

"C" is a pipe passing through the receiver, X, to the exhausting apparatus of said receiver. When used in connection with the pipe C', it may be regarded as the prolongation of said pipe.

"C² is an auxiliary discharge pipe, used in connection with any suitable auxiliary transporting apparatus, and extends from said auxiliary to another auxiliary transporting agent or apparatus, or to the place of deposit.

"C³, Fig. 10, is a discharge pipe extending from a second relay discharging apparatus to a place of deposit. When a floating discharge pipe would impede navigation, the greater portion may lie upon the bottom, 4, Fig. 9; and, when the water is too deep for this, it may be suspended from the buoys, 5, 5, Fig. 9, and guys and anchors, 6, may, if necessary, be used to prevent it from being disturbed by winds, waves, or currents. When the pipe is to be submerged, it may be advisable to construct it of thin metallic plates, uniting the several sections with ball and socket or other strong flexible connections. In other cases it may be made of wood or metal, according to the preferences of the user.

"E is a rotary bucket-wheel excavator, having radiating bottomless buckets, k, Figs. 4, 5, 6, 7, firmly secured at each end to the discal ends, b, b, of said excavator. These buckets may be stiffened, strengthened, and protected by rings or screens, d, passing around, secured to, and preferably projecting beyond the edges of, said buckets, Figs. 1, 5, 6, 7, 8. These rings may be sharp to cut like the revolving disk colters of plows, and serve to subdivide the material entering the buckets, and to exclude substances too hard to be cut and too coarse to pass through the pipe and pump. They serve also as fenders to enable the cutter to ride over obstructions without catching and breaking.

The edges of the bucket are sharp, and may be provided with detachable steel knives or cutters, S, Fig. 6, for working in hard material. The outer discal end, Figs. 1, 3, 6, 8, may be provided with cutting edges, lips, or scoops, c, to obviate the danger of breakage from jamming against a hard bank, as the dredger heaves in the swell of the sea. In making the necessary openings in the discal end to admit the silt from said scoops, said end plate becomes changed to the form of a spider or series of arms, which may be strengthened by the lower ring, d, which, in turn, may be regarded as forming a series of braces extending between the said arms at or near their outer parts. The several parts of this excavator may be made separate and detachable, or it may be cast in a single piece. I do not confine myself to the precise mode described of mounting this wheel, or of freeing it of its contents. It may be of any desired size and proportion of parts, and may discharge its contents inward through itself into any suitable conduit or receiver. The rings, d, may be omitted in soft mud, free from substances too coarse to pass through the pipes and pump, though always at the risk of the projecting buckets catching upon obstructions, and getting broken.

"F, Figs. 1, 2, 10, is a small cylindrical turntable, rotating in a circular well or frame. It is provided with a strong flange or other suitable bearing, and is rotated in any convenient manner. Two or more vertical apertures, e, e, pass through the turntable from top to bottom on opposite sides, as shown.

"G, G², are vertical anchors passing loosely through the apertures, e, e, in the turntable, into the mud below. They are raised by blocks and tackle attached to the mast, f, or in any other usual manner.

"H is a counter balance cylinder, connected with the suction pipe, excavator, and hoisting apparatus, to obviate the danger of breakage from pounding upon the bottom in a heavy swell. It is provided with a piston, piston rod, and gland, like a steam engine. Steam or compressed air is admitted to the upper side of the piston, the area of which is sufficient very nearly to balance under the given pressure the weight of the suction-pipe and excavator. To the upper end of the piston is attached the hawser, L, passing over suitable sheaves in the frame, K, thence through the block, g, Fig. 3, whence it passes over other sheaves in said frame to the windlass, J, by which means the excavator can be raised or lowered by said windlass without interrupting the action of the counter balance. When the dredger rises on a swell, the excavator rises also; and, as the dredger sinks in the trough of the sea, the excavator falls upon the bottom, not with the full weight of the excavator and suction pipe, but with the unbalanced weight only, striking so lightly as not to endanger the safety of the wheel. This device is necessary only when dredging a hard bottom in a heavy swell. When not required for this purpose, the cylinder, H, may be utilized as a steam or hydraulic hoist, or be dispensed with altogether.

"I is a variable winding device, of which there are many suitable forms. I prefer ordinary winding drums driven by a separate engine, though, for simplicity of illustration, I have shown tapering drums, h, h, loosely mounted on a shaft, and driven (through V-shaped friction couplings and suitable connections) by the main engine. The disengaged drum gives out one warping line, as the engaged drum takes in the other. The office of this device is to vary the speed of the side feed, for the purpose of regulating the percentages of earth and water delivered to the pump, without affecting the speed of other parts of the machinery. This speed, with the device shown, is dependent upon the diameter upon which the warping lines wind, and is varied by shifting the sliding guide sheaves, j, j, towards or from the larger ends of the drums, by means of the hand wheels and screws, as shown.

"J is a windlass for raising and lowering the excavator.

"K is a frame from which the suction pipe and excavator are suspended.

"L is a line or chain for raising, lowering, and counter balancing the excavator.

"M, M, are warping lines passing from the hold to the winding drums, h, h, around which they make a sufficient number of turns to prevent slipping, whence they pass around suitable guide sheaves, to and through the anchored blocks, U, U, to the outer end of the suction pipe, to which they are secured,

so that the working side-strain falls mostly upon the outer end of the suction pipe (or of the ladder supporting said suction pipe, if such be used), and but lightly upon the joints or trunnions supporting the inner ends of said pipe or ladder. As the outer ends of these lines wind upon the drums in the device shown, the inner ends unwind and descend to the hold. The office of these lines is to swing the excavating apparatus or the dredger from side to side in the process of dredging, and firmly to anchor the excavator end of the dredger when it is not at work, which latter is accomplished by simply engaging both drums, h, h, in their friction couplings.

"N is a force and suction pump. It is used to exhaust the water from the discharge pipe for the purpose of raising the submerged portion, to dilute the spoils, so that they will spread over a large area of land, or to enable them to be transported through long pipes without the aid of a relay pump, to clear the pipes when accidentally choked, should this ever occur, and to prime the pump B; the latter or its suction pipe being provided with the usual valve or valves for that purpose. Like most steam pumps, it is provided with two suction orifices on opposite sides of the water chamber, and a discharge directly over each suction. To the suction and discharge on one side is connected the branch pipe O, leading into the pipe C'. Each branch is provided with valves in the usual manner of arranging a branch pipe to serve for suction and discharge. The discharge branch only is shown, the suction being directly under it. To the suction on the other side of the water chamber is secured a valve and pipe communicating with any suitable supply of water (usually that in which the dredger floats), and sometimes by a branch pipe and valve with the hold of the vessel for discharging leakage, and by another branch and valve, with pump B, for priming said pump by suction. To the discharge above this suction is connected a pipe or hose, that may also be used for priming the pump B by discharging into it, and for all the various purposes of an ordinary ship pump. When O is used as a suction pipe to draw from pipe C', the valve on the discharge branch is closed, the suction-branch valve is opened, and the discharge is through the pipe or hose on the opposite side. When O is used as a discharge pipe to force into pipe C', the suction-branch valve is closed, the discharge-branch valve is opened, and the suction is through the opposite suction pipe. When the suction is through the pipe opposite the suction branch of pipe O, the discharge may be through the pipe or hose above it, or through the discharge branch of O into pipe C', as regulated by the valves to suit the purposes of the user.

"O is a pipe with branches and valves connecting both suction and discharge on one side of the pump N with pipe C', and is either a suction or discharge pipe, as regulated by its valves.

"P, P, are long, narrow, hollow floats, preferably extending longitudinally along each side of the short sections of the discharge pipe, for supporting them on the water. They may be made of wood or metal, and be secured together and to the discharge pipe by pieces of scantling passing crosswise over and under the pipe and floats, and fastened with rods passing each side of the pipe and floats, as shown in Fig. 11, though I do not confine myself to this form of construction.

"Q is a pulley or gear for actuating the gears, I, and excavator, E. It may be connected with its shaft by a friction coupling.

"R is the driving shaft of the bucket wheel. It is keyed or otherwise secured to the hub of the wheel, whence it passes through suitable bearings in the inner chamber, up the suction pipe, and through a stuffing box to the gears, I, by which it is actuated.

"S is a strong detachable steel knife, sometimes used on the edges of the buckets when working in hard material. It may be serrated, chisel-toothed, or straight-edged, according to the character of the materials to be cut, a straight edge being preferable for ordinary work.

"T is an inner chamber or shield, around which the bucket wheel revolves, and into which it discharges. This chamber is provided with a strong flange, by which it is secured to a similar flange on the end of the suction pipe. It is also provided with a large opening, a, Figs. 4, 7, through which the spoils

enter from the buckets, and through this opening, Fig.4, is seen a portion of the driving shaft, R, and the bearing of said shaft in the end of said chamber. This chamber or shield forms a bottom for the buckets, K, until they reach the opening, A, as shown in the cross section of the wheel and chamber, Fig. 7. As the buckets pass this opening, they discharge mud and water into the chamber, as indicated by the inner arrows, the outer arrow showing the direction of rotation. The office, in part, of this chamber or shield, is to prevent too large a percentage of water from entering with the mud; but when the spoils are of a character to require a large percentage of water to carry them up the suction pipe, or to send them through the discharge pipe, as may sometimes be the case, the chamber may be cut away until only enough remains to support the excavator and shaft, R.

"U, U, are blocks anchored at suitable points on each side of the dredger, through which pass the warping lines, M, M, for the purpose of swinging the dredger or the excavating apparatus from side to side. They are usually placed from three hundred to six hundred feet apart, and a little in advance of the ends of the first cuts made by the excavator, to allow a wide swing, and avoid the necessity for two frequent change of place as the work progresses.

"V is a branch pipe and valve, through which samples of the spoils are drawn from the discharge pipe, to enable the operator properly to regulate the speed of the side feed. It is preferably placed about one-third the diameter of the discharge pipe from the lower side of said pipe, in order to secure a fair average sample.

"W is a small tank resting upon scales. It is provided with a discharge pipe and valve. It is filled with spoils drawn from the discharge pipe through the branch and valve, V, and the speed of the side feed is increased or diminished according to the weight of the spoils.

"X is a floating mud receiver carrying the relay pump or other auxiliary discharging apparatus, B', and its actuating apparatus. The main purpose of this receiver is to permit the excavator to run continuously, although the relay pump be stopped for a little while, the receiver affording a receptacle for the spoils in the meantime. Longitudinally through this receiver passes the pipe C' to the auxiliary discharging apparatus, B', whence the pipe C² extends to another auxiliary discharging apparatus, or to the place of deposit.

"Y is a valve on the pipe C', within the receiver, X. This valve is adjusted to open automatically outward with slight pressure, and serves as a relief valve in case of stoppage of the pump B' while the pump B is running. It serves also as a guide to regulate the speed of pump B', which should be increased beyond that necessary for preventing the opening of this valve in order to aid by suction as well as forcing. This valve may be set wide open for the purpose of filling the receiver, and may be securely closed when the pump B is used to force the material into the pump B' for the purpose of increasing the efficiency of the latter. It is also opened to admit air into the discharge pipe when the water is to be withdrawn therefrom by pump N.

"Z is a branch and valve through which mud is drawn from the receiver to be discharged through the pipe C².

"Z' is a branch and valve for admitting water to wash out the pipe C² after the mud has been discharged from the receiver.

"Z² is a valve for closing the pipe C' while the mud receiver is being discharged, or when said receiver is disconnected from the pipe C', and takes the mud directly from the dumping or dredging apparatus.

"Z³ is a pipe and valve used for admitting water through the bottom of the receiver for the purpose of diluting the mud when it is too stiff to pass freely up the branch Z. It may have branch pipes with numerous small openings for the more thorough dilution of the spoils. This receiver may be used in connection with any dredging apparatus for continuous transportation of the spoils through pipes as the work progresses; or it may be filled, towed to the place of deposit, and there be connected with a discharge pipe for putting the spoils on shore.

"The operation of dredging is as follows: The vertical anchors and excavator being raised to allow freedom of motion, the dredger is placed in position with the turntable in line with the longitudinal axis of the proposed cut. The turntable is then rotated until the vertical anchors are also in line with said axis, and both anchors are then dropped into the mud. The discharge pipe is placed in position, the blocks, U, U, anchored at suitable points for swinging the machine, and the dredger swung around until the excavator reaches the side of the proposed cut, as shown in Fig. 10. The lines, M, M, are drawn taut, and the excavator lowered below the surface of the water. The pump B is then primed, started, and the excavator set in motion, and lowered its entire diameter into the mud. The proper winding drum is then engaged, and the dredger, swinging on the turntable as a pivot or center of oscillation, rapidly cuts its way to the opposite side. To secure a steady side feed, the friction coupling of the unwinding drum may be adjusted to keep the unwinding line sufficiently taut to prevent the veering of the dredger with wind or tide. Upon reaching the opposite side, the winding drum is disengaged, the excavator again lowered its full diameter, the side feed reversed, and the dredger cuts back again. This process is repeated until the proper depth is obtained. The excavator is then raised above the bank in front, the anchor G raised, as shown in Fig. 2, and the turntable rotated upon the anchor G² until G is squarely in front of G², in line with the longitudinal axis of the proposed excavation, as indicated by the broken-lined outline G', Fig. 2. G is then dropped into the mud, and the work proceeds as before, the dredger having been fed forward the distance between the centers of the vertical anchors, which is fixed to correspond with the cut capable of being made by the excavator. This arrangement for feeding forward keeps the center of oscillation of the dredger coincident with that from which the arc to be cut by the excavator should be described. A less perfect forward feed is secured by placing the dredger so that the excavator is at the side, and the turntable in line with the longitudinal axis of the proposed excavation. The turntable is then rotated until the vertical anchors are in a line parallel with the transverse axis of the dredger where it is made stationary. This leads one anchor diagonally in advance of the other, the dredger lying diagonally across one-half of the line of the proposed excavation. The forward anchor is now dropped into the mud to form a pivot, upon which the dredger swings as it cuts to the opposite side. The dredger then lies diagonally across the other half of the line of the proposed excavation, the swing having brought the rear anchor to the front. This anchor in its turn is dropped to form a new pivot, and the other anchor is then raised. The dredger swings first upon one and then upon the other anchor, these anchors being alternately raised and lowered for this purpose. As this mode of feeding by swinging alternately upon two different pivots gives a wedge-shaped cut, requiring two full swings to make one full cut, it is equivalent to a loss of one-half of the time, and is used only to prevent stoppage of work when the apparatus for rotating the turntable is stopped for repairs or other cause, in which case it becomes valuable."

It will be seen from the foregoing that the fundamental elements of the complainant's patent 318,859, and of the machine covered by it, are a boat and excavator capable of working with a side feed, a nonrotating suction pipe, an exhausting and discharging apparatus, a discharge pipe, a self-contained pivot or center of oscillation, on which the boat swings from side to side while it is working, devices for swinging and for working the machine from side to side, devices for moving the machine ahead preparatory to a new cut, a floating discharge pipe when the spoil is to be transported over water, a submerged discharge pipe when the spoil is to be carried across a navigable channel without impeding navigation, and an outer stationary section of discharge pipe when the spoil is to be carried over land.

The claims of this patent found by the court below to have been infringed by the defendant are the following:

"(10) A dredge boat having a self-contained pivot forming a center of horizontal oscillation, with devices for swinging and working said boat upon said pivot, in combination with a suction pipe, exhausting apparatus, and rotary excavator."

"(16) A dredge boat and oscillating section of a conduit discharge flexibly joined to a nonoscillating section to allow said boat to feed forward, and said oscillating section to swing upon the flexible joint connecting said oscillating and nonoscillating sections."

"(25) A discharge pipe consisting of a series of sections flexibly joined together, and supported by floats, in combination with a dredger having a rotary excavator."

"(53) The combination, with a nonrotative suction pipe, of a rotary excavator having an inward delivery through said excavator."

"(54) The combination, with a dredge boat and nonrotative suction pipe, of a rotary excavator having an inward delivery through said excavator."

"(59) A rotary excavator with inward delivery, in combination with a non-rotating suction pipe mounted upon strong trunnions or equivalent joints, to permit the excavator and outer end of the suction pipe to be raised and lowered to suit the depth at which the work is progressing."

The defendant contends that the complainant was not the inventor of the machine thus patented to him, but that he copied its essential features from a machine built and invented by the defendant; and, moreover, that the complainant's machine was anticipated by various other patents and publications set up in the answer. If the evidence shows this to be true, we need go no further with the case. We therefore turn to the record to see what foundation, if any, there is for this contention. So far as the defense of anticipation is concerned, it must be established as of a date anterior to the patentee's invention or discovery; not merely prior to the application for, or the date of, his patent. Rev. St. §§ 4886, 4920; *Plow Works v. Starling*, 140 U. S. 198, 11 Sup. Ct. 803; *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 492, 11 Sup. Ct. 846; *Loom Co. v. Higgins*, 105 U. S. 592; *Kneeland v. Sheriff*, 2 Fed. 901; *Woodman v. Stimpson*, 3 Fish. Pat. Cas. 105, Fed. Cas. No. 17,979; *Merw. Pat. Inv.* § 323. And, as against the defense of anticipation, it is well settled that the patentee may show, if he can, the fact of invention by drawings, sketches, models, or any other competent proof. *Walk. Pat.* § 70; *Loom Co. v. Higgins*, 105 U. S. 594; *Bates v. Coe*, 98 U. S. 34; *Smith v. Vulcanite Co.*, 93 U. S. 486; *Apparatus Co. v. Woerle*, 29 Fed. 451.

The record shows that for many years the complainant was investigating the subject of dredging, and had familiarized himself with most, if not all, of the dredgers in existence. He was familiar, too, with the sand pump. The latter, while it would pump sand, would not cut and remove hard material. Before the complainant did anything in the direction of invention, there were also dredgers in existence and in use that would cut and remove hard material. There were the "Scoop" and the "Clam Shell," and the "Chain Bucket," and Hart's dredger, and Fraser's dredger, and the patent to D. S. Howard of January 9, 1855, and Atkinson's patent of July 7, 1863, and the

rotary-wheel dredge of Fondé and Lyons, and other rotary dredgers of which the complainant had knowledge; for in the original specification contained in his application for a patent he himself stated that "for more than two centuries rotary dredges have shown a capacity for cutting and lifting far in excess of any other dredging device; but in the forms of construction hitherto adopted it has been necessary to make the diameter of the wheel much greater than the depth to be dredged, thus making them too unwieldy for ordinary uses, while the best appliances for removing the spoils have fallen far short of the dredging capacity of the wheel." But, prior to the complainant coming into the field, there was no machine, by whatever name known, that would, by the simultaneous and continuous co-operation of its various elements, cut and remove hard material from a waterway, and itself transport the same to any desired distance and place. The complainant undertook to accomplish that thing. The accomplishment of the purpose necessarily involved the severing of the material in place, the lifting of it, and its transportation through some sort of conduit to the desired place of deposit.

The evidence shows that the complainant, having devoted much study and thought to the subject, embodied his ideas in a drawing, marked "Exhibit DD," and which was introduced in evidence. Upon its face, the drawing is dated July 13, 1864. Counsel for the appellant assert in argument that this date is false; that the drawing was actually made in the year 1884, and antedated 20 years. The ground of this contention on the part of the appellant is that the words "inward delivery," which appear upon Exhibit DD, do not appear in the complainant's proceedings in the patent office prior to March, 1884. The words "inward discharge" appear, instead, in the complainant's original specification. The two expressions mean one and the same thing. The use of the word "discharge" in place of the word "delivery," in the original specification, is explained by the complainant by saying that the first draft of the specification was prepared by his attorney, who used the term "inward discharge" instead of "inward delivery," and that, when he (the complainant) revised and redrafted the specification before sending it to the patent office, he followed the phraseology of his attorney, but that subsequently, when he took personal charge of his application, he redrafted the specification and claims and adopted the phraseology originally used by him in the drawings of 1864. There is nothing in the circumstance relied on by the appellant to cast any doubt upon the testimony of the complainant in respect to the true date of Exhibits DD and EE, especially as there is much testimony corroborative of that of the complainant, which is to the effect that he made the drawing on the day they, respectively, bear date.

The complainant testified that, while holding a position as clerk in the office of the United States surveyor general for the state of California, he was thrown in daily contact with all matters pertaining to swamp land and swamp land reclamation, and had many conversa-

tions with people desirous of reclaiming such lands, and in regard to the best mode of doing so.

"This led me," said the witness, "to continue my investigation of dredging and ditching machinery, and I soon came to the conclusion that the proper mode of leveeing a river was to take the material from the bed of the river. I then conducted a series of experiments with regard to the carrying capacity of water in pipes. I discovered that, by cutting holes in the bottom of the pipe, the sand would drop through those holes, while the water would pass over and be discharged where I wished to deposit the sand, and in this way I could build sand embankments. This led me to devise a hopper with an injection pipe entering the bottom of the hopper directly opposite to the mouth of a discharge pipe, and the material to be dumped into this hopper and carried by the injection stream through the discharge pipe. I then considered the mode of applying this method with reference to putting the material from the river on shore. This led me to connect with my pipe floats for supporting it. I then became convinced that centrifugal pumps would carry off a larger quantity of material than could be handled by ordinary dredgers, and I began to investigate for the purpose of discovering some method of supplying the pump with all the material that it could handle. This led to the combination with the aforesaid apparatus of a rotary excavator, and on the 13th day of July, 1864, I made a drawing showing this combination, which I now produce, and offer in evidence [being Exhibit DD]. The date above mentioned appears upon the drawing itself. I fix this date in three ways: First. Because I was so elated with the idea that I would never forget it if I would live to be a thousand years old. I thought I had discovered something that was going to make me a fortune. Second. Because of the date appearing on the drawing itself. Third. Because I was introduced the day before, by John S. Hittell, to the Librarian of the Mercantile Library; and while there in that library, on the 12th day of July, I found in Oressley's Encyclopedia of Engineering an account of Bailey's rotary excavator used in the time of King Charles the Second of England; and that set me to thinking, and led me to devise the combination, which I thought out during the night, and of which I made a drawing the next day. This drawing represents a rotary excavator with inward delivery through itself to a suction pipe. These buckets are of themselves bottomless, and revolve around an inner cylinder, which forms a bottom to the buckets until they reach a depression in the top of said inner cylinder where the material is discharged into a receiver communicating with the suction pipe. Objection being made to this sketch by certain parties to whom I showed it, on the ground that material might wedge in between the buckets and the drum, I devised and made a drawing of the rotary bucket-wheel excavator, with hinged falling bottoms, to obviate this difficulty. This drawing last referred to was made the following day, July 14, 1864, and that drawing I now produce, and offer in evidence [being Complainant's Exhibit EE]."

This testimony of the complainant in respect to the time when the drawings Exhibits DD and EE were made finds corroboration in the testimony of the witnesses Houghton, McGann, Crane, Bender, Shaw, and Gray. We are satisfied from the evidence that they, together with the memoranda appearing upon them, were made at the time they respectively bear date. Copies of those drawings and memoranda are inserted on page 130. They show not only and altogether new combination of elements for the transportation of the spoils, but also something radically new in rotary excavators, namely, a rotary excavator with inward delivery through itself in combination with a suction pipe. They show a dredge boat having two self-con-

tained pivots or centers of oscillation for the swinging of the boat while at work; a flexible joint near the pivots; a discharge pipe consisting of an inner flexible oscillating section, a series of sections flexibly joined together, and supported by floats, and an outer rigid nonoscillating section; a suction pipe; a rotary excavator having inward delivery; the arc-shaped cuts of the excavator made by the dredge while swinging from side to side on the pivot; and devices for its working with a side feed. All of these are also shown in the complainant's patent 318,859. In 1868 the complainant made four models showing different forms of construction of his invention, marked "M²," "M," "N," and "II," respectively, and which were introduced in evidence, and are inserted on pages 126-129. While these models show details of construction not shown in the drawings upon Exhibits DD and EE (II, among other things, showing the inner cylinder at the end of the suction pipe partially cut away, and N showing it entirely removed, and N also showing the trunnions of claim 59 of patent 318,859), they each and all embody the principle of the invention represented by those drawings and the memoranda thereon. All of this antedated by many years the defendant's patent for his first dredger, as well as his plans and model therefor, which, according to the averments of his answer, were not made until the years 1874 and 1875, respectively. Hence it cannot be true that the complainant got his ideas from any model or machine of the defendant.

The complainant did not, however, make any application for a patent for his invention until December 9, 1876. But from the time of its conception he was indefatigable in his efforts to perfect it, and to demonstrate its practical utility. His long delay in applying for a patent, the appellant contends, constituted an abandonment of whatever invention was made by him. To review the many pages of evidence going to show the reasons for the delay in the complainant's application would serve no useful purpose. It is enough to say that, so far from showing any intentional abandonment on the part of the complainant, they show the most persistent and continuous efforts on his part, against very adverse circumstances, to perfect the invention, and avail himself of its benefits, and excuses the laches with which he might otherwise be justly charged. It was so held by the patent office, where the question of abandonment was raised, and was decided in favor of the complainant. "No general standard by which diligence can be established has been established by the law; nor, in the nature of things, is such a standard possible. It must be reasonable under all the circumstances of the particular case in question. The character of the invention; the health, the means, the liberty of the inventor; his occupation upon kindred or subordinate inventions, —are proper subjects for consideration. Such reasonable diligence does not involve uninterrupted effort, nor the concentration of his entire energies upon the single enterprise." Rob. Pat. § 387.

The original application of the complainant for a patent for his invention was filed in the patent office, as has been said, December

9, 1876. It embraced a description of his invention and claims, and was accompanied by a model. The original specifications and claims were prepared by the complainant's attorneys, and met with objections in the patent office. After amendments by the attorneys, the patent office allowed 20 of the 54 claims embraced in the application. The complainant refused to accept the claims as allowed, on the ground that they failed to properly cover his invention, and allowed his application to lapse by failing to pay the government fee within six months after the allowance; but within two years after that date, to wit, April 16, 1879, he filed a renewed application for letters patent for his said invention, asking therein that the original specification, oath, drawings, and model be used as a part thereof. Based upon the renewed application, the patent office demanded of the complainant's attorneys further description and illustration of the invention, which the attorneys insisted was unnecessary. Much correspondence ensued between the attorneys and the patent office upon that question, and finally the complainant concluded to take personal charge of his application, and accordingly addressed to the commissioner of patents the following communication:

"613 Mission St., San Francisco, June 13, 1882.

"To the Commissioner of Patents, Washington, D. C.—Sir: Unable to fee attorneys to prosecute my cases at the patent office, they hang fire, while I grow grey. It becomes necessary for me to do the best I can with them myself. The power of attorney heretofore granted by me to Dewey & Co., of San Francisco, and A. H. Evans, of Washington, D. C., is hereby revoked in the case of the renewal application for improvements of dredging machines. Ignorant of the changes that may have been made in specifications or drawings, I inclose \$5 for copy of contents of the file wrapper. I cannot give the serial number.

"Respectfully,

A. B. Bowers."

On the next day, June 14, 1882, the complainant sent to the patent office a communication amending his specification, "by striking out all thereof save the signatures, preparatory to submitting a new specification, in accordance with the views of the examiner"; and on July 26, 1882, he filed in the patent office the new and substituted specification. The examiner having found that the specification as thus amended included new matter not disclosed in the original application, the complainant struck out all of the amended specification except the signatures, and on November 13, 1882, filed a second new and substituted specification. Much correspondence thereupon ensued between the patent office and the complainant, resulting in the complainant going to Washington in person, and there, concluding that his invention could not be covered by a single patent, and that several patents would be necessary to properly cover it in all of its parts, determined to, and accordingly did, divide his application into several divisional applications. The first divisional application so filed by him culminated in patent numbered 318,859, issued May 26, 1885. His second divisional application was patented on the same day, May 26, 1885, by patent numbered 318,860, for "The Art of

Dredging." His third divisional application embraced all the remainder of his original application not comprised in the first and second divisions. This third divisional application was filed April 29, 1885, while the original application was pending, and before the issuance of any patent. In the prosecution of his third divisional application, it was found that several independent inventions were described, and that it, too, would have to be divided accordingly. The complainant divided it into nine different divisions, and filed divisional applications therefor, while the third divisional application was pending, and before the issuance of any patent therefor. The second of these last-mentioned divisional applications was filed August 3, 1886, and patented December 28, 1886, as No. 355,251, which is the second patent sued upon herein.

The defendant, on July 3, 1876, made application for a patent for an improvement in dredging machines, and for such improved dredging machine a patent was issued to him December 19, 1876, and is numbered 165,600. It is conceded by both parties to the present controversy that nothing covered by that patent to the defendant constitutes any infringement of the invention claimed by the complainant. Subsequently, the defendant applied for a patent for a new and improved excavating curved rotating plow for submarine work; and on May 8, 1883, a patent therefor was issued to him, and numbered 277,177. Two other patents were afterwards issued to the defendant,—one of date June 10, 1884, for a new and useful improvement in dredging machines, and the other of date October 7, 1884, for a new and useful improvement in rotary plows for submarine work. Under his patents the defendant built and operated two machines. The first machine so built and operated by the defendant was confessedly no infringement of anything patented to the complainant; and if, as is contended by the counsel for the appellant, the second machine built and operated by him, "with the exception of having a greater capacity and more power, was built just like" his first machine, it would follow necessarily that the second and only other dredging machine built or operated by the defendant within the state of California could no more be an infringement of anything patented to the complainant than was his first dredger. But is that assertion of the counsel for the appellant correct? The defendant's first machine was built in 1876, in accordance with his patent 165,600. The machine there patented, and as thus constructed, had no self-contained pivot, and, of course, no devices for swinging or for working the boat on such pivot; nor did it contain any floating or submerged discharge pipe. Its excavator, while rotary, consisted of radiating arms, the effect of which was the exact reverse of that of inward delivery. The defendant states in his patent for his second invention that it "has for its object to so construct the plow that, when connected with any suitable scow or float, and properly geared with any suitable driving mechanism, it may be readily rotated; and, with these ends in view, my invention consists of a rotary plow so curved on the land side that the rotary sweep of

the plow will be within the circle described from the axis of motion of the plow." And in his specification he proceeded to describe the construction and operation of the plow, referring by letters to the drawings accompanying the same, as follows:

"A represents a series of plows made in the ordinary manner, except that the land side, b, is curved in a line drawn from the axis of motion of the rotating ring support. These plows, A, are secured in position by vertical plates, B, and screw bolts, a, to circular frame or ring, D, formed with radial wrought-iron arms, C, and hub, H, the latter being secured by a feather or in any other suitable manner to a vertical hollow shaft, E, provided near its upper end with a bevel-gear meshing, with a similar gear on the end of a horizontal driving shaft, which may be driven by an engine on the scow or float. The vertical hollow shaft, E, is secured by any suitable means to bearings on the side of a vertical frame, which, in the instance illustrated in the drawings, consists of a hollow tube, J, the lower end of which is provided with a foot valve, K; and within this tubular frame may be arranged a suction dredging tube, L, the frame, J, and tube, I, being so arranged with reference to the ring frame, D, of the plows, that the material loosened by the plows will be dredged from the center.

"It will be observed that the land side, b, of the plows, being curved, causes the sand, mud, &c., loosened by the plows, to be swept to the center, where it can be readily acted upon by the dredge. L is a hood arranged over the plows and their supporting ring frame, D, to protect the same, and the plows are set at an angle, so as to cut slightly outside said hood. To the upper end of the hollow shaft, E, I connect, by a swivel coupling, F, a hose, G, which I employ to conduct a stream of water under pressure, should the plows, A, be caved in on; this stream of water, as will be readily understood, serving to break up and scatter the sand or mud where it acts as an impediment to the action of the plows. The channel cut by the plows will be in the direction of the movement of the float or scow, on the same principle as a metallic 'routing machine.'

"I do not, of course, wish to limit myself to all of the exact details of construction shown, as they may be varied in many particulars without departing from the spirit of my invention; as, for instance, while I have shown the supporting frame of the vertical shaft, E, as constituting a hollow tube, with an exhaust or suction dredge tube arranged within the same, for the purpose of removing the material plowed up by the plows, A, I may substitute therefor any suitable supporting frame, and employ any desired independent mechanism. I have shown the ring frame, D, armed with four plows, A; but I do not wish to be confined in this particular, as a greater or less number of plows may be employed, the gist of my invention resting in the idea of the rotary plows formed with a curved land side, and connected with a rotary frame, so that they may be rotated from a central driving shaft, and in combining with such arrangement a means for flushing and disintegrating the material cut up by the plows by means of a stream of water under high pressure."

The claims embraced in the defendant's patent 277,177 are as follows:

"(1) The plows, A, provided with land sides, b, curved to conform to the circle of their rotation, in combination with a rotary frame or ring, D, and driving shaft, E, substantially as and for the purpose set forth.

"(2) In combination with the plows, A, provided with curved land sides, as described, and the revolving frame or ring, D, the driving hollow shaft, E, and suitable hose and connections, G, F, substantially as and for the purpose set forth."

That the plows of this patent, unlike the excavator of the defendant's first patent, have an inward delivery through itself to a nonrotating suction pipe, is plain; and, indeed, it is, in effect, so declared by the defendant himself in his specification above quoted, for he says:

"It will be observed that the land side, b, of the plows, being curved, causes the sand, mud, &c., loosened by the plows, to be swept to the center, where it can be readily acted upon by the dredge."

These specific devices thus described by the defendant in his specification, and for which his patent 277,177 was issued, and which were afterwards embodied by him in his second machine, not being specifically described in either of the complainant's patents, it is urged on the part of the appellant that no infringement of those patents is thereby shown. If the complainant is to be limited to the specific devices described in his patents, that would undoubtedly be true; but, as has already been said, he was the first to invent not only a rotary excavator having an inward delivery through itself to a suction pipe, but also of the combination of such an excavator with transporting and discharging devices by means of which hard material in place can be severed, lifted, and continuously carried over water or land to any desired place of deposit. He is therefore justly entitled to be regarded as standing at the head of the art in those respects, and to a broad and liberal construction of his claims thereto. So regarding him, the objections of the appellant to the validity of the complainant's patents are not well taken. Those most urged are that the complainant's claims are merely for functions and results, and that they constitute aggregations only.

By section 4888 of the Revised Statutes it is provided that every inventor, when making his application for a patent, shall file in the patent office a written description of his invention; and, if the application be for a machine, he is required to explain the principle thereof, and the best mode in which he has contemplated applying the principle, so as to distinguish it from other inventions. But he is not necessarily limited to the one mode shown. The pioneer inventor is entitled to a generic claim, under which will be included every species included within the genus. In addition to such generic claim, he may include in the same application specific claims for one or more of the species. *Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299; *Clough v. Barker*, 106 U. S. 166, 1 Sup. Ct. 188; *Clough v. Manufacturing Co.*, 106 U. S. 178, 1 Sup. Ct. 198; *Rob. Pat. § 535*; *Hammerschlag v. Scamoni*, 7 Fed. 584; *Telephone Co. v. Spencer*, 8 Fed. 509; *Machine Co. v. Teague*, 15 Fed. 390; *Manufacturing Co. v. Buffalo*, 20 Fed. 126; *Brush Electric Co. v. Electric Imp. Co.*, 52 Fed. 965; *Ex parte Nagle* (1870) *Com. Dec.* 137; *Ex parte Howland*, 12 O. G. 889.

When the complainant claimed, in claim 10 of his patent 318,859, "a dredge boat having a self-contained pivot, forming a center of horizontal oscillation, with devices for swinging and working

said boat upon said pivot, in combination with a suction pipe, exhausting apparatus, and rotary excavator," he was not claiming a result, which, of course, he could not do. Nor did he thereby limit himself to any particular form of construction of the several devices therein mentioned. What he there claimed, and what he, as the first inventor of any combination that would accomplish the desired result had a right to claim, was the combination of a dredge boat itself containing a pivot forming a center of horizontal oscillation, with devices for swinging and for working the boat on the pivot, a rotary excavator for the severing of the material in place, a suction pipe for its receipt and transmission to the exhausting apparatus, and the latter for the transportation and discharge of the spoils to the desired place of deposit. The record shows that the complainant was the first to combine those elements at all, and that the functions performed by his machine so constructed were entirely new. Hence he had the right to make the broad and generic claim embodied in claim 10, without any limitation as to the form of construction of the particular elements, and all subsequent machines which employ substantially the same means to accomplish the same result are infringements, notwithstanding the subsequent machine may contain improvements in separate mechanism which go to make up the machine. Authorities *supra*, and *McCormick v. Talcott*, 20 How. 402; *Railway Co. v. Sayles*, 97 U. S. 554; *Clough v. Barker*, 106 U. S. 166, 1 Sup. Ct. 188; *Consolidated Safety-Valve Co. v. Crosby Steam Gauge & Valve Co.*, 113 U. S. 157, 5 Sup. Ct. 513. Of course, it remained open to any subsequent inventor to accomplish the same result by substantially different means.

Claim 16 of the complainant's patent 318,859 is a combination of a dredge boat, a floating pipe, a land pipe, and a flexible joint between them. The same combination was, for the first time in the history of the art, made by the complainant July 13, 1864, and illustrated by the drawings and memoranda upon Exhibit DD.

Claim 25 is for a combination of a discharge pipe, consisting of a series of sections flexibly joined together, floats for supporting the pipe on water, and a dredger having a rotary excavator.

Claim 53 is for a combination of a nonrotative suction pipe with a rotary excavator, having an inward delivery through itself.

Claim 54 added to the combination covered by claim 53 a dredge boat; and claim 59 added to the combination covered by claim 53 trunnions or equivalent joints to permit the excavator and outer ends of the suction pipe to be raised and lowered to suit the depth at which the work is progressing. The trunnions embraced by claim 59 are not shown in the complainant's drawings of 1864, but are shown in the model N made by him in 1868, and are thus described in his specification:

"The swinging portion of this [suction] pipe is mounted at the inner end of the well upon strong trunnions, one of which forms an elbow of the pipe, and passes through a stuffing box, or other suitable connection, into the suction

pipe of the pump B. Through the other trunnion passes a shaft that actuates the gears, I, that drives the shaft, R, and bucket wheel, E; and upon these trunnions the shaft, R, suction pipe, and excavator swing as the cutter is raised or lowered, to suit the depth at which the work is progressing."

Claims 13, 17, and 18 of the complainant's patent 355,251, found by the court below to have been infringed by the defendant, are as follows:

"(13) In combination, a dredge boat, exhausting device, telescoping suction pipe, and a rotary excavator provided with detachable cutting edges."

"(17) In combination, a dredge boat, exhausting device, telescoping suction pipe, and a swinging section of discharge pipe flexibly joined to the boat, and to an outer stationary section, to allow said boat to feed forward, and said oscillating pipe to swing on the joint connecting the oscillating and nonoscillating sections."

"(18) In combination, a dredge boat, exhausting device, telescoping suction pipe, rotary excavator, and a swinging section of discharge pipe flexibly joined to the boat, and to an outer stationary section, to allow said boat to feed forward, and said oscillating pipe to swing on the joint connecting said oscillating and nonoscillating sections."

The element here introduced that is not embraced by any claim of patent 318,859 is a telescoping suction pipe, which is thus described in the specification contained in patent 355,251:

"O is a suction pipe provided with an elbow and telescoping section or sections, O'. It is also provided with stiffening slide rods, t, t, t, that pass through suitable slides or guides at the top and bottom of the elbow, and at the lower end of each telescoping section, except the lowest, to the latter of which they are firmly secured by strong fastenings. These slide rods are large and strong, to keep the telescoping sections of pipe and the bearings of the excavator shaft in line, and insure their easy working. The joints of the telescoping sections are placed below the surface of the water, to obviate the necessity for stuffing boxes and packing. This pipe is also provided with a hollow (generally a rotary) excavator, that delivers its spoil inward through itself to said pipe. It is further provided that the chain, I, secured to the lower end of the lowest telescoping section, and passing over suitable sheaves to a hoisting device, by means of which it is raised and lowered in the process of dredging. Similar chains are attached to the lower ends of the intermediate telescoping pipes, and to some suitable point above, to prevent said intermediate pipes from dropping out of the pipes above them."

While the telescoping suction pipe was old, the record shows that the complainant was the first to combine it with the other elements of the several combinations specified in claims 13, 17, and 18 of patent 355,251. In no just or proper sense can any of the combinations described in the complainant's claims involved on this appeal be said to be mere aggregations, for the reason that the result is the product of the combination, each element affecting the action of the others, and all of them co-operating in the one result of severing by the forward and side action of the machine the material in place where it is not wanted, and depositing it in another place where it is wanted. The flexible joints of the floating discharge pipe and the vertical anchors or turntable, as the case may be, permit the movement of the machine from side to side, as well as forward, and, in combination with the other elements spec-

ified, make possible the continuous cutting and lifting of the material in place, and its continuous transportation to the desired place of deposit. No combination of elements that so operate can be regarded as a mere aggregation, for each one has a direct influence upon the action of each of the others, the result necessarily being the product of the combination itself, and not a mere aggregate of several results, each the complete product of one of the combined elements. *Hailes v. Van Wormer*, 20 Wall. 353; *Royer v. Roth*, 132 U. S. 201, 10 Sup. Ct. 58; *Reckendorfer v. Faber*, 92 U. S. 347; *Beecher Manuf'g Co. v. Atwater Manuf'g Co.*, 114 U. S. 524, 5 Sup. Ct. 1007.

The contention that the complainant limited the form of his excavator so as to avoid an interference with the defendant in the patent office is not supported by the evidence. That he amended it is true, but not for the purpose stated by the counsel for the appellant. As amended, it described the excavator as shown in the drawings of July 13, 1864, and also as shown by the model N made by the complainant in 1868; one form containing an inner chamber at the end of the suction pipe, and the other showing the chamber cut away until only enough remains to support the excavator and its shaft; both having an inward delivery, the first to be used when the spoils do not require a large percentage of water to carry them up the suction pipe, and the second when they do. The clear meaning of a claim to an excavator having inward delivery, or with inward delivery through itself, is to an excavator so constructed as to produce an inward delivery. The terms "inward delivery" have direct reference to the mechanism itself, and cannot be properly limited to the description of the action or effect of such mechanism.

The contention on the part of counsel for the appellant that no successful machine can be built and operated in accordance with the complainant's patents is not at all supported by the record, which contains abundant evidence to the effect that machines have been so built, and have ever since been operated with very great success. The fact, if fact it be, that the first machine built by the complainant (called in the record the "Davis Machine") was not successful in its operation, is unimportant. As was well said by the court in answer to a similar objection in the case of *Mergenthaler Linotype Co. v. Press Publishing Co.*, 57 Fed. 502, 506:

"It would certainly be a novel doctrine to deny to an inventor the fruits of a broad invention because the machine which first embodied it was rudimentary in character, and failed to do as good work as improved machines made subsequently. None of the great inventions could survive such a test. Ten years after the invention of Howe, the machine first made by him would hardly have satisfied the least exacting sewing woman. The Dodds and Stephenson locomotive would, only a short time after its construction, have been discarded as behind the age, even by the savages of Tasmania. The telephone of Bell is not the perfected telephone of commerce. The Morse telegraph is looked upon to-day as an interesting antique. And yet it would be an unheard of proposition to withhold from these illustrious men the credit they deserve because their machines were crude at first, and were improved afterwards."

Giving to the complainant's patents the broad and liberal construction to which we think them justly entitled, it is clear that the second machine of the defendant constitutes an infringement of the complainant's excavator with an inward delivery, and of the combination claims of the complainant's patents adjudged by the court below to have been infringed. The judgment is affirmed.

FOUGERES et al. v. JONES et al.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 276.

1. PATENTS—INFRINGEMENT.

Structural characteristics of a device, which are distinguished and made essential in a patent claim, must necessarily be found in any infringing device.

2. SAME—ANTI-RATTLERS FOR THILL COUPLINGS.

The Blair patent, No. 334,842, for an anti-rattler for thill couplings, made of a plate of steel or other suitable elastic material bent upon itself, and adapted to be inserted between the ears of a jack-clip, is expressly limited to the special form of device described, and is not infringed by a device of a different form which lacks some of its parts.

Appeal from the Circuit Court of the United States for the District of Indiana.

V. H. Lockwood and Warren G. Sayre, for appellants.
Chester Bradford, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

SHOWALTER, Circuit Judge. Appellants brought suit for the infringement of letters patent 334,842, issued January 26, 1886, to one George W. Blair. The patentee says in his specification:

"The object of my invention is the production of an anti-rattler for thill couplings, made of plate steel or other suitable elastic material bent upon itself, and adapted to be inserted between the ears of the jack-clip, and having two curves or corrugations upon its face front, one of which has a bearing against the thill iron. In the accompanying drawing, forming a part of this specification, the figure is a perspective view of the anti-rattler embodying my invention. A represents a steel or other suitable elastic plate, bent forward at a, and having a return bent at a'. The outer limb, B, is formed with a rib or corrugation, b', and has a curved portion, c, between a' and b'. From b' to the end of the plate is a curve, c', adapted to fit against the back part of the thill iron, and, by pressure against the same, prevent rattling, as is well understood. To the forwardly projecting part, X, of the spring plate, is secured by rivets, or in other appropriate manner, the plate, D, which forms a T-head adapted to rest on top the ears of the jack-clip, thus preventing the spring from falling or working out in a downward direction, while the rib between the two curved portions, c, c', prevents it from working out in an upward direction. By making the sharp return curves at a', the spring is easily inserted between the end of the thill iron and axle clip. I am aware that anti-rattlers have heretofore been made of single plates of steel bent in various forms. I therefore desire to restrict my claim to the specific device herein shown and described.

What I claim is: The anti-rattler for thill couplings hereinbefore described, made of a steel or other elastic plate, with the sharp return curve, at a', the

curved portions, c and c', and rib, b', in the outer limb thereof, and having the back part bent forward at a to form the part X, and with the plate, D, secured thereto."

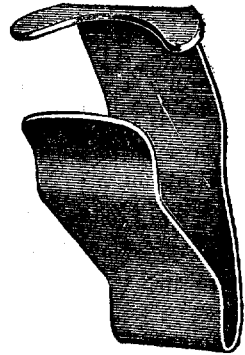
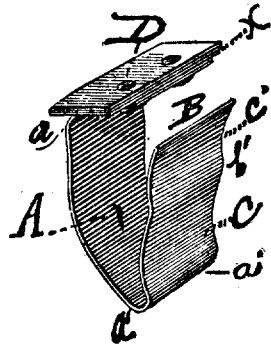
The drawing which accompanied the patent is as follows:

The claim on its face, as well as by the express concession and declaration in the specification, is restricted to the specific device shown and described. In the specification and in the claim itself a distinction is made between a rib and a curve. An angular projection like b' is a rib. An inward bend like c or c' is a curve. Structural characteristics thus distinguished and made essential in the claim must necessarily be found in any infringing device.

That complained of is shown in the following figure:

By comparing this device with that of the patent, it will be noticed that in the bent bar or plate of appellees there is no "curved portion, c," no "part X," in form and function as stated in the patent, and no "plate, D, secured thereto." We do not find it necessary to go generally into details on the prior art, as abundantly shown in the record. If the ears, C, and the clip, D, be omitted from the Murbarger drawings, that device would anticipate the one in suit unless the "curved portion, c," and the "plate, D," constructed and attached as described, be insisted on as essential. But obviously the patentee here, by the terms of his claim when construed with reference to his specification and concession therein, left no scope for his monopoly beyond the special form of device described and a choice of material in making his elastic plate. Hence there is no infringement. We do not find it necessary to consider the point that the claim as a combination is invalid, or the matter of invention.

The decree is affirmed.



THE W. H. SIMPSON.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 308.

1. TOWAGE—DUTY OF TUG.

A tug is neither a common carrier nor an insurer, nor is the highest possible degree of skill and care exacted of her. She is bound to exercise reasonable care and skill in the performance of the duty assumed, and failure therein is a gross fault, creating liability for resulting injury to the tow.

2. SAME—PRESUMPTIONS.

No presumption of negligence on the part of a tug arises from the mere fact of an injury to her tow, and the burden of proof is upon the tow to show by the evidence and the reasonable probabilities of the case that the tug was guilty of the fault charged through failure to exercise ordinary skill and care.

3. SAME—COLLISION OF TOW WITH DOCK—EVIDENCE.

Evidence and circumstances held insufficient to show that the collision of a schooner in tow of a tug with a dock in the harbor of Milwaukee was due to the negligence or want of skill and care of the tug.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

The schooner F. W. Gifford sailed from the port of Chicago on the 8th day of April, 1894, laden with a cargo of 29,000 bushels of corn, bound for Port Huron. She was a vessel of 400 tons burden, 151 feet in length and 31 feet beam, and with her cargo on board drew 12 feet and 6 inches. During the night a severe northeast storm sprang up, with a high sea, causing the vessel to labor heavily, and at 4 o'clock in the morning it was discovered that the forward pump was broken, and rendered useless. She was then about 30 miles northeast by east from the port of Milwaukee, and was put back for that port. When four or five miles distant from the piers of the straight-cut harbor at Milwaukee, she signaled for a tug, which signal was answered by the steam tug W. H. Simpson, the latter vessel reaching her about a mile east or south-east of the piers. This tug was 67 feet in length, between 17 and 18 feet beam, and had a steam steering gear. At this time there prevailed an easterly gale, accompanied by rain and sleet, the strength of the gale being variously estimated at from 30 to 40 miles an hour, with a heavy sea which washed over the harbor piers, causing a swell of 4 feet running between the piers. These harbor piers extend easterly and westerly and are 1,800 feet in length. The width between the piers is 260 feet. The distance from the west end of the piers across the Milwaukee river, which here runs about north and south, is 550 feet. Benjamin's coal dock is situated on the west bank of the Milwaukee river, nearly opposite the entrance of the piers. The lighthouse is located on the north pier, about 600 feet from the easterly end of the pier. The life-saving station is south of and at the westerly end of the south pier. The schooner passed a line to the tug out of the chock on the port side, which was made fast on the tug. This line was about 250 feet in length between the vessels, which was a proper length of line for towage in the then condition of the sea. The line was 6½ inches in circumference, in good condition, almost new, and in all respects a proper line for the purpose. Upon making fast, the tug proceeded with her tow, distant from 15 to 20 feet on the port side of the schooner. Upon entering the jaws of the piers the schooner lowered her canvas. This being done, signal was given by the tug to stand by and to shorten the towline. This was about opposite the lighthouse. There is much conflict in the evidence with respect to the number of men upon the schooner who were employed in taking in the line, the one party asserting and the other denying that a sufficient num-

ber of men were engaged in that work. At all events, the schooner signaled that she could not get in the line, and that the tug should go ahead, which she did, picking up the slack of the line. A second signal was given to haul in the slack when the tug was some 600 feet east of the west end of the piers, but for some reason the slack was not taken up rapidly enough to prevent a bight or loop in the line, and the schooner, at that time proceeding a little more rapidly than the tug, ran up upon the line and got so near to the tug that the slack in the towline was in the water under the bow of the vessel. By this time the tug had gotten, as asserted by the one party, some 250 feet eastward of the life-saving station, when she signaled the schooner to make fast the line, and when at about the corner of the west end of the pier, she hauled to the northward to swing the vessel up the Milwaukee river, signaling the schooner to put her helm hard a-port, which signal was answered that the helm was hard a-port. There is dispute whether this signal was given; the tug asserting that it was as stated, the schooner asserting that it was not given. According to the claimants, when the tug went across the bow of the schooner, for some reason the latter did not answer to her helm, the line was caught on the bobstay plate and cut, and the schooner, proceeding without control, collided with Benjamin's dock, and sustained injury. According to the schooner, when within 150 feet of Benjamin's dock, and not until then, the tug hauled to the northward, and started ahead at full speed across the bows of the schooner, and without signal, and fetched on the line with a sudden jerk, and it parted; the schooner colliding with Benjamin's dock "a little on the port bow,—a little; not exactly stem on." This libel was filed to recover the damages sustained, and the negligence alleged is this: "That when the tug had towed the vessel to a point within about one hundred and fifty feet of the said H. M. Benjamin's coal dock on the west bank of the river, said tug, without orders, notice, or directions to those on board of the vessel, suddenly changed the tug's course to a point east of north, and said tug shot across the bow of said vessel with great force and speed. That as soon as the tug changed her course from a point about west to a point somewhere east of north, the greater portion of the towline became slack in the water, and when the tug shot across the bow of the schooner as aforesaid, going at full speed, she fetched up on the towline with a tremendous jerk, and parted it; and in spite of all efforts that were made or could be made by the officers and crew of the Gifford to prevent it (the Gifford being so close to the dock known as the 'H. M. Benjamin Coal Company Dock') that she ran into said dock and coal shed standing thereon." The court below dismissed the libel, and the libellant appeals.

Charles E. Kremer, for appellant.

Max C. Krause, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge, upon this statement of the case, delivered the opinion of the court.

The law which governs this case is well settled. A tug is neither a common carrier nor an insurer, nor is the highest possible degree of skill and care exacted of her. She is bound to exercise reasonable care and skill in the performance of the duty assumed, and failure therein is a gross fault, creating liability for injury. *The Margaret*, 94 U. S. 494; *The L. P. Dayton*, 120 U. S. 337, 7 Sup. Ct. 568. The difficulty arises, not in the law, but in the ascertainment of the facts from the evidence, which, in cases like the present, is usually conflicting. This one furnishes no exception to the rule. There is here no presumption of negligence arising from the

fact of the disaster, and the burden of proof is put upon the libellant to satisfy the court upon the evidence presented and upon the reasonable probabilities of the case that the tug was guilty of the fault charged through failure to exercise ordinary skill and care.

There would seem to be no need to enter into a discussion of the voluminous evidence presented to the court. It would do no possible good, and would but incumber the reports. The considerations which have led to our conclusion may be briefly stated. The purpose of the tug was unquestionably to take her tow northward up the Milwaukee river. The contention of the tug is that she made the proper maneuver for that purpose at the proper time, and when about opposite the life-saving station. The charge in the libel is that the maneuver was not attempted until the schooner was within 150 feet of Benjamin's dock, when the tug, without signal, suddenly shot across the bow of the schooner, going at full speed, and fetched up on the towline with a tremendous jerk, which parted it. This is the only wrongful act asserted. If this charge be true, it exhibits not only a want of ordinary skill, but a willful and reckless act, and, as it seems to us, without possible motive to sanction it, or reason to suggest it. If, for any uncontrollable cause, the schooner had got within 150 feet of the Benjamin dock, and was in danger of colliding therewith, and the tug had suddenly shot across the bows of her tow, straining on the line, to swing her from her course to avoid collision, the alleged maneuver might be comprehended as a desperate act in extremis; but that skilled seamen, as were those on board of the tug, desiring to go up Milwaukee river, which was there 550 feet in width, should not change course from west to north before arriving within 150 feet of the west bank of the river, and this in manifest disregard of the most ordinary rules of seamanship, and without cause for or purpose in the delay, passes comprehension. Such action is only explainable or made credible upon the theory of utter incompetency in seamanship. The burden of proof being upon the libellant asserting this charge, it must be made out satisfactorily, and this has not been done. It is proven, as we think, by the preponderance of evidence, and is coincident with what was naturally to be expected under the circumstances, that the tug changed her course to the north, upon proper signal to the schooner, when about opposite to or easterly of the life-saving station; and that the schooner answered to the signal that her helm had been put hard a-port, but that for some reason she did not follow the course of the tug, but kept on a westerly course until the towline parted, and she collided with the dock; and this notwithstanding the efforts of the tug to turn her bow. This failure upon the part of the schooner may have resulted from the length of line which she had been unable for some reason to haul in, and the inability of the tug by reason thereof to properly control her movements. It may have resulted from the strong swell carrying her forward. It may

have resulted from failure of the schooner to respond to her helm. It may have resulted from a combination of these causes. No fault in respect to any of these possible causes is charged against the tug. It may have been for the reason, asserted by the witnesses for the libellant, that the helm of the schooner was not in fact put hard a-port until within 150 feet of the dock. The latter cause would clearly account for the disaster, and may have proceeded from failure to notice or from disregard of the signal by the master or wheelsman of the schooner. This cause, while it explains the disaster, would acquit the tug of fault if the signal was timely given, as is established by the preponderance of the evidence. Whatever the cause, it is not satisfactorily shown to be owing to the fault of the tug. It was of course the duty of the tug, when it became evident that the schooner did not answer to her helm, to make diligent effort to prevent collision. This she attempted to do, and in the doing of it the hawser parted, not by excessive strain upon it, or from chafing, but by cutting by coming in contact with the bobstay plates of the schooner, under the water, as is evidenced by the appearance of the line which was inspected by the court. We are not satisfied, upon a careful consideration of all the evidence in this case, that there was want of ordinary skill and care upon the part of the tug. While strenuous to hold those engaged in the towing of vessels to a strict performance of duty, we cannot place upon them a greater burden than the law imposes, or assume without satisfactory proof, or from the mere fact of injury, that they have been derelict in duty. The decree appealed from will be affirmed.

THE GEORGE W. CLYDE.

COMMERCIAL TOWBOAT CO. v. THE GEORGE W. CLYDE. LUCK-
ENBACH et al. v. SAME. MORNING JOURNAL ASS'N v. SAME.

(District Court, E. D. New York. March 5, 1897.)

1. SALVAGE SERVICES—COMPENSATION.

Services of tugs which came promptly to the assistance of a vessel in immediate danger of sinking in deep water from collision, and in some 15 minutes, without danger to themselves, beached her in a safe place, *held to be salvage services for which \$1,000 should be awarded.*

2. SAME.

The action of a tug in going voluntarily to a vessel injured by collision, merely to take off her passengers and crew, while other tugs summoned by the master, and adequate for the purpose, are engaged in rescuing her, is not a salvage service.

These were libels filed by the Commercial Towboat Company, by Lewis Luckenbach and others, and by the Morning Journal Association, against the steamer George W. Clyde, to recover compensation for alleged salvage services.

Carpenter & Park, for Commercial Towboat Co.

Peter S. Carter, for Luckenbach et al.

Benedict & Benedict, for Morning Journal Ass'n.

Robinson, Biddle & Ward, for claimant.

BENEDICT, District Judge. These are actions to recover salvage compensation for services rendered in towing the steamship George W. Clyde at the Narrows on the afternoon of February 29, 1896. The steamer George W. Clyde, a coastwise iron steamer, 250 feet long, having on board some cargo and passengers, outward bound, when passing through the Narrows, in a dense fog, encountered a collision which stove a large hole in her port side, and put her in danger of sinking immediately. When struck, she was in the middle of the channel at the Narrows, where the water was from 60 to 80 feet deep. The fog lifted almost immediately after the collision, and two steam tugs, the Joshua Lovett and the Dudley Pray, belonging to the Commercial Towboat Company, chanced to be opportunely within hailing distance. These towboats were immediately hailed by the master of the George W. Clyde, and, coming alongside of the Clyde on her starboard side, they passed their lines to her, and at once towed her to shore, some 800 to 1,000 feet away, where she was beached in safety. These towboats were made fast in about three minutes, and the vessel was beached in about fifteen minutes, time. There was no risk encountered by the tugs, no extraordinary exertion was put forth, and the towage was of an ordinary character. The service was, however, rendered promptly, and it saved the Clyde from the danger of sinking in deep water. I think that salvage compensation may well be awarded these tugs, and, in my opinion, \$1,000 will be sufficient

salvage compensation for them both. I do not apportion the sum between the two boats, for the reason that they are owned by the same company.

At about the same time the steam tug Scandinavian, a tugboat belonging to the libelants Lewis Luckenbach and others, came up to the port bow of the Clyde. The object of her approach to the Clyde is plainly stated by Mr. Quail, who was on board of the Scandinavian for the Morning Journal, and who claims to have been in command of that tug as owner pro hac vice. This witness said: "I ordered Capt. Olson to lay the Scandinavian alongside of the Clyde, so that we might take off the crew and passengers." Again: "The tug's boarding ladder was put up to the side of the Clyde for no other purpose than to allow the crew and passengers of the Clyde to descend in safety to the tug." Again: "It was because of my desire to take these people off that the Scandinavian was first made fast to the Clyde, so as to keep her alongside until she got the people off." There is testimony showing that, when the Scandinavian approached, she approached in a shape that would render her assistance useless. But, however that may be, she got out one five-inch line, and made fast to the Clyde, and, after the crew and passengers were taken off, she no doubt, by means of her line, applied some power to the Clyde. But she received no orders from the Clyde, was not asked to render assistance, and the evidence shows plainly that her assistance was not needed. The two tugs that already were there, that were called at the request of the captain of the Clyde, and whose lines those on the Clyde had taken and fastened, were abundantly sufficient to put the Clyde in a place of safety. Under such a state of facts, in my opinion, the Scandinavian is not entitled to salvage—First, because her services were not needed nor furnished at the request of the captain of the Clyde; second, because, according to the testimony of Quail, the only object of her exertions was to take off the crew and passengers. Services of that character do not give rise to a claim for salvage against the ship. In my opinion, therefore, the claims of the Morning Journal and of Lewis Luckenbach and others for services rendered by the Scandinavian must be rejected. The decree will be that the libel of Lewis Luckenbach and others be dismissed, without costs; also the libel of the Morning Journal will be dismissed, without costs. On the libel of the Commercial Towboat Company the decree will be for \$1,000 and costs.

THE LAMINGTON.

MERRITT et al. v. THE LAMINGTON.

(District Court, E. D. New York. January 23, 1897.)

SALVAGE COMPENSATION.

Arduous and expensive services to a vessel on shore on the Long Island coast were rendered by a wrecking company, the cargo lightered to New York, and the vessel hauled off, but it was much damaged. No case being found where successful salvors have not been awarded more salvage than the value of their services would be on the basis of quantum meruit, *held*, that a proper salvage for vessel and cargo would be \$19,020.79, being \$1,500 more than the expenses proved; but, the ship, only, being under the jurisdiction of this court, salvage for her is awarded at \$6,900.

This was a libel by Israel J. Merritt and others against the steamship Lamington to recover compensation for salvage services.

Benedict & Benedict, for libelants.

Convers & Kirlin, for claimant.

BENEDICT, District Judge. This action is brought to recover salvage compensation for services rendered by the libelants to the steamship Lamington between the 5th and the 26th days of February, 1896. The Lamington went ashore on the Long Island coast, 15 miles east of Fire Island, on the 4th day of February, 1896, and those in New York City interested in her requested the libellant Israel J. Merritt to proceed to the relief of the steamer, upon the basis of a salvage compensation. Thereupon Merritt proceeded to the Lamington with a tug, and arrived shortly after 2 o'clock in the afternoon of the 5th, and took charge of the operation. An anchor was got out, and strain put upon it, but it was impossible to move the steamer. The weather during the 6th and 7th was severe, and work was impossible. On the 8th the sea had moderated, the steamer having meanwhile been driven over the outer bar to and on the main beach. Then the salvors boarded her, and commenced to rig spars and cargo gear for the purpose of lightening the ship. From that time until the 25th, when the weather would permit, the salvors were engaged in lightening the ship and saving such part of the cargo as was worth saving, which was placed in barges brought from the city of New York, and transported therein to the city of New York, and there sold. On the 26th, at high tide, the vessel was pulled off the beach, but grounded on the bar, and the next day she was pulled off the bar and taken to New York. The labor involved in this service was hard; the weather being very cold, and much of the time very stormy. After the ship grounded on the shore, the labor was, for the most part, confined to lightening the vessel, and transporting to New York such of the cargo as was undamaged. The steamer, while on the beach, was so damaged that, on being sold under the process

of this court, she only realized \$8,600 net. The cargo was libeled in the Southern district of New York, and the proceeds of the auction sale thereof amounted to the sum of \$14,147.59.

That it is a case of arduous salvage services, carried on for many days in bad weather and severe cold, is not disputed. The only question raised relates to the amount to be awarded the salvors. The libelants, in order to show the nature and extent of the services they were called on to render, have offered proof of the cost of the services rendered, if paid for upon the basis of quantum meruit, which shows the value of the services to be the sum of \$17,520.79. The argument of the libelants is that, as this is a case for salvage compensation, the libelants must be awarded more than \$17,520.79; otherwise they will receive no salvage compensation at all. No case has been found where, in awarding compensation for salvage services, the salvors have not been awarded more than the value of their services upon the basis of quantum meruit, and I am unable to see any ground upon which to deny these salvors some extra compensation for their risk and their trouble. If these claimants had employed no salvors, but had undertaken to get this vessel and her cargo off themselves, they would, upon the proofs, have been compelled to expend \$17,520.79. Taking the testimony of Merritt to show the exact value of the services rendered, I am of the opinion that the ship and cargo should pay, in addition to the sum of \$17,520.79, the sum of \$1,500, amounting in all to the sum of \$19,020.79. As the proceeds of the cargo are not in this court, this court can only award salvage against the vessel. The sum awarded as the proper salvage for both vessel and cargo should be apportioned between the vessel and the cargo in proportion to their value. The proceeds of the vessel amount to \$8,000. The proceeds of the cargo amount to \$14,147.59. This will make the salvage compensation to be paid by the vessel the sum of \$6,900, for which sum the libelants may have a decree. I have fixed the sum above named upon the supposition that the testimony of Merritt as to the value of the services rendered is correct. It was not disputed on the trial. If, however, the claimants have any idea that his statement is exaggerated, they may have a reference to ascertain the value of the services rendered upon the basis of a quantum meruit, and the award will be modified accordingly.

NOTE. The reference being taken and proofs offered to oppose the valuation of services, and also to show additional expenses incurred by the owners of the vessel, it was ruled that, nevertheless, the award made should stand.

STATE OF MISSOURI *ex rel.* RAUCH v. BOWLES MILLING CO. *et al.*
(Circuit Court, E. D. Missouri, E. D. April 24, 1897.)

No. 4,023.

FEDERAL JURISDICTION—STATE AS NOMINAL PARTY.

Under Rev. St. Mo. 1889, §§ 527, 531, 532, attachment bonds are payable to the state, and may be sued on at the instance of any party injured, in the name of the state, to his use, and defendant may avail himself of any set-off he may have against the party to whose use the suit is brought with the same effect as if such party were the plaintiff, etc. *Held*, that in suits on such attachment bonds the state is merely a formal party, whose presence cannot oust the jurisdiction of the federal court.

L. F. Parker, for plaintiff.

Wm. S. Pope, Warwick Hough, and W. F. Carter, for defendants.

ADAMS, District Judge. This is a motion by defendants to dismiss the case for want of jurisdiction. The action is upon a bond given by the defendants on the institution of a suit by attachment in the state courts of Missouri against the relator. By the provisions of the statutes of Missouri the attachment bond is payable to the state of Missouri, and may be sued on at the instance of any party injured, in the name of the state, to his use. The defendant in such suit may avail himself of any set-off or counterclaim he may have against the party to whose use the suit is brought, with the same effect as if such party were the plaintiff; and, if such set-off or counterclaim exceeds in amount the damages proved in behalf of the relator, judgment is rendered against the relator in favor of the defendant setting up the set-off or counterclaim for the amount of the excess and all proper costs. Rev. St. Mo. 1889, §§ 527, 531, 532. The relator, or the person to whose use such action is brought, may be required to give security for the costs of the suit. Rev. St. Mo. 1889, § 2915.

From the foregoing it is clear that in such suit the state is at best only a nominal party, without any interest. It does not institute or control the litigation by any of its law officers. On the contrary, the party in interest to whose use the suit is brought has a legal right to make use of the name of the state, not for the benefit or, at the peril of the state, but as a matter of personal right, and for his own purposes exclusively. The real controversy in this case is, therefore, between the relator, a citizen of Illinois, and the defendants, citizens of Missouri, and as there is no controversy between the state of Missouri and the defendants, the formal use of the name of the state of Missouri as a supposed necessary party cannot oust this court of jurisdiction. *Maryland v. Baldwin*, 112 U. S. 490, 5 Sup. Ct. 278; *Browne v. Strode*, 5 Cranch, 303; *McNutt v. Bland*, 2 How. 9.

Attention is called to the feature of the Missouri statute which provides for a judgment for the penalty of the bond, and execution for the assessed damages only, in favor of the relator, and to that further provision of the statutes relating to *scire facias* on such judgment for further execution in favor of other persons damaged

within the purview of the attachment bond; and these features of the Missouri statute are claimed to present a case different from the cases *supra*. It is said that the state statutes involved in the Maryland Case, *supra*, made provision for any number of independent consecutive suits on the bond, at the instance of any person or persons injured, and that the proceeding by *scire facias* is not there recognized. It is further claimed that, as only one judgment can be rendered for the penalty of the bond in Missouri, and as the only recourse for subsequent breaches is by way of *scire facias* on that judgment, persons damaged by subsequent breaches, who may not happen to be citizens of states other than that of the defendants, can have no remedy. Without expressing any opinion concerning the claims so made, I am satisfied that the results, whatever they may be in the exceptional case suggested, cannot countervail the clear provisions of the constitution and acts of congress as interpreted by the supreme court. The motion to dismiss must be overruled.

HARDING et al. v. GUIOE.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1897.)

No. 201.

FEDERAL COURTS—FOLLOWING STATE DECISIONS—BILL TO REMOVE CLOUD ON TITLE.

The decisions of the supreme court of West Virginia holding that, under the state statutes, a bill to remove a cloud on title created by an irregular or void tax deed can be maintained by one out of possession, who relies solely on his legal title, are controlling in the federal courts.

Appeal from the Circuit Court of the United States for the District of West Virginia.

John T. McGraw, for appellants.

B. M. Ambler, for appellee.

Before SIMONTON, Circuit Judge, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge. This case comes up on appeal from the circuit court of the United States for the district of West Virginia, in equity. The bill is filed for the purpose of removing a cloud from the title of land. The complainant alleges that she is the owner in fee simple of 2,212 acres of land in the county of Randolph, W. Va., and sets out in detail her chain of title. The title is traced to C. J. P. Cresap, who purchased the same at a tax sale made by the sheriff, 8th of November, 1871, for taxes assessed in 1865 and 1866, the land at that time being the property of one George Reagan. Reagan himself traced his title to a sale made on the 6th of April, 1854, on the forfeiture of these lands by the original patentee. She further alleges that the land is in the state of nature, wild and uncultivated, but covered with a large quantity of valuable timber, which constitutes its chief element of value; that upon the faith of this she

had selected it as her portion in the division of an estate in which she was one of the devisees. She further alleges that John S. Hoffman, under whom she holds the land as devisee, and that she herself after him, had as full possession of these lands as, according to their nature, they were capable of possession. The bill goes on to allege that there has appeared on the record of the county of Randolph, where said lands are located, a deed to the defendant Harding, purporting to convey said lands to him under a sale alleged to have been made by the sheriff of said county in November, 1889, for taxes assessed on the said land for the year 1887 as the property of one John Reagan and others, and that Harding and Butcher, the other defendant, are preparing to take possession of said land to cut the timber thereon. This title to Harding, the bill charges, is null and void. The answer challenges the title and possession of complainant; denies that she has in fact any title; admits their proposed use of the land to which they aver they have good title; prays the dismissal of the bill, and the dissolution of the restraining order granted thereon on the filing thereof. The cause came on to be heard on the pleadings and on depositions. It resulted in a decree that complainant had a good and valid title to the land as claimed by her, that the title set up by defendants was null and void, that they had not proved possession in themselves, that the tax deed under which they claim be canceled and annulled, and that the injunction be made perpetual. Leave to appeal from this decree was granted to the defendants, and the cause is before this court on their assignments of error. These assignments of error go to the jurisdiction of the court. They allege that a court of equity passed upon and settled the legal title to the land in controversy when there was no other question before it, and that it took from defendants the land of which they held both title and possession, without the intervention of a jury. Also, in that plaintiff has a plain, adequate, and complete remedy at law. Also, in that plaintiff, being out of possession, seeks to remove a cloud upon the title to the land in controversy without showing ground for equitable relief.

The jurisdiction of courts of equity to entertain bills for the removal of a cloud on the title of real property is too well established to be now drawn in question. *McConihay v. Wright*, 121 U. S. 205, 7 Sup. Ct. 940. The general rule is that such bills will not lie if the party complainant be not in possession. If the complainant be in possession, he could not have any remedy at law, for under such circumstances he could not bring his action to try the title. The rule is clearly and distinctly stated by the supreme court of West Virginia in *Moore v. McNutt*, 24 S. E. 682, as follows:

"Equity will exercise jurisdiction to remove a cloud resting upon the title of real estate—First, where the complainant has only the equitable title, and is either in or out of actual possession, and whether his adversary is in or out of actual possession; second, where complainant, though having legal title, is in actual possession. It will not exercise such jurisdiction where complainant has legal title and is not in actual possession, no matter whether his adversary is in actual possession or not. The party is left to his remedy at law; that being plain, adequate, and complete." But only when it is plain, adequate, and complete. *Rich v. Braxton*, 158 U. S. 406, 15 Sup. Ct. 1006.

There can be no doubt that a bill will lie to remove a cloud created on the title to land by a tax deed alleged to be void for fraud or irregularity, although the complainant set up his legal title only, if he be in possession. In the case at bar, although the bill alleges possession in the complainant, it seems to be that possession which the legal title draws to it. The important question in this case, therefore, is, will a bill lie to remove a cloud upon the title created by a tax deed, if the complainant be not in actual possession of the land, and if he relies on his legal title? As we have seen, the general rule requires that in such a case the complainant should allege and prove actual possession. The supreme court of the United States, while holding that remedies in the courts of the United States are at common law or in equity, according to the essential character of the case, uncontrolled in this particular by the practice of the state courts (*New Orleans v. Louisiana Const. Co.*, 129 U. S. 45, 9 Sup. Ct. 223), yet an enlargement of equitable rights by state statute may be administered by the circuit courts of the United States as well as by the courts of the state, etc. *Gormley v. Clark*, 134 U. S. 348, 10 Sup. Ct. 554; *Frost v. Spitley*, 121 U. S. 552, 7 Sup. Ct. 1129; *Greeley v. Lowe*, 155 U. S. 58, 15 Sup. Ct. 24. This doctrine was applied in the case of *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495. This was a case from Nebraska. The complainant in a bill to quiet title set up a claim to the land under a tax sale, but did not aver possession. The defendant was the prior owner of the land sold for taxes. A statute of Nebraska provides that an action may be brought, and prosecuted to final decree, judgment, or order, by any person, whether in actual possession or not, who claims the title to real estate, against any other person setting up an adverse estate or interest therein, for the purpose of determining between these conflicting claims. The supreme court held that this created an exception to the general rule on that subject. The language of the court shows that this statute modifies the general rule of equity, that, in order to maintain a bill to quiet title, it is necessary that the complainant must be in possession, and, in most cases, that his title should have been established by law, or founded on undisputed evidence or long-continued possession. The court also held that this was an enlargement of equitable rights which could be administered by the circuit courts of the United States within that state as well as by the courts of the state itself. There are cases in the supreme court which seem to conflict with the doctrine of *Holland v. Challen*,—such as *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, in which this case and others are commented upon. But these cases all turn upon the crucial question, is this a suit cognizable in equity, or has the complainant a plain, adequate, and complete remedy at law? *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 129. The supreme court of the United States, in *Rich v. Braxton*, 158 U. S. 376, 15 Sup. Ct. 1006, held in a case like the one at bar, coming up from West Virginia, that the complainant who sought to quiet his title did not have a plain, adequate, and complete remedy at law. In *Davis v. Gray*, 16 Wall. 203, it is held that a party going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state

courts of that locality, unless, indeed, it conflicts with the constitution of the United States. *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712; *Grether v. Cornell's Ex'rs*, 43 U. S. App. 779, 23 C. C. A. 498, 75 Fed. 742. The subject is treated exhaustively, and very many authorities are cited, in *Darragh v. Manufacturing Co.*, 23 C. C. A. 609, 78 Fed. 7. In West Virginia the supreme court of that state, while rigidly enforcing the general rule in every other case in which it is attempted to remove a cloud on the title, and while requiring in such cases, as an inexorable condition precedent to the relief sought, that the complainant be in possession, if he relies on the legal title, made an exception in every case in which the cloud on the title is created by a tax deed charged to be irregular or void. This is distinctly and expressly shown in the cases of *Moore v. McNutt*, cited *supra*, and in *Christian v. Vance*, reported in 24 S. E. 596,—both cases in the supreme court of West Virginia. In the case first named, the general doctrine, as has been seen, is clearly stated; and in the last-named case, while the doctrine is repeated, a cloud created by tax deeds is distinctly excepted. This practice prevails, and has for a very long period prevailed, in West Virginia, without question. It arose out of the construction put by the court of that state upon its tax laws adopted soon after the organization of the state. And, although the tax laws then adopted have been changed in some particulars, still the action of the court of last resort in that state conclusively indicates its opinion that in this respect the change of the law has not affected this practice. *Forqueran v. Donnally*, 7 W. Va. 114; *Dequasie v. Harris*, 16 W. Va. 359; *Carskadon v. Torreyson*, 17 W. Va. 43; *Jones v. Dils*, 18 W. Va. 759; *Orr v. Wiley*, 19 W. Va. 150; *Simpson v. Edmiston*, 23 W. Va. 675; *Danser v. Johnsons*, 25 W. Va. 380; *Clayton v. Barr*, 34 W. Va. 290, 12 S. E. 704; *Christian v. Vance* (W. Va.) 24 S. E. 596. Without doubt, the existence of large bodies of wild and uncultivated land in that state, and the facility with which clouds could be created upon the title, furnished the reason for, and required the enforcement of, this rule. An examination of the facts stated in *Rich v. Braxton*, *supra*, not only justify, but show the imperative necessity of, this departure from the general rule. The court of last resort of the state of West Virginia having construed its statutes so that a bill to remove a cloud upon a title, created by an irregular or void tax deed, can be brought by one out of possession, and who relies upon his legal title only, this construction will control this court. This disposes of the questions of law raised by the assignments of error. We see no error in the facts found by the circuit court, and the decree of the circuit court is affirmed.

BROWN v. FRENCH, County Treasurer, et al

(Circuit Court, D. Montana. April 13, 1897.)

No. 458.

1. NATIONAL BANKS—TAXATION OF CAPITAL AND STOCK.

The Montana statute (Pol. Code, § 3692) provides for assessing shares of bank stock to the owners thereof, and, to aid the assessors in determining their value, requires the bank to furnish a verified statement showing the amount and number of shares of its capital stock, surplus, etc. An assessor, instead of demanding the statement here required, presented to a national bank a blank form for listing property subject to taxation. The bank did not return a verified list, but its assistant cashier handed to the assessor a statement beginning, "Capital, \$800,000," followed by items of surplus, undivided profits, United States bonds, and real estate. The assessor deducted the amount of the bonds and real estate from the "capital" and assessed the remainder to the bank, as stock. *Held*, that the tax was illegal, as the capital of national banks is exempt from taxation under the federal laws, and as both the state and federal laws require the shares to be taxed to their owners; and that the form of the return did not warrant the assumption that the bank owned its own shares.

2. SAME—ESTOPPEL.

A national bank which returns its capital for taxation is not thereby estopped from setting up that the same was not subject to taxation, and refusing to pay the tax.

3. SAME—INJUNCTION.

A federal court will enjoin a sale of the real estate of a national bank to enforce payment of taxes illegally assessed against its capital stock, under a law which would make the sale a cloud on its title, though the state law gives an action at law to recover back taxes illegally exacted.

4. SAME—NATIONAL BANK RECEIVERS.

A receiver of an insolvent national bank occupies a fiduciary relation to its creditors, and may sue in equity to enjoin the collection of taxes illegally assessed against the stock of the bank.

Toole & Wallace, for complainant.

R. R. Purcell and Carpenter & Carpenter, for defendants.

KNOWLES, District Judge. This is an action on the part of complainant to enjoin the defendants from proceeding to sell certain real estate, the property of the First National Bank of Helena, for taxes claimed to be due from said bank to said county of Lewis and Clarke for the year 1896. It appears from the bill that complainant is the receiver of said bank, appointed by the comptroller of the currency of the United States, and has qualified and is acting as such officer; that said French is the treasurer of said Lewis and Clarke county, and as such the collector of taxes for the same; that said French has advertised for sale, and threatens to sell, the real estate of said bank to pay said taxes; that one E. D. Edgerton, who was then the receiver of said bank duly appointed by said comptroller, paid the taxes upon all of the real estate of said bank, which was advertised for sale as above stated; that said bank was a national bank, incorporated under the banking act of the United States, and was conducting business as such. The tax claimed to be due from said bank, and for which said sale was

advertised and proposed to be made, was an assessment on what is claimed to be for the shares of stock of said bank, valued at \$497,906. From the affidavit of W. J. Bickett and Henry T. Davis, it appears that a blank form for a return of a list of property subject to taxation for the year 1896 in the county of Lewis and Clarke, Mont., was presented to said bank, and a list of said property demanded. It is set forth in the bill that the said bank never made out a verified list of said property, but, in the latter part of June of the said year 1896, George H. Hill, then the assistant cashier of said bank, for it handed to said Bickett, as deputy assessor for said county, the following:

Capital	\$800,000 00
Surplus	100,000 00
Undivided profits	94,000 00
	<hr/>
	\$994,149 01
U. S. bonds	\$100,000 00
Real estate	<hr/>

It is set forth, also, in the bill, that the said bank did not for the year 1896, but that the said assessor did for that year, prepare the assessment list of property belonging to the said bank, and that he (the assessor) estimated for himself the value of the property. The assessor added the \$100,000 in United States bonds, and the value of the real estate, estimated at \$147,290, together, and then deducted the amount from the said \$994,149.01, and then took as the value of the stock two-thirds of the amount left, which, according to the calculations of said assessor, left \$497,906. For this amount the bank was assessed. The deputy, Bickett, in his affidavit claimed that this was the value of the shares of stock, and this stock was assessed to the bank.

The return, if any, of the bank, was of capital. The entry of "stock" by the assessor opposite to the said sum of \$497,906 would appear to also indicate capital stock, and not the value of shares of stock. There is no number of shares indicated. It is stated in the affidavits that the bank has been accustomed to make such returns for assessments for several years prior to 1896. This would not make it legal. Section 3691, Pol. Code Mont., provides:

"The stockholders in every bank or banking association organized under the authority of this state or the United States, must be assessed and taxed on the value of their shares of stock therein, in the county, town, city or district where such bank or banking association is located, and not elsewhere, whether such stockholders reside in such place or not. To aid the assessor in determining the value of such shares of stock, the cashier or other accounting officer of every such bank must furnish a verified statement to the assessor, showing the amount and number of shares of the capital stock of each bank, the amount of its surplus or reserve fund, the amount of investments in real estate, which real estate must be assessed and taxed as other real estate."

Section 3692:

"In the assessment of the shares of stock mentioned in the next preceding section, each stockholder must be allowed all the deductions and exemptions allowed by law in assessing the value of other taxable personal property owned by individual citizens of this state, and the assessment and taxation must not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this state."

It will be seen from this section that the law provides for the assessing of shares of stock to the owners, and to this end the cashier or other accounting officer of a bank must furnish a verified statement showing the amount and number of shares of the capital stock, and the surplus or reserve fund. It is not required that such officer should state the names of the shareholders. The statement is required to enable the assessor to fix the value of the shares of each stockholder. There is nothing in any of the affidavits to show that any such statement as is provided in said section 3691 was demanded of any officer of the bank. If the statement given of the amount of capital, the undivided profits, and surplus was intended to comply with this provision of the statute, this did not authorize the said assessor to list the shares of stock to the bank. Neither a national bank nor the stock therein can be taxed by a state law unless the United States expressly authorizes the same, and then only to the extent of such authorization. *Mercantile Bank v. City of New York*, 121 U. S. 138, 154, 7 Sup. Ct. 826. I am unable to see how the term "capital," as returned by Hill, the assistant cashier, can be construed to mean shares of stock. There is a clear and well-understood distinction between the terms "capital" and "shares of stock." When the assessor made his computation, he found \$497,906 of stock. If this meant the value of the stock, we do not have the number of such shares, or by whom held. Unless the bank owned the shares of stock, the assessor had no right to assess the same to the bank. The law, both state and national, provides that the shares of stock shall be assessed, and to the owners thereof. The bill avers that there were various individual stockholders of the said bank, holding various numbers of shares of said capital stock in separate and distinct ownership. It cannot be assumed that the bank owned all the shares of its capital stock. There is no list of the bank showing this. I do not think the return that the bank made can be construed to be a return of the shares of the capital stock. It has been held that the capital of a bank is not subject to state taxation. If the bank gave in its capital for taxation, it is not estopped now from refusing to pay the same. It would be the same as listing property exempt from taxation, and there is no reason of justice or public policy which would preclude the bank from refusing to pay the same. *Cooley, Tax'n*, 263, 264; *Dunnell Manuf'g Co. v. Inhabitants of Pawtucket*, 7 Gray, 277; *City of Charlestown v. Middlesex Co. Com'rs*, 109 Mass. 270. If the assessor made out the list, and assessed the capital or shares of stock to the bank, he had no right to do either. He should have known that the bank was not liable to pay taxes on the shares of its stock in solido; that that tax was due from the holders of such shares; and, as for the capital, that was not permitted to be taxed. *National Bank v. City of Richmond*, 42 Fed. 877.

The next question presented is as to whether the court has any right to enjoin the collection of this tax. It is claimed on behalf of the defendant that the receiver, Brown, should pay this tax under protest, and then recover the same back from the tax

collector in an action at law. The tax in this case was made by law a lien upon the real estate of the bank, although not a tax on such real estate. The tax collector was proceeding, under the provision of the state law, to sell the real estate described, and had advertised the same for sale. Such a sale as this would have created a cloud upon the title of the bank to the real estate sought to be sold. The deed given in pursuance of such a sale would be prima facie evidence that (1) the property was lawfully assessed as required by law; (2) the property was equalized as required by law; (3) the taxes were levied in accordance with law. Pol. Code Mont. § 3897. In the case of *Huntington v. Railroad Co.*, 2 Sawy. 503, 514, Fed. Cas. No. 6,911, Judge Sawyer held that a deed in such a case would cast a cloud upon the title to the land named therein, and said:

"In such case the court will interfere by injunction to prevent a cloud being cast upon the title. The court will enjoin the casting of a cloud upon the title in cases wherein the cloud itself, when cast, would be removed." Pom. Eq. Jur. § 1345.

In the case of *Railway Co. v. Cheyenne*, 113 U. S. 516, 525, 5 Sup. Ct. 601, 605, Justice Bradley, speaking for the court, said:

"Even the cloud cast upon his title by a tax under which such a sale would be made would be a grievance which would entitle him to go into a court of equity for relief."

In the following cases it is recognized that a court of equity will interfere to restrain the collection of an illegal tax when some established ground for equitable interference is presented: *Shelton v. Platt*, 139 U. S. 591, 11 Sup. Ct. 646; *Dows v. City of Chicago*, 11 Wall. 109; *Hannewinkle v. Georgetown*, 15 Wall. 547; *Lyon v. Alley*, 130 U. S. 177, 9 Sup. Ct. 480. *Cooley, Tax'n*, 422-444. If the preventing or removing a cloud upon a title is a recognized ground of equity jurisdiction, a law of a state which affords a legal remedy for the wrong complained of will not divest the court of equity of its jurisdiction in a proper case. In the case of *Barber v. Barber*, 21 How. 582, 592, the supreme court said:

"It is no objection to equity jurisdiction in the courts of the United States that there is a remedy under the local laws; for the equity jurisdiction of the federal courts is the same in all the states, and is not affected by the existence or nonexistence of an equity jurisdiction in the state tribunal."

See, also, *Kirby v. Railroad Co.*, 120 U. S. 130, 137, 7 Sup. Ct. 430.

There is another consideration presented in this case. The complainant is a receiver, and hence occupies a fiduciary relation to the creditors of said bank. In the case of *Cummings v. Bank*, 101 U. S. 157, the supreme court said (in a case where a bank held a fiduciary relation to its shareholders), "It holds a trust relation which authorizes a court of equity to see that it is protected in the exercise of the duties appertaining to it." In *City of Boston v. Beal*, 51 Fed. 306, it was held that a receiver of an insolvent bank could not be required to pay the taxes on the shares of stock of the stockholders, although the law requiring the bank, if solvent, to do this, would be good.

For these reasons, I hold that an injunction pending this action should issue, upon the complainant executing a bond to save defendants harmless on account of the issuing thereof, in the sum of \$5,000.

KING v. WILLIAMSON et al.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1897.)

No. 183.

INJUNCTIONS PENDING EJECTMENT.

An injunction obtained by a plaintiff in ejectment to preserve the status quo pendente lite is properly dissolved, and the bill dismissed, when it appears that judgment has been rendered for the defendant in ejectment.

Appeal from the Circuit Court of the United States for the District of West Virginia.

Maynard F. Stiles, for appellant.

Campbell & Holt, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge. This case comes up by appeal from the circuit court of the United States for the district of West Virginia. Henry C. King claims to be the owner in fee simple of a tract of land containing about 500,000 acres, granted to Robert Morris on the 23d of June, 1795, lying in the states of Virginia, West Virginia, and Kentucky. In order to recover possession of a part of this tract which lies in West Virginia, he instituted actions of ejectment in the circuit court of the United States for the district of West Virginia against a large number of persons, among whom are the appellees here. Very soon thereafter, and as ancillary to said actions of ejectment, he filed his bill on the equity side of the court against these appellees, praying an injunction against them from using the said land pendente lite. On the 4th of December, 1894, an order was issued on this bill against the said defendants, requiring them on a day certain to show cause why an injunction should not issue as prayed for in the bill, and in the meantime the usual restraining order was granted. On the 28th of February, 1896, the restraining order being still in force, but no formal order of injunction having been granted, the defendants filed their plea to the bill. In this plea they aver "that in the action of ejectment of the said Henry C. King against M. B. Mullins, Alexander McClintock, and John McClintock, wherein the said Henry C. King sought to recover possession of and an estate in fee in the same tract of 500,000 acres of land mentioned and described in the bill, upon a trial thereof before this honorable court and a jury impaneled therein, it was, to wit, on the 27th of February, 1896, by the judgment and consideration of this honorable court, adjudged that the said Henry C. King had no right to recover the possession of the said land, or any part thereof, and that he had no title in fee or otherwise thereto, or to any part thereof; which judgment still remains in full force and

effect, unreversed and unappealed from. * * * These defendants aver that the land mentioned and described in the bill is the same land, and none other, as the land so sought to be recovered in said action of ejectment against said Mullins and McClintocks, and the same for which it was adjudged the said Henry C. King has no right to recover." The plea prayed the bill be dismissed. This plea, and, presumably, the joinder thereon, came on to be heard, and the circuit court held the plea sufficient, and valid in law. Thereupon the bill was dismissed. To this action of the court exception was taken, and an appeal was allowed and the cause is here on assignments of error.

It is not necessary to discuss in detail these assignments of error. The case comes within and is controlled by the principle settled in the case of *King v. Buskirk*, the decision of which was announced at the February term of this court, 1897, 24 C. C. A. 82, 78 Fed. 233. The granting or the refusal or the dissolution of an injunction on a bill filed ancillary to an action of ejectment at law is wholly within the discretion of the court. It is for the chancellor to say, after the examination of the claim of title in the complainant, whether the showing *prima facie* is such as to render it proper to preserve the status quo. *Poor v. Carleton*, Fed. Cas. No. 11,272. When such an injunction is granted, it goes upon the idea that the property should be preserved until one or the other of the parties shows the best title to it, for the purpose of preventing irreparable mischief. But if it be made to appear to the chancellor at the hearing, or at any time after an injunction has been granted, that the injury is not of the irreparable character alleged, or that compensation may be afforded in damages, or that the title set up by complainant is not good, there can be no reason why the injunction should not be dissolved. The action of the chancellor does not conclude the claim of title of the complainant, and it can have no effect on the action at law. All that he does is to determine from the circumstances surrounding the case whether the ordinary course should be followed, and the party plaintiff be made to establish his right by the verdict of a jury, before depriving defendant of possession, or whether the equities of the case demand that the defendants be restrained from use of the land while the plaintiff is proceeding to prove his title. This conclusion the chancellor may reach either by an inspection of the record, or by affidavits, or by formal pleadings and evidence. In the present case, after presentation of certain facts relating to the claim of complainant, the consideration of these facts, and after argument, he concluded that it would not be equitable to allow the restraining order to remain in force. As the bill was filed solely for the purpose of obtaining an injunction *pendente lite*, the natural result of his conclusion was the dismissal of the bill. We see no error in this exercise by him of his discretion. The circuit court decree is affirmed.

BREYFOGLE et al. v. WALSH et al.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 350.

1. VENDOR AND PURCHASER—RESCISSION—RESTORATION OF STATUS QUO.

To entitle plaintiffs to rescind a contract of sale and repurchase, upon the ground that it was obtained by fraudulent means, they should, before bringing suit, have offered to place defendant in statu quo, by offering to return certain notes which had been surrendered to them as a part of the contract, and to repay to defendant, with interest, whatever sums it had paid out in compliance with the contract.

2. SAME—CONTRACT OF SALE AND REPURCHASE.

Where the parties to a contract of sale and repurchase, in which time is made the essence of the contract, were not dealing at arm's length, but there had been previous relations between them of partnership and of mortgagor and mortgagee, the purchaser having prevented the vendors from repaying the purchase price within the time prescribed by interfering with negotiations by them for a sale of the property, which interference was in pursuance of a conspiracy long before entered upon to cheat the vendors by forcing them to part with the property at a price greatly less than its value, it is within the power of a court of equity to extend the time within which the purchase price should be repaid.

3. SAME—CORPORATIONS—LIABILITY FOR FRAUD OF OFFICERS.

A corporation, whether private or quasi public, like a trust company or a national bank, cannot be allowed immunity for participation in a fraud whereby one has been forced to part with his property at less than its value, and it is immaterial whether the corporate participation was the result of action by a board of directors or by a president or other officer in actual and presumably authorized control.

4. SAME—PAROL TESTIMONY AS TO WRITTEN CONTRACT.

Proof of oral promises made at the time of a written contract is competent to show the good or bad faith of the parties in the transaction and in their subsequent conduct.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The question presented by this appeal is whether upon the facts averred in the amended bill, to which the circuit court sustained demurrers, the appellants, who were complainants below, are entitled to equitable relief. The original bill was filed on the 30th day of October, 1894, and a temporary injunction granted, which, after the filing of the answers, was dissolved on the ground that the averments of the bill were not sufficient. 71 Fed. 898. The amended bill fills 62 pages of the printed record, and differs from the original only in being more specific and full in its allegations of fraudulent purposes, promises, representations, and conduct on the part of Walsh and the Equitable Trust Company at the time of making and after the execution of the contracts of June 8, 1894. The following summary is deemed sufficient for an understanding of the case and of the questions to be determined:

After averment of the citizenship of the parties, it is alleged that in 1891 the appellants William L. Breyfogle, W. C. Winstandley, and one Thornton caused to be organized, under the laws of Kentucky, the Bedford Stone-Quarries Company, which for brevity will be called the "Stone-Quarries Company," with a capital of \$1,000,000, which corporation acquired the stone-quarry properties of two other corporations, issuing for that purpose first mortgage bonds to the amount of \$500,000, of which Thornton received \$50,000, together with \$100,000 of the capital stock, the appellants receiving the remaining \$450,000 of the bonds and the remaining \$900,000 of the stock, under an agreement with Thornton that, in consideration of the stock and bonds, they would acquire for the Stone-Quarries Company the property of the Oolitic Stone Company, one of the two corporations mentioned, which,

It is alleged, the appellants did acquire by the payment in cash to the Oolitic Stone Company, represented by Voris, of \$50,000, and the delivery to it of \$275,000 of said bonds, of which \$250,000 were intended as security for the payment of the further cash sum of \$150,000, which, by subsequent agreement, was reduced to \$140,000, a part of which sum was paid with money borrowed through the appellee Walsh, and became a portion of the \$542,720.95, for which the appellants on the 8th of June, 1894, were indebted to the Equitable Trust Company, as hereinafter stated; that the \$50,000 cash payment to the Oolitic Stone Company was also borrowed by appellants from the Chicago National Bank, of which Walsh was president, upon the pledge of \$175,000 of the bonds of the Stone-Quarries Company. The bill then avers that, after the purchase of the property of the Oolitic Stone Company, the construction of a short railroad being deemed necessary to fully develop the stone quarries, the appellants entered into an oral agreement with Walsh, by which all the money necessary to pay the balance of the purchase price due the Oolitic Stone Company (except \$30,000 to be paid by appellants), and to construct and equip the railroad, and to improve and develop the quarries, should be "advanced and furnished, or caused to be advanced and furnished," by Walsh, as needed; that out of the profits of the business, or out of the proceeds of the sale of bonds of the Stone-Quarries Company and the Belt Railway Company (organized to construct the railroad), or out of the sale of the properties of the companies, there should be paid to the appellants the amounts advanced by them; and the value of their interest at the time the agreement was made, and the advances made or caused to be made by Walsh, and that the balance, being the profits of the enterprise, should be divided, one-half going to the appellants and one-half to Walsh; that to carry out this plan there was organized by appellants, with a capital stock of \$250,000, the Bedford Belt Railway Company, which immediately issued first mortgage bonds to the amount of \$250,000; that all these bonds were delivered to appellee the Equitable Trust Company, from which, through Walsh, \$300,000 were borrowed and expended in the construction and equipment of the proposed railroad; but that, notwithstanding the completion of the railroad by means of the loans thus procured, Walsh refused in May, 1893, to advance the money necessary fully to complete the work of developing the stone quarries, by reason whereof the appellants were compelled either to advance or to incur liability for \$50,000, whereby they became "so financially embarrassed and distressed as to be unable to advance any further money," and the Stone-Quarries Company, on June 20, 1893, executed an assignment for the benefit of creditors to appellant Breyfogle, who remained in possession of and conducted the business of the company until July 10, 1894, when its property was sold by order of the court for the sum of \$7,700 to E. C. Ritscher, who purchased for the benefit of Walsh and the trust company. It is further alleged that Thornton's interest in the Stone-Quarries Company was purchased prior to September 1893, by appellants, for \$48,000, of which Walsh caused to be advanced to appellants \$40,000 upon the security of \$50,000 of the Stone-Quarries Company's bonds; that by this purchase appellants became possessed of all the stock of the Stone-Quarries Company; that they also owned all the bonds of that company, and all the stock and all the bonds of the Belt Railway Company, subject only to the pledges thereof to secure the loans made to them through Walsh, and subject to the right which, as alleged, Walsh had in the profits of the enterprise.

It is averred that, for the advances thus obtained from time to time, the appellants executed notes to Walsh; that on the 31st of March, 1894, all these advances (\$65,000 of the purchase price of the Oolitic Stone Company property being still unpaid) were represented by two notes signed by appellant Breyfogle, payable to his own order, and by him indorsed, one for \$300,000, dated January 31, 1894, and due 15 days after demand, and the other for \$166,677.95, dated March 31, 1894, and due 15 days after demand; that as collateral for these notes Breyfogle delivered all the stock and all of the bonds of the Belt Railway Company, and all of the bonds of the Stone-Quarries Company (the latter being subject to a prior pledge to secure the payment of the balance of \$65,000 of the purchase price of the Oolitic Stone Company property), and also promissory notes of third parties for small amounts; that the principal notes

each contained the usual clause, in general use in Chicago, describing the collateral, and authorizing its sale at any time after maturity (or before, if, in the judgment of the legal holder, any such collateral should be depreciating in value), at public or private sale, "with or without notice or demand of any kind," and authorizing the legal holder of the note to purchase at such sale. The bill avers, further, that all of these notes were delivered to Walsh upon the understanding that, if used by him for the purpose of borrowing money to prosecute the work contemplated, he (Walsh) "would attend to the payment or renewal" thereof, and prevent the sale of the securities; that the note for \$166,677.95 was held by the Chicago National Bank up to the 7th day of April, 1894, when the bank transferred the same to the Equitable Trust Company, which then held the note for \$300,000, and that on the 10th day of April, 1894, the Equitable Trust Company demanded of appellant Breyfogle payment of the two notes, whereby, under the terms thereof, both (aggregating \$466,677.95 and interest) became due and payable, and the Equitable Trust Company became in law entitled to sell the collaterals at private sale, with or without notice.

It is further averred that Walsh gave a false reason for not furnishing more money, pretending that on account of the panic he could not obtain it, when in fact he was able to procure all the money needed; that knowing the value of the properties, and being aware of the financial embarrassments of the appellants, on or about the 5th of April, 1894, he entered into a conspiracy with the Equitable Trust Company, of which he was president, to cheat and defraud the appellants of their interest in the property, and to procure from them without consideration a release from all liability on account of his agreement with them; that all subsequent steps and movements by him and by the Equitable Trust Company in the premises were planned with a view to effect the purpose of the conspiracy; that for that purpose the trust company, at the instigation of Walsh, demanded of Breyfogle the payment of his notes, and, Breyfogle having thereupon applied to Walsh to carry out his agreement and prevent the sale of the bonds and stock by the trust company, Walsh repudiated the agreement and threatened that unless the notes were paid he would cause the bonds and stock to be sold as provided in the powers of attorney contained in the notes; that thereupon the appellants applied to the trust company, but that neither that company nor Walsh would enter into any negotiation with them, unless they would abandon all claim that Walsh was liable to them as a partner in respect to the property, and that, unable to do otherwise, they assented to the execution of the three contracts of June 8, 1894, of which the following is the substance: The first agreement, which was between the trust company and the plaintiffs, was, in substance, a sale by the plaintiffs of the bonds and stock of the Stone-Quarries Company and of the railway company, also of two notes of \$5,000 each of the railway company, three notes of the Stone-Quarries Company amounting to \$14,898.41, and the note of Samuel Chandler for \$1,800, in consideration of the cancellation and surrender to the plaintiffs of the two notes of \$300,000 and \$166,677.95, and the payment by the trust company of the balance due Voris, for the Oolitic Stone Company, under the contract between him and Breyfogle, which balance amounted to \$65,000 and interest from April 1, 1894. By the second agreement, which was between Walsh and the appellants, each released the other from all claims and demands of every name and nature, and the appellants especially released Walsh from all claims against him as a partner. The third agreement was between the trust company and Breyfogle, representing the appellants, and provided for the repurchase from the trust company by Breyfogle of the bonds and stock of the Stone-Quarries Company and the railway company, the two notes of \$5,000 each of the railway company, the three notes for \$14,898.41 of the Stone-Quarries Company, and the note of Chandler for \$1,800, the consideration of the repurchase being \$542,720.95, with interest thereon at 6 per cent. from June 8, 1894, to the date of payment, and in addition thereto such sum or sums as should have been paid out by the trust company after the date of the agreement to pay any outstanding indebtedness of the Stone-Quarries Company or of the railway company, or to furnish working capital for the Stone-Quarries Company or for the railway company, or to purchase any lien or outstanding title, claim, or equity of redemption, in or

upon the property of either company, or to protect either company or the property of either, and which should not have been repaid to the trust company, together with interest upon all such sums at the rate of 6 per cent. per annum. Payments were to be made as follows: On or before November 1, 1894, \$225,000, with 6 per cent. interest from June 8, 1894, to the date of payment; on or before January 1, 1895, \$317,720.95, with 6 per cent. interest from June 8, 1894, to the date of payment, and in addition thereto all such sums as should have been paid out by the trust company for the purposes above mentioned. Time was declared to be of the essence of the agreement, and, upon the default of Breyfogle to make the payments above mentioned within the time provided by the agreement, the agreement was to be null and void, unless the trust company should otherwise expressly elect. In case the trust company elected not to declare the agreement null and void, it was required to commence suit to enforce the same against Breyfogle within five days after the default.

It is alleged that in the negotiations which ended in the execution of these contracts Walsh and the trust company repeatedly stated to Breyfogle that neither of them had any desire to acquire the property or to make any profit out of it, and promised that they would give appellants every possible aid in their efforts to raise money, would keep the agreements secret, and that if the property of the Stone-Quarries Company should be sold under the decree of the circuit court of Lawrence county, and should be purchased by Walsh or by the trust company, the purchase should inure to the benefit of the appellants; that the appellants relied upon these representations and promises, without which they would not have entered into the agreements; that immediately after the making of the agreements the appellants proceeded to endeavor to make some arrangement whereby they might be able to make the payments required by the agreement of repurchase, to which end Breyfogle opened negotiations with Messrs. Harvey Fisk & Sons, of New York, by which, if consummated, the appellants would have been able to obtain for their interest in the quarries property at least \$400,000 over and above the payments to be made to the trust company; that the negotiations failed because of repeated violations of their promises by Walsh and the trust company, who shortly after the agreements were made entered into negotiations with divers persons, some of whom are named in the bill, for the purpose of preventing a sale of the property by the appellants, and, with a view of inducing them to refrain from dealing with the appellants, informed them of the nature and terms of the agreements, and of the financial embarrassments and distress of the appellants, and promised and held out to them that if they would not deal with appellants they could, after November 1, 1894, deal more advantageously with Walsh and the trust company; that at the instigation of Walsh a communication was sent to Harvey Fisk & Sons, to the effect that Breyfogle's statements to them in respect to the value of the property were false, though they were in fact true; that by this and by other representations, which are set out in detail, Harvey Fisk & Sons were induced to abandon the negotiations, and the appellants were prevented from effecting any disposition of the property; that the promises and representations made by Walsh and the trust company, in order to obtain an execution of the agreements by the appellants, were not made in good faith, but with an intent to violate them, for the purpose of preventing a repurchase of the property by the appellants; that although the agreement of sale purports to be an absolute conveyance, and although by the strict terms of the agreement of repurchase the trust company would, upon the failure of the appellants to make the payments within the time specified, be empowered apparently to declare the rights of the appellants in the property forfeited, yet in equity and good conscience the agreements of sale and repurchase are and always have been in fact only a mortgage, and the title to the stock and bonds has never been held by any of the respondents otherwise than in trust to secure the repayments to the trust company of any moneys that might be due it from appellants on account of the transactions mentioned; that all moneys advanced by the trust company, and interest thereon, have been paid to it by Walsh, but that, if that company has not been repaid in full by Walsh or otherwise, the appellants are ready and willing and offer to pay to it within such time as the court may decree

all such sums as upon an accounting had under the direction of the court shall be found to have been advanced by it over and above repayments; also to pay to Walsh, though he has no right to demand it, within such time as the court may direct, all such sums as may be found to be justly and equitably due him, and to perform any and all acts that may be decreed to be performed by them.

The prayer of the bill, so far as it need be stated, is that the agreement of release entered into between the plaintiffs and Walsh may be adjudged null and void; that the agreement of sale and the agreement of repurchase may be adjudged to have no other force or effect than a mortgage, and that the property may be decreed to be held in trust only for plaintiffs and Walsh and as security for the payment of the moneys advanced by the trust company, and not repaid to it, and for the satisfaction of the liabilities incurred by it; that an account may be taken of the moneys and properties advanced by plaintiffs and Walsh and the trust company in and about the property over and above the amounts, if any, received by them, or either of them, including the moneys paid to Voris, together with all outstanding liabilities incurred by Walsh and the trust company in and about the property; that the damages sustained by plaintiffs by reason of the failure of Walsh to advance the moneys necessary for the development and improvement of the property may be ascertained, and Walsh charged therewith; that the indebtedness of the Bedford Stone-Quarries Company may be ascertained, and the payment of the same provided for; that if, upon a just accounting, it shall appear that the trust company has not already received repayment in full, plaintiffs may be permitted to redeem the stock and bonds of the companies and the other property mentioned in the agreement of repurchase by paying to the trust company, within such time as the court may direct, such an amount as upon such accounting the trust company shall be entitled to receive from plaintiffs, which amount plaintiffs are ready and willing and offer to pay, and that the respective rights and interests of plaintiffs and Walsh in and to the property may be determined, declared, and adjusted in such manner as may seem equitable and just, and that the plaintiffs may have such other and further relief as to equity may appertain.

Hiram T. Gilbert, for appellants.

A. W. Green, Henry S. Robbins, A. F. Hatch, and Lockwood Honoré, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The allegation in the bill that, in equity and good conscience, the agreements of sale and repurchase constitute a mortgage is at most only the statement of a legal conclusion, and whether tenable need not be considered, because it has not been relied upon in the argument here. The propositions asserted in the brief for the appellants are that the trust company, as a mortgagee, was bound to deal fairly with its debtor, and that its purchase of the equity of redemption will be set aside if consummated by oppressive or other unfair means; and that Walsh, being a partner of the appellants, was bound to exercise towards them the utmost good faith. The necessary implication is that the agreements are what they purport to be, contracts of purchase and of resale, and not the mere substitution of one form of pledge or security for another, and the contention is that they ought to be set aside because obtained by oppressive and fraudulent means. But, assuming that the averments are otherwise sufficient, the bill does not show a case for relief on that theory, because it is not alleged that the necessary steps were taken or offers made, before the

bringing of the suit, to place the parties in statu quo. The rule in that regard is too familiar to need restatement. The making of the agreements in question worked essential changes in the situation of the parties. Prior contracts were annulled. Instead of pledgee the trust company became owner. It released the appellants from personal obligation on the demands then held by it, and in addition bound itself to pay \$65,000 to Voris. Walsh was released from liability, and at the same time surrendered his rights under the alleged agreement of partnership. To be entitled to a cancellation or rescission of the agreements it was therefore necessary that the appellants, before bringing the suit, should themselves have offered to cancel the agreements, should have returned or offered to return to the trust company the Breyfogle notes which had been surrendered, and have repaid or offered to repay to that company, with interest, whatever sums it had paid to Voris or otherwise had expended. They could not treat such sums as an addition to their debt to the trust company, and so retain a benefit from the agreements which they sought to have rescinded.

It follows that, if the appellants can have any relief upon this bill, it must be upon the assumption that the contracts of June 8, 1894, were valid and became conclusive of the status and rights of the parties at that time. We are of opinion that a case for relief on that theory is shown. The agreement for the resale of the property to appellants contains the harsh, though not illegal, provision that time shall be of the essence of the contract; and we quite agree with the proposition in the brief for appellants that, even had there been no promises by the trust company and Walsh that they would not interfere with efforts of the appellants to dispose of the property in order to obtain the money necessary to pay the purchase price as stipulated, it would have been bad faith on the part of Walsh to interrupt, as he is alleged to have done, the negotiations with Harvey Fisk & Sons, and, if by that or other like means the performance of the contract by the appellants within the required time was prevented, it ought not to be beyond the power of a court of equity to extend the time within which the purchase price should be paid. Whether in such a case, when the parties had dealt at arm's length, equity would interfere, is not the question presented. The case here is different. There had been previous relations between the parties, as it is alleged, of partnership and of mortgagor and mortgagee. It is shown that the purpose of Walsh and of the trust company was deceitful from the beginning; that, in order to induce the appellants to enter into the agreements, they made representations of their wishes and aims concerning the property which were false; that they made promises which they intended not to keep; and that the subsequent interference with the efforts of the appellants to dispose of the property was in pursuance of a conspiracy long before entered upon to cheat the appellants by forcing them to part with the property at a price greatly less than its alleged value. If the facts in this respect were as charged, there ought to be no question of the power of the court to give relief, both against Walsh and against the trust company represented by him in the transac-

tion. Not in justice or common honesty, nor upon any consideration of public policy, can a corporation, whether private or quasi public, like a trust company or a national bank, be allowed immunity for participation in a fraud, and, in such a case as this, it is immaterial whether the corporate participation was the result of action by a board of directors or by a president or other officer in actual and presumably authorized control.

It is urged on behalf of the appellees that, the contracts between the parties having been reduced to writing, all oral promises by Walsh and by the trust company are merged in the agreements, and are not to be considered. The general rule on the subject is familiar, and likewise the exception from the rule of purely collateral contracts, which may be left in parol; but the question here is not of the obligatory force of the alleged promises as such, but what do they show of the good or bad faith of the parties in the transaction in connection with which they were made and in their subsequent conduct? On that point whatever was said and done by Walsh, representing, as he did, the trust company, was clearly relevant and competent.

One form of appropriate relief, if the bill should be sustained by the proof, manifestly would be an extension of time beyond the date of the decree for the payment of each installment of the purchase price, with interest, according to the contract; and, if additional sums are found to be due, the payment thereof should also be required. The time allowed should be reasonable,—perhaps equal to but not greater than was originally agreed upon by the parties. Whether relief could be made effective in some other form, upon the theory of constructive trust, for instance, as defined in section 1053, Pom. Eq. Jur., quoted in *Angle v. Railway Co.*, 151 U. S. 1, 27, 14 Sup. Ct. 240, has not been discussed by counsel, and need not now be considered. The decree below is reversed, with direction that the respective demurrers of Walsh and the Equitable Trust Company to the amended bill be overruled, and that further proceedings be had in accordance with this opinion.

HENSZEY et al. v. LANGDON-HENSZEY COAL MIN. CO.

(Circuit Court, E. D. North Carolina. March 26, 1897.)

1. RECEIVERS—PETITION FOR REMOVAL—MOTION FOR LEAVE TO INSPECT MINE.

A petition by a stockholder and bondholder of an insolvent company to inspect a mine either in person or by agent, with a view to having the receiver in charge thereof removed, is in the nature of a motion made for the production, by parties, of books or writings in their possession, or motion for inspection of writings or examination of parties before trial, and being made by a party in interest, and entitled to the knowledge sought, will be granted by a federal court.

2. SAME—EVIDENCE.

An inspection made pursuant to such a petition gives the party inspecting only the ordinary powers, and his report is subject to the same rules of evidence as the testimony of any other witness.

John W. Hinsdale, for petitioner S. P. Langdon.

MacRae & Day, Womack & Hayes, and Simmons & Ward, for receiver.

SIMONTON, Circuit Judge. A petition has been filed in the main cause by S. P. Langdon, a stockholder and bondholder of the defendant company. The purpose of the petition is to secure the removal of the receiver. One of the grounds for removal is mismanagement and waste on the part of the receiver. The receiver is in charge of the mines worked by the company, and in exclusive possession of them, under the order of this court. The motion now under consideration is that the petitioner, S. P. Langdon, be permitted to examine the mines by a person named Davis, in order that he should see if the grounds upon which he has based his petition are well founded. This motion the receiver resists. The discussion of the motion seems to proceed on the idea that, if the motion be granted, the person selected by Langdon will be clothed with a sort of official responsibility, and will make a report for the consideration of the court with more or less authority. This is by no means the case. If the motion be granted, Davis will be the agent of Mr. Langdon; no more and no less. He may or may not testify to all that he sees. If he does testify, his evidence will be taken as that of any other witness, subject to any proper exception, liable to any rebuttal, and exposed to any attack. Neither the court, nor any party to the cause,—least of all the receiver,—will be responsible for him in the smallest degree.

The motion appears to me to be analogous to the motion made for the production, by parties, of books or writings in their possession, which contain evidence pertinent to the issue (Rev. St. U. S. § 724), and to the motions under the Code practice for admission or inspection of writings or examination of the parties, before trial. The petitioner, a party in interest in the main cause, one of those whom the receiver represents, wishes to examine the mines in charge of the receiver. He cannot do so in person. He wishes to do so by agent in whom he confides. He is entitled to this knowledge. It is for himself only, certainly, in the first instance. It is ordered that the petitioner have access to the mines for the purpose indicated at such time as will not interfere with the working thereof, either in person or by any one agent whom he may select. The receiver may require that he himself or some other person selected by him shall accompany the agent selected by the petitioner; this visit to be limited to one occasion, the petitioner to be at liberty to employ as his agent Evan H. Davis.

CONTINENTAL TRUST CO. OF NEW YORK v. AMERICAN SURETY CO.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 316.

1. MORTGAGES—RESERVATION OF LIEN IN FORECLOSURE DECREE.

A foreclosure decree for the sale of a mortgaged railroad provided that, within 20 days after the confirmation of the sale, the purchaser should pay of the purchase money a sum sufficient with the cash payment to pay the costs and claims that should have been adjudged to be due as court and receiver's indebtedness, and to be prior in equity to the lien of the mortgage, excepting such final decrees as might have been superseded, and that upon such payment the purchaser should be let into possession, and that the deed to the purchaser should reserve to the court full power on his default to retake possession of the property, and forthwith resell the same; it being further provided that the residue of the purchase money not required to make the payments stated should be paid by the purchaser from time to time upon the amount finally adjudged by the court to be due upon court and receiver's indebtedness, the surplus, if any, left after payment of such indebtedness, to be distributed pro rata upon the coupons and bonds secured by the mortgage. *Held*, that the court in effect reserved a lien for the purchase money of as great dignity as a purchase-money mortgage executed by the purchaser would be, and all subsequent purchasers were bound thereby, and the holders of preferred claims subsequently adjudicated had the right to invoke the power of the court to enforce that lien.

2. SAME—BONA FIDE PURCHASER.

The purchaser at the foreclosure sale being the representative of the mortgage bondholders, his conveyance by quitclaim deeds to several different corporations, afterwards consolidated, did not constitute the consolidated corporation a bona fide purchaser without notice, even if that were material, the consideration paid being expressed to be the capital stock of the new company, the old bondholders thus becoming stockholders of the new corporation; and bondholders under a mortgage executed by the new corporation, being notified by the recitals of the mortgage, took their bonds subject to the purchase-money lien.

3. SAME—SURETY IN SUPERSEDEAS BOND—SUBROGATION.

The foreclosure decree provided that the purchaser should have the right to appeal from any final order decreeing the payment of claims adjudged to be entitled to priority as court and receiver's indebtedness, the decree excepting from present payment such final decrees upon claims as may have been superseded by proper appeal bond. A company to which the purchaser applied to sign such a supersedeas bond being unwilling to do so unless, by the decree of confirmation, the bond should be made a superior lien to all others upon the railroad property, it was provided in the decree of confirmation that the amount secured by any such supersedeas bond "shall be considered as part of the purchase money, to enforce payment of which the court may retake said property, or any part thereof." The decree to supersede which the bond was executed decreed the claims adjudged to be "a prior and paramount lien upon all the railroad property." *Held*, that the surety entered into the suretyship upon the express condition that the purchase money of the road should be the primary fund for the payment of such claims, notwithstanding the appeal; and, having taken an assignment of the claims which it was obligated as surety to pay, it is subrogated to the right of the claimant to payment out of the purchase money, as against mortgage bondholders who acquired their rights pursuant to the decree of confirmation.

Appeal from the Circuit Court of the United States for the District of Indiana.

The Toledo, Cincinnati & St. Louis Railroad Company, a consolidated corporation, owned and operated a line of railway extending from Toledo, in the

state of Ohio, through the states of Ohio, Indiana, and Illinois, to the city of East St. Louis, in the latter state. The Toledo or Eastern Division of this road extended from Toledo to the city of Kokomo, in the state of Indiana; the Western or St. Louis Division from Kokomo to East St. Louis. These divisions had been separately mortgaged prior to the consolidation. Upon default in the payment of these mortgages, foreclosure suits were commenced in the circuit court of the United States for the district of Indiana,—one for the foreclosure of the mortgage upon the Toledo Division, and two suits, which were subsequently consolidated, for the foreclosure of the mortgages upon the St. Louis Division. Prior to the decrees in these several foreclosure proceedings, a number of intervening petitions were filed by trustees under car trusts, and by holders of other claims of similar character, each claiming payment out of the mortgaged premises and property in priority to the bonds secured by the mortgages sought to be foreclosed. These petitions were contested, and, at the time of the entry of the decrees of sale in the foreclosure suits, many of them were still pending and undetermined. Receiver's certificates had been issued under order of the court in the action for foreclosure upon the mortgage upon the St. Louis Division, the validity of which was disputed, and this question also remained undetermined upon the entry of the decree. On November 12, 1885, decrees of foreclosure and sale were entered in the foreclosure suits. The decrees were similar in character, and found that the respective mortgages were paramount and first liens upon the property described in them, "subject only to such court and receiver's indebtedness as had theretofore been or might thereafter be decreed to be prior in equity to the lien of said mortgage"; and after the usual provisions for the sale of the mortgaged railroad at not less than the upset price fixed by such decree, a specified portion whereof was to be paid in cash, each decree provided that, within 20 days from and after the confirmation of the sale thereunder, the purchaser should pay, of the unpaid purchase money for which said mortgaged property was sold, a sum sufficient, with the cash payment to be made at the time of sale, to pay and discharge the court costs, the master's fees, solicitor's fees, counsel fees, and the claims and debts, including the taxes legally due upon the mortgaged property that should have been then and prior thereto found and determined and finally adjudged and decreed to be due and payable as court and receiver's indebtedness, and to be prior and superior in equity to the lien of the mortgage thereby foreclosed, excepting such final decrees upon claims and debts as might have been superseded by proper appeal and supersedeas bonds, and, upon such payment, the purchaser should be let into the possession, use, and enjoyment of the railway and property purchased, subject to the stipulations thereafter set forth; that upon confirmation of the sale, and upon payment within 20 days thereafter of such part of the purchase money as might be required fully to comply with the provisions of the decree, the masters should deliver to the purchaser a deed of conveyance of the mortgaged railroad and property, which deed should contain an express stipulation reserving to the court, and the court reserved, full power and jurisdiction over the mortgaged property, with full authority and power, upon default of the purchaser in complying with the requirements of the decree respecting payment of the purchase money, to retake possession of the railway and property, and forthwith resell the same; that the deed should contain the further stipulation that the purchaser and his assigns should forthwith yield possession of the railway and property upon the order of the court entered upon default of the purchaser in the payment of purchase money required by the order of the court. Each of the decrees further provided that the residue of the purchase money not required to make the payments above stated should be paid by the purchaser from time to time upon the amounts found and determined and finally adjudged by the court to be due and payable upon court and receiver's indebtedness, and to be prior and superior to the lien of the mortgage thereby foreclosed, such payments to be made by the purchaser, upon 20 days' notice, upon the order of the court requiring such payment, until the entire purchase money should be exhausted, if it should require the entire purchase money to pay and discharge said court and receiver's indebtedness, and that, if any surplus be left after full payment of the court and receiver's indebtedness, the same should be distributed pro rata upon the coupons and bonds secured by the mortgage, until the same should

be fully paid; that, in making payment of any surplus of the purchase money left after full payment of the court and receiver's indebtedness, the purchaser should be allowed to make payment in the bonds and coupons to which the same may be applicable, which were to be receivable for such sum as the holder would be entitled under the distribution according to the priorities adjudged. It was also provided that the purchaser or purchasers at the foreclosure sale reserved the right to appeal from any order or final decree made by the court decreeing the payment of claims adjudged to be due and payable as court and receiver's indebtedness, and to be prior and superior in equity to the mortgage in suit, and that any or either of the parties might apply to the court for such other and further directions at the foot of the decree as might be necessary to carry it into effect, according to its true intent and meaning.

The special masters appointed to sell the railway properties incorporated in their notice of sale the special provisions of the decree referred to, and on December 30, 1885, sold both such railway properties at the upset prices stated in the decrees, to Sylvester H. Kneeland, who was a representative of the bondholders. The reports of sales were approved by the court on February 5, 1886, and on March 10, 1886, the court approved the form of the proposed masters' deeds, and directed their delivery by orders which provide that the deed is delivered upon the express understanding that the court shall have and retain full power and authority to retake possession of said property, or any part thereof, if the grantee shall fail to pay the full purchase money according to the decree of sale; and, in case any appeal is taken from any decree for the payment of money by said grantee, and supersedeas bond be given, the amount secured by said bond shall be considered as a part of the purchase money, to enforce the payment of which the court may retake said property, or any part thereof." On March 10, 1886, the master delivered deeds of the property to the purchaser, which conveyed the property "free, clear, and discharged of all right, authority, and interest, claim, lien, equity of redemption in or to the premises, real and personal property, right, and franchises so sold and hereby conveyed, and every and any part thereof, of each and every of the defendants to such suits respectively, and of all persons claiming and to claim under them or any of them," and which deeds also contained the following clause: "It is hereby stipulated that the court shall have, and hereby it is reserved, full power and jurisdiction, and, upon default of the said Sylvester H. Kneeland to comply with any order of the court respecting payment of the purchase money, to retake possession of said property, and forthwith sell the same or any part thereof, upon order of the court to that effect entered. And the said grantee further stipulates that he and his assigns will forthwith yield possession of said railroad and property upon such order of the court entered upon his default in the payment of the purchase money, or any part thereof, as required by said decree; and, further, that all money becoming due on appeals to the supreme court shall be deemed to be purchase money, notwithstanding said decrees may have been superseded pending such appeal."

On April 6, 1886, the purchaser conveyed to the Toledo, Charleston & St. Louis Railroad Company all that part of the St. Louis Division of the railways situated in the state of Illinois. On June 11, 1886, he conveyed to the Bluffton, Kokomo & Southwestern Railroad Company all that part of the railway situated in the state of Indiana; and on June 12, 1886, to the Toledo, Dupont & Western Railway Company all that part of the Toledo Division situated in the state of Ohio. These deeds were respectively quitclaim deeds, and are not expressed to be subject to any lien or reservation whatever, and contain no assumption on the part of the respective grantees of any liens, charges, or payments whatever. These three several corporations, grantees, on June 19, 1886, were consolidated into the Toledo, St. Louis & Kansas City Railroad Company. On June 19, 1886, the consolidated company, the Toledo, St. Louis & Kansas City Railroad Company, executed its deed of trust of the road so acquired to the American Loan & Trust Company and Joseph E. McDonald, to secure an issue of first mortgage bonds to the amount of \$9,800,000, of which \$9,000,000 in amount were issued, which was duly recorded. The trust deed recites as a reason for the bonding of the road that the company is about to broaden the gauge of its road to standard gauge, to furnish the same with motive power and rolling stock, "and is about to provide for the discharge of all underlying

liens," and to exchange with certain holders of securities in the companies therefore owning the property, for securities to be issued by the present company, and that it is necessary to provide money for the matters aforesaid. The American Loan & Trust Company having become insolvent, and having been dissolved by process of law, the Farmers' Loan & Trust Company was substituted as trustee in place of such insolvent in the month of May, 1891, and subsequently, in November, 1893, removed by action of the bondholders, who on the same day appointed the Continental Trust Company, the present appellant, as trustee. The trustee Joseph E. McDonald died on June 19, 1891, and John M. Butler was afterwards, and on the 20th day of January, 1892, substituted, and he died after the rendering of the decree from which this appeal is taken.

On April 5, 1886, a decree was entered upon certain of the claims for car rentals and for car repairs and for cars destroyed, adjudging claims to the amount of \$158,708.93 in favor of the claimants specified, which decree adjudged "that each of said several claimants for car rentals, cars destroyed, and repairs above named, do have and recover the amount so found due to them as above set forth, with interest thereon at the rate of six per cent. from the date hereof, which said sums, respectively, are hereby ordered, adjudged, and decreed to be prior and paramount liens upon all the railroad property and effects, of every nature and kind, pertaining to each of said divisions respectively, and prior to the rights and interests of the bondholders and purchasers thereof, and of all persons claiming by, through, or under them, or either of them, which said sums shall be paid out of the proceeds of the foreclosure sale of said divisions prior to any distribution of the proceeds thereof among the holders of the bonds secured by the mortgages thereon," and directed that the purchaser of the railway pay into the registry of the court, within 20 days, the sum of \$158,708.89, for the use of the claimants, "such payment to be made in cash as a part of the purchase price due upon the sale of said division, in accordance with the decree of foreclosure entered in said causes." To this decree, Sylvester H. Kneeland, "as purchaser and trustee, representing the first mortgage bondholders on said entire line of railroad, covering both divisions from Toledo, Ohio, to East St. Louis, Ill.," excepted and prayed an appeal to the supreme court, which was granted, to operate as a supersedeas upon giving bond in the sum of \$200,000, "which is now filed, with the American Surety Company of New York as surety, and the same is approved by the court; the court, however, reserving the right to resume possession of the property on the terms mentioned in the order confirming the sale and approving the deed." Similar decrees in favor of other claimants were entered from time to time, with similar provisions. Appeals were taken from these decrees by the purchaser, Kneeland, upon supersedeas bonds executed by the American Surety Company, the appellee, and the decrees were substantially affirmed. *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950; *Id.*, 138 U. S. 509, 11 Sup. Ct. 426; *Kneeland v. Lawrence*, 140 U. S. 209, 11 Sup. Ct. 786; *Kneeland v. Bass Foundry*, 140 U. S. 592, 11 Sup. Ct. 857; *Kneeland v. Luce*, 141 U. S. 437, 12 Sup. Ct. 39; *Id.*, 141 U. S. 491, 12 Sup. Ct. 32. The first bond executed by the American Surety Company was forwarded by it on the 6th day of March, 1886, to the clerk of the court at Indianapolis, with a letter authorizing him to fill in the date of the decree from which an appeal was to be taken, and stating that the bond was to be delivered upon condition that the decree and deed of the property to Mr. Kneeland contained all of the stipulations embodied in the public notice of the master's sale, and upon the further condition that the decree of the court "shall contain the stipulation that the inclosed supersedeas bond is a prior and superior lien to all other liens upon said railroad property." On March 9, 1886, the company wired the clerk of the court that the "supersedeas bond given by this company is to be a lien upon the R. R. under which appeals are taken, and decrees should so provide." It was established by the evidence that the American Surety Company executed these surety bonds upon the assurance of the purchaser and his counsel that the company would be fully indemnified for the liability assumed, for the reason that the judgment or decree of the court which allowed the claims appealed from made the judgments a lien upon the property, and, if it should not be paid when directed, the court reserved the power to retake

the property, and resell it for the payment of the claims directed. On the affirmation by the supreme court of the several decrees referred to, and upon failure by Kneeland to comply with the terms of the decrees, the American Surety Company took from a number of the claimants assignments to it of their respective claims, amounting in the aggregate to \$300,000, paying the claimants the amount of their claims respectively.

In the year 1893, the Toledo, St. Louis & Kansas City Railroad Company became insolvent. Two of its judgment creditors, Stout and Purdy, thereupon filed bills in the several federal courts of the districts in which the railroad was situated, for the appointment of a receiver, and one was appointed by the courts, May 18, 1893. The railroad company made default in the payment of its interest on June 1, 1893, and in the month of December, 1893, the Continental Trust Company and John M. Butler filed their bills in the several federal courts of the districts in which the railway was situated for the foreclosure of the first mortgage of the Toledo, St. Louis & Kansas City Railroad, and the same receiver was therein appointed who had been appointed in the suit of Stout and Purdy. In the original foreclosure suits on July 22, 1891, Sylvester H. Kneeland, the purchaser at the foreclosure sales, applied to the court for an order extending the time for the payment of various sums adjudged to be due for rental and repairs of cars and locomotives, and for cars destroyed as adjudged by the several orders of the court recited, and this motion was denied. The several intervening petitioners and claimants for car rentals, etc., thereupon moved the court for an order resuming possession of the railway property and the appointment of a receiver, and for a sale thereof in satisfaction of such decrees. Upon the hearing of this motion, the court decreed that unless the several decrees referred to should be paid in full on or before the 10th day of September, 1891, the court would resume possession of the railway property, and that an order of sale would be entered directing its immediate sale in satisfaction of such decrees. These orders were not complied with, and proceedings to enforce them would seem to have been suspended under some arrangement not disclosed. On August 7, 1893, by agreement between the parties and their solicitors, but without notice to the trustees, the Continental Trust Company and John M. Butler (except so far as Butler, one of the trustees, had notice from the fact that he acted as counsel for Kneeland and for Stout and Purdy), and with the assent of the judges of the court having jurisdiction of the matter, the American Surety Company filed its petition in the original foreclosure suits, reciting the facts and the allowance of the claims; that Kneeland was the largest owner and holder of the new mortgage bonds and stocks of the Toledo, St. Louis & Kansas City Railroad Company, and was a member of its board of directors, of its executive committee, and its fiscal agent and representative in the state of New York, and had agreed with the surety company to pay it the amount which it had paid for the several claims which had been assigned to it, for which it was holden upon its supersedeas bond, and which amounted on the 1st of July, 1893, to the sum of \$323,909.99, as computed and determined between Mr. Kneeland and the American Surety Company. The petition recited the embarrassments of the new company, the appointment of the receiver, and the want of funds with which to pay the claims; that the available moneys in the hands of the receiver were needed in the current operation of the road, and for pressing labor and supply claims, and for betterments indispensable to its safe and profitable operation, and that the enforcement of the claims of the American Surety Company would greatly embarrass and possibly arrest the operation of the railroad, and hinder and delay the progress of its reorganization; that it had been requested to exercise further forbearance in the collection of its debt and delay in its enforcement for at least one year longer, and was willing so to do if the receiver would pay quarterly the interest accruing on the debt from and after July 1, 1893, with suitable provisions, to be agreed upon, for the payment of the debt after the expiration of the year. The petitioner asked the court for an order directing the receiver to pay such interest, and to direct a stay of the petitioner's debt, "but without prejudice to any of the paramount rights of your petitioner, and with leave to your petitioner to proceed to enforce the same at once upon any default in the payment of such interest, or in the event of any contest or denial of any of the rights of your petitioner

in respect of said claims on the part either of such receiver or of said Kneeland, or of any one holding by, through, or under them." A similar petition was also filed by the State Trust Company, the holder of some of the claims. On August 7, 1893, the court entered an order upon the petition, at the hearing of which appeared not only Mr. Kneeland, the purchaser, as trustee and agent of the bondholders of the respective divisions, but also Stout and Purdy, complainants in the creditors' suit, and Mr. Calloway, the receiver appointed in such suit, and the Toledo, St. Louis & Kansas City Railway Company, successor to Kneeland, as purchaser. The order recites that the American Surety Company had become the purchaser and assignee of certain of said claims, specifying them, and that the State Trust Company had become the purchaser of certain of the receiver's certificates, specifying the amount, and the order then recites: "And it further appearing to the court that the said claims, as liquidated by said decree, are prior and paramount liens upon all of the railroad property and effects, of every nature and kind, pertaining to each of said divisions, and prior and paramount to the title of said Kneeland, as purchaser of said railroad property, or of said Toledo, St. Louis & Kansas City Railroad Company, as successors to said Kneeland, and prior to the rights and interests of all persons claiming by, through, or under them, or either of them, and that the holders of said claims are entitled, under said decree, to have all of said railroad property reclaimed by this court, and resold for the payment and satisfaction of the same." It further recites the embarrassment of the road, and that the enforcement of the claims would interfere with the current administration of the property, and hinder and delay the reorganization of the railroad property. The court thereupon adjudged and decreed that the receiver of the Toledo, St. Louis & Kansas City Railroad Company, out of any moneys that may come to his hands as such receiver, from the operation of the road, should pay to the American Surety Company the interest due on the sum of \$323,909.99, at the rate of 6 per centum from July 1, 1893, and to the State Trust Company like interest on the sum of \$52,247.30. And the court, in consideration thereof, ordered that the collection of the principal of said sums should be stayed for the period of one year from July 1, 1893, "but with leave to the said petitioners, respectively, to proceed to enforce their said claims at once upon any default in the payment of such interest, or in the event of any contest or controversy of any of the rights of said petitioners in respect to their said claims on the part of such receiver, or of said Kneeland, or of any one holding by, through, or under them, or either of them." This decree was entered by consent.

At this time the Farmers' Loan & Trust Company and John M. Butler were acting as trustees under the mortgage of the Toledo, St. Louis & Kansas City Railway Company. On June 27, 1894, the Continental Trust Company and John M. Butler, the then trustees under the mortgage, filed their intervening petition, setting forth the various facts herein recited, alleging that the mortgaged property was not sold subject to any claim, but that, by the terms of the decree the claims were to the extent of the proceeds of the sale transferred to such proceeds, which were thereby made the primary fund for their payment; that the purchaser became personally liable for the amount bid; that the decrees awarding payment of the claims were decrees for their payment by the purchaser personally in satisfaction pro tanto of the purchase price of the property, and that such decrees established a personal liability upon the part of the purchaser in exoneration to that extent of the property; that the surety company, by the execution of the supersedeas bonds, became surety in respect to the personal liability of the purchaser, and became bound as surety, for the payment of the decrees, and, upon their affirmation, became bound to discharge the same; that it could not, in violation of its liability, acquire the decrees, and hold the same adversely to the railroad and property mortgaged to the petitioners. It then prayed that the American Surety Company account for and refund all sums received, by way of interest, on the claims, and for an injunction against the further prosecution of its claims against the mortgaged railroad and property. To this petition an answer was duly filed, in which it was alleged, among other things—First, that the supersedeas bond for \$200,000, given on the appeal from the decree of April 5, 1886, was executed under an agreement between the American Surety Company, the court, and the

parties, and that that decree should be and remain a lien upon the railroad property; second, that the purchase in 1891 by the American Surety Company of the intervening decrees was made after it had been advised by the petitioner Butler that the matter of such purchase had been submitted to the judges of the circuit court having the matter in charge, and that they announced their satisfaction with the purchase of the claims by the surety company, and that there could be no doubt about the assignments being valid, and that they would convey to the surety company, as assignee, all the rights, liens, and securities possessed by the claimants, assignors, to the surety company; third, that the petitioner Butler, as trustee, had knowledge of the entry of the decree of August 7, 1893, before and at the time it was entered, and that the same was entered with his knowledge and approval as trustee. At the hearing, a decree was entered December 31, 1895, dismissing the petition of the trustees, for want of equity. Mr. Butler, one of the trustees, died during the pendency of the proceeding, and the Continental Trust Company, as surviving trustee, prosecutes this appeal.

E. C. Henderson, Alpheus H. Snow, and Samuel O. Pickens, for appellant.

Bluford Wilson and H. C. Willcox, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts). It is contended by the appellant that, by the decrees of foreclosure and sale, the mortgaged property was not sold subject to the claims which might be adjudged paramount to the lien of the mortgages, but was sold free and clear of all claims and liens whatever. We concur in this contention so far as it asserts that the intervening claimants had and retained no equitable lien upon the mortgaged property after its sale. It is clear that the railway properties were to be sold subject to no incumbrance existing prior to the sale; nor were they sold subject to liens thereafter to be ascertained and decreed upon intervening petitions. The contemplation of the decrees was that the property should be sold at the upset price stated, which was deemed to be, and was, sufficient to discharge all such intervening claims as should be established, and that the proceeds of the sale should be devoted to their payment before any payment upon the mortgage debt. It is undoubtedly true that the terms of the decree of sale and the decree of confirmation constitute the contract of purchase, and that, therefore, it was not within the power of the court to impose further terms, or to declare a lien upon the property not contemplated by those decrees. *Railroad Co. v. McCammon*, 18 U. S. App. 628, 10 C. C. A. 50, and 61 Fed. 772; *Id.*, 18 U. S. App. 709, 10 C. C. A. 50, and 61 Fed. 772. It was also clearly contemplated that the railway would be purchased by the bondholders, secured by the mortgages foreclosed, as in fact it was, and at the upset price in the decree; and undoubtedly, if the entire purchase price had been paid in cash into the registry of the court, the purchasers would have taken the road discharged of every lien and incumbrance whatever. Such a course, however, was not in the interest of the bondholders. Numerous claims, of large amounts, growing out of the operation of the road while in the hands of the court, had been preferred. These arose upon receiver's certificates issued by authority of

the court, and for car rentals and the like. They were asserted to be entitled to payment in priority to the mortgage debt. These claims were disputed by the bondholders. The court therefore did not require the purchasing bondholders to make present payment into the registry of the court of a large sum of money to be held for the payment of claims which might or might not be established, but, by the decree, required the payment of so much of the purchase price as should be necessary to discharge the claims when and as they should be determined and adjusted. By the terms of the decree, the purchasing bondholders were to be let into possession subject to the conditions of the decree, which reserved full power and jurisdiction over the property, with the right, upon default by the purchaser respecting any order for the payment of the purchase money, to retake possession of the road, and to resell the same. This was tantamount to the reservation of a lien reserved by the court upon the property for the purchase money, and this reserved lien was of as great dignity and potency as a purchase-money mortgage executed by the purchaser; and all subsequent purchasers of the property were bound thereby as effectually as though a purchase-money mortgage had been given and duly recorded before any conveyance by the purchaser. Kneeland, the purchaser, was bound by the provisions of the decree directing the sale and the decree of confirmation of the sale. So, also, were his grantees; and so also were the trustees in the mortgage executed by the Toledo, St. Louis & Kansas City Railroad Company and the holders of the bonds thereunder. The trust deed itself recites that the bonds were issued in part for exchange for the interests of the bondholders under the old mortgage, and in part "to provide for the discharge of all underlying liens." There was no other lien upon this property, so far as the record discloses, except the lien for the purchase price reserved by the decree. So that the purchaser at the sale, his subsequent grantees, the trustees under the mortgage, and the bondholders, all held their interests in this property, subject to the lien imposed upon it by the decree of sale, and subject to the payment of such amount of the purchase price that the court should decree must be paid upon the claims which had been preferred before the decree, but which had not then been adjudicated. Without question, the claimants could rightfully invoke the power of the court to enforce that lien to render them satisfaction of their demands. They were debts which the court had incurred in the operation of this property. It was to secure payment of these debts that the court demanded, as it might rightfully do, that the bondholders who were seeking foreclosure of their mortgage should bid for the property a sum sufficient to their payment, and that the payment of that sum should be charged as a purchase-money lien upon the railway. It may be true that these claimants had no direct recourse upon the court or upon this railway; but it still remains true that here were debts which the court had incurred in protecting the property of the bondholders, and at the request of the bondholders. Under such circumstances, no court of equity would permit the property

to escape from its control until such debts were adjusted and paid. These claims were thereafter adjudged and adjusted, and the court could unquestionably enforce the lien reserved for their payment, in whosoever hands the road might come. If, therefore, the American Trust Company is in a position to assert the rights of those whose claims it was obliged to pay, and whose debts it now claims to hold, we entertain no doubt of the right of the court, by all proper proceedings, to enforce the payment of the purchase money which has not been paid, so far as it may be necessary for the satisfaction of such claims. And, in this view, it would be immaterial that the railway had passed into the possession of a purchaser without notice of this reserved lien. Such a one was bound to take notice of the provisions of the decree of sale, and of confirmation of sale. But the parties here stand in no such plight. Kneeland was the representative of the bondholders under the mortgages foreclosed. His conveyance to the several railways which were consolidated under the title of the Toledo, St. Louis & Kansas City Railroad was by quitclaim deeds, the consideration paid being expressed to be the capital stock of the company grantee. In other words, the old bondholders became stockholders of the present corporation; and the bondholders under the new mortgage, if not identical with the old bondholders, were notified by the recital in the mortgage, and took their bonds subject to the payment of the purchase money of the road. There is here no bona fide purchaser without notice.

We pass to the consideration of the question whether the American Surety Company is in a position to assert the demands of the original intervening petitioners. The circumstances antecedent to and attending the execution of the first supersedeas bond are important to be considered, and may be briefly summarized. It was clearly within the contemplation of the decree of foreclosure of November 12, 1885, that the bondholders should be granted the right to make full contest of claims, and, if any of them should be sustained by the court below, they should be protected in the right of appeal to the ultimate tribunal, and, intending to purchase the property, they desired to be protected from the enforced payment of the claims, or of that part of the purchase money which ought to be applied to the payment of the claims, until final adjudication of their validity by the courts. In that view, and for the convenience of the bondholders, the decree provided there should be excepted from present payment such final decrees upon the claims as may have been superseded by proper appeal and supersedeas bond. It would appear that prior to March 10, 1886 (the date of the confirmation of sale), some of these claims had been adjudged, although the decision of the court thereon was not formally entered until April 5, 1886. Mr. Kneeland, representing the bondholders, during the first days of March, applied to the American Surety Company to sign a supersedeas bond or bonds to enable the bondholders to stay proceedings upon the contemplated appeal, and thus to contest the claims without payment into court of the part of the purchase money of the property properly ap-

plicable to such claims. It appears also that the American Surety Company was unwilling to become bound unless, by the decree of confirmation, the supersedeas bond should be made a prior and superior lien to all other liens upon the railroad property. This appears from the letter of the company of March 6, 1886, addressed to the clerk of the court, and by its telegram to the clerk under date of March 9th. These conditions were evidently brought to the attention of the court, and assented to by the bondholders and purchasers, for we find in the decree of confirmation of March 10, 1886, this provision: That the deed of the master was approved with the express understanding that the court should retain full power and authority to retake possession of the property if the grantee should fail to pay the full purchase money according to the terms of the decree of sale, "and that in case any appeal is taken from any decree for the payment of money by said grantee, and supersedeas bond be given, the amount secured by said bond shall be considered as a part of the purchase money, to enforce payment of which the court may retake said property, or any part thereof." In pursuance of that decree the deed contained the stipulation "that all money becoming due on appeals to the supreme court shall be deemed to be purchase money, notwithstanding said decrees may have been superseded pending such appeal." The formal order entered on April 5, 1886, adjudging the claim, decreed it to be "a prior and paramount lien upon all the railroad property and effects, of every nature and kind, pertaining to each of said divisions respectively, and prior to the rights and interests of the bondholders and purchasers thereof, and of all persons claiming by, through, or under them, or either of them, which said sum shall be paid out of the proceeds of the foreclosure sale of said property prior to any distribution of the proceeds thereof among the holders of the bonds secured by the mortgages thereon." To this decree, Mr. Kneeland, as purchaser and trustee representing the first mortgage bondholders on the entire line of railroad covering both divisions, excepted and prayed an appeal, which was granted, the court "reserving the right to resume possession of the property on the terms mentioned in the order affirming the sale and approving the deed." It is thus apparent that the American Surety Company entered into its stipulations of suretyship upon the express condition that the purchase money of the road should be the primary fund for the payment of such claims, notwithstanding the appeal, to which it should be entitled to resort for reimbursement in case the decrees appealed from should be affirmed, and it should be compelled to pay the claimants under their obligation of suretyship. It is also clear that this understanding was assented to by all the parties interested, and this before the time of the confirmation of the sale; and, to carry out and make effectual such understanding, the court, by its order confirming the sale, decreed to the like effect.

We lay no stress upon the language contained in the formal adjudication of April 5, 1886, or of any of the subsequent decrees adjudging the claims which declared them to be liens upon the

railroad property, since, if such decrees may be treated as independent decrees entered subsequently to the confirmation of sale, it was not competent for the court, after confirmation of sale and delivery of the deed, to create a new charge upon the property sold. These provisions were, however, manifestly designed to express what is more aptly expressed in the decree of confirmation, that each claim was a charge upon the proceeds of sale, and that such proceeds should constitute a primary fund for payment, and that the lien reserved for payment of the purchase money might be resorted to for the payment of the claim established either by the claimants or by the American Surety Company, obligated as surety to pay them. Such seems to have been the understanding of all parties down to the time of the filing of the intervening petition of the Continental Trust Company, which we are considering. On July 22, 1891, Mr. Kneeland, still representing the parties interested in the road, applied to the court for time to pay these claims, recognizing the right of the court to enforce payment of them notwithstanding the decree and execution of the supersedeas bond. This motion was denied, and the court directed possession of the road to be retaken unless the claims should be paid by the 10th day of September, 1891. Notwithstanding this order, the court and the American Surety Company seem to have stayed their hands, and on the 7th day of August, 1893, after the road had again passed into the hands of a receiver under the creditors' proceedings of Stout and Purdy, by agreement of all the parties, except possibly the trustees of the mortgage, and certainly with the active co-operation and consent of Mr. Butler, one of the trustees, in his capacity as attorney, the court granted a further extension of payment for the period of one year, and directed, as a condition, that the receiver should pay the interest accruing upon the claims from the 1st day of July, 1893. We are constrained, therefore, to hold that the American Surety Company entered into its obligations upon the condition, created before the decree of confirmation of sale, and expressed in that decree and in the master's deed, that the purchase money of the property should be the primary fund for the payment of the claims, notwithstanding the appeal and the supersedeas bonds, and that such fund might be resorted to by the surety company for reimbursement in case it should be compelled to meet its liability under the obligation of suretyship. It is a general doctrine in equity that a surety who has discharged the debt is entitled to stand in the shoes of the creditor as to all liens securing the debt. This doctrine of subrogation, it is true, is a purely equitable one, and is only enforced to accomplish the ends of substantial justice. It may be true that it should not be asserted against third persons whose rights may be subordinate to the liens of the creditor if they are prior in date to the obligation of the surety, and more specific in character than the equity of the surety.

We need not stop to consider the case of *Patterson v. Pope*, 5 Dana, 241, and the large number of cases to which we are referred, and which follow in its wake. It is to be observed, however,

that in that case the surety for the debtor entered into his obligation of suretyship after his principal had parted with all interest in the property, and that the debtor had conveyed the property free of incumbrance, and received its consideration. The court expressly disclaimed any purpose to determine "the proper limits of the right of a surety whose obligation is coeval with the debt itself, or who comes in afterwards by the act or with the consent of the creditor, or who may be supposed to have some peculiar equity against him," but held that a surety upon an obligation incidental to the prosecution of a legal remedy against the person of the debtor "is prima facie to be considered as trusting to his principal only, for whom he alone is surety, and, upon payment, is entitled to subrogation only as to remedies against the person and property of the principal, and that, as to a prior surety or prior interest in the property which may be under pledge, he must occupy the place of the debtor." But here the incurring of the obligation of suretyship was contemplated, and the conditions agreed to, prior to the confirmation of the sale, and they were recognized by the decree of confirmation, which determined, as between the purchaser of the property and the American Surety Company, that the purchase money should be the primary fund for the payment of the claims, notwithstanding the subsequent execution of supersedeas bonds. The obligation of suretyship was contracted upon these conditions, with the knowledge and by the consent of all parties then interested in the property. The trustees of the subsequent mortgage upon the road, and the bondholders themselves, acquired their rights under and pursuant to the decree of confirmation, and must be held to stand consenting thereto, and to be bound thereby. They must be held to have agreed, in advance of their mortgage, that the surety should have the right of subrogation upon any supersedeas bonds thereafter made, upon which appeals should be taken from any decree upon the claims, and they agreed to and consented to the right by the surety of recourse to this fund. They took their rights subject to the payment of the purchase money, and upon the express stipulation and under decree of the court that the surety should be reimbursed out of it. That purchase money has not been paid. They cannot now be rightfully held to object to its payment.

The intervening petition asks a court of equity that the railway property may be relieved from the payment of the purchase price, for which its title was acquired. It asks a court of equity to refuse to enforce the payment of a lien which the court had reserved for the payment of the debts which it had incurred. It asks a court of equity to repudiate its own obligations made in the management of the road, for the benefit of the bondholders. It asks a court of equity to repudiate its own decrees which sought to secure satisfaction of these claims. It asks a court of equity to repudiate the sanction which it had given to this surety company to enter into an obligation of suretyship upon the faith of a decree of the court, which was made a condition of the confirmation of the sale; and this notwithstanding the fact that the trustees

and the bondholders take their title subject to all the conditions and reservations of the decrees of sale and of confirmation. It asks a court of equity to repudiate its own solemn decrees, that the present bondholders may escape payment of the purchase money of the very property to which they now claim to be entitled. To grant the prayer of the petition would be to work a grievous wrong. We are unable to bend our judgment to its consummation. The decree will be affirmed.

PLATT v. THREADGILL.

(Circuit Court, W. D. Virginia. April 17, 1897.)

1. JUDGMENT—EQUITABLE RELIEF—MISCONDUCT OF JURY.

Equity has jurisdiction of a suit to enjoin the enforcement of a judgment based on a verdict which is vitiated by the misconduct of the jury, where the complainant had lost all ground of relief at law at the time of discovering the facts. Nor does it affect the jurisdiction that the judgment is pending on error, and under a supersedeas, in the supreme court.

2. SAME—IMPROPER INFLUENCE.

In an action against a common carrier to recover for loss of a shipment of cigars, where the quality and value of the cigars are in issue, the fact that plaintiff conducted three jurors to his agent's place of business, and gave them a box of cigars, is sufficient ground for enjoining the enforcement of the judgment by suit in equity.

Beverly T. Crump, for plaintiff.

Kirkpatrick & Blackford, for defendant.

SIMONTON, Circuit Judge. F. M. Threadgill obtained a verdict against Thomas C. Platt, representing the United States Express Company, on the law side of this court, at Lynchburg, 27th April, 1895, in the sum of \$54,371. Judgment was entered and exceptions were taken, but the appeal was not perfected in time for the circuit court of appeals. A levy having been made under execution on this judgment, it was stayed; the defendant entering into bond, with sureties, conditioned in the alternative, for the payment of the said judgment on or before the 15th April, 1896, or the obtaining of a writ of error or supersedeas thereon on or before that date. This bill is now filed to enjoin said judgment, and to enjoin proceedings upon the said bond. Afterwards, and by leave, an amended bill was filed, setting up yet other grounds for enjoining the judgment. The facts which are recognized and admitted on both sides are that pending the trial of the action at law, during the afternoon of the day preceding the day on which the case was submitted to the jury, some of the jurymen were present at and heard a conversation between one Bowden, the agent of the plaintiff, and a deputy marshal, in which the latter suggested that the former should treat to cigars. They heard his response that he was perfectly willing to do so, if a visit was paid to his place of business, and they thought that they were included in the invitation. After the court had adjourned for the day, three of the jury started to seek the place of business of Bowden, accompanied by a fourth juror, who was

going in the same direction, but not to the same place. On their way they either overtook or met the plaintiff, and, telling him their purpose, asked where Bowden's place of business was. Plaintiff replied that his place of business was in the same building as that of Bowden, and that he would show them where it was. He went along with them. On the way he endeavored to show them into a church building in which he was interested, and, failing to enter, he continued with them to Bowden's place of business. The fourth juror, who was with them, did not go to Bowden's. The others, with plaintiff, did go, however. When they reached the store, plaintiff told the brother of Bowden the purpose of the jurors, and instructed him to get a sample box of cigars,—25 in the box. He received the box; gave two of the jurors 9 cigars each, and the box with 7 cigars to the other juror. They waited about five minutes in the store, and then went out. On their way they met the fourth juror, and he was offered a cigar, which offer he declined. The cause of action in the pending suit was a lot of cigars, and an important question in assessing the damages recoverable was the character, quality, and value of the cigars. The bill charges that this communication with the jury had in this way tended to influence their verdict, was grossly improper, and that the verdict rendered so soon after it occurred should be set aside.

The trial by jury was instituted to secure an impartial tribunal of the issues of fact in a case. The jurors are kept as far as possible from all extraneous influences. And although the rigidity of the common-law practice has been relaxed, and now jurors are not kept secluded from possibility of such influences, still every precaution is taken to prevent them from reaching the jury. And, in so far as the absolute seclusion of the jury under the common law has been relaxed, just so far should the moral restriction substituted in its stead be enlarged and enforced. The jury are instructed to try every case according to the evidence. They are sworn to do so. The evidence before them is always delivered under oath or affirmation. Every fact submitted to them is brought out by examination and cross-examination. Every question by which such fact is elicited must be put in the presence of counsel, is subjected to the scrutiny of counsel and to discussion by them of its competency or relevancy, and, if any dispute arises, it is decided by the court. This examination is controlled by rules of evidence, a violation of which, even with the sanction of the court, will be ground for a new trial. Testimony is taken only before a full jury, and the rule is inflexible that nothing goes to them except in the presence of all. Private communications, possibly prejudicial, between jurors and third persons or witnesses or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least until their harmlessness is made to appear. *Mattox v. U. S.*, 146 U. S. 150, 13 Sup. Ct. 50. "The rule is that the slightest tampering with the jury during the trial or prior to it, by a party, or the agent or attorney of a party, in whose favor the verdict has been rendered, is, on ground of public policy, good cause for setting aside the verdict, without reference to the merits of the case, and without considering whether the attempt to poison the sources of justice was or was not successful. On this point Hawkins says: 'The law so abhors all corruption of this

kind that it prohibits anything which has the least tendency to it, what specious pretense soever it may be covered with, and therefore it will not suffer a mere stranger so much as to labor a juror to appear and act according to his conscience.' Although this extreme doctrine is not universally approved, all the cases agree that if a party or his counsel, or any one for him, deliver to the jury or to a juror a paper, the tendency of which is to influence the verdict in favor of that party, without the consent of the opposite party, or leave of the court, a verdict given in his favor will be set aside." *Thomp. & M. Jur.* p. 438, § 364. Such are the general rules. It is difficult, perhaps impossible, to reconcile the cases applying them, which in such number have been brought to the attention of the court by the learning and research of counsel. The general result to be deduced from an examination of them is that in no case will a mere accidental meeting with a juror pending a trial, or an inadvertence, affect the verdict; and in all other instances each case will be governed by its own circumstances. Great care is always to be taken to avoid suspicion as to the motive of the party, or as to the effect on the jury. *Vane v. City of Evanston*, 150 Ill. 616, 37 N. E. 901. And the interference with the jury is punished without regard to the merits of the case, or inquiry as to its actual effect on the verdict. *Veneman v. McCurtain* (Neb.) 50 N. W. 955; *Knight v. Inhabitants of Freeport*, 13 Mass. 218.

In the case at bar the jury was engaged—had been engaged for days—in trying a question between the complainant, defendant in the law court, and the present defendant, plaintiff in that court. The main question in the case was as to the amount of damages to be allowed, and this amount of damages depended very much upon the quality, character, and value of the cigars intrusted by Threadgill to the express company, and by the latter lost to the former. The testimony was nearly all in. An effort had been made to produce the cigars before the jury, which had failed. Slurs upon the quality and value of the cigars had been uttered in the presence of the jury. Just at this critical period the plaintiff, Threadgill, casually met with four of the jury. He entered into company and conversation with them, walked with them towards his own store, and prolonged his companionship with them by visiting a church edifice on the road. He took three of them to his store. One of the jurymen, recognizing the manifest impropriety of the act, refused to accompany the others. With these others, Threadgill entered his store, called for a box of cigars, and distributed the whole box between the three. He, a dealer in cigars, suing for the value of cigars, put into the hands of one-fourth of the jury the best evidence of the value of his cigars, and gave them the means and opportunity of furnishing the same evidence to the rest of the jury. It does not fully appear what took place during the walk with Threadgill and the interview in his store. But the next day the jury brought in a full verdict for the plaintiff,—nearly all that plaintiff claimed,—the cigars getting their full value. The least that can be said is that Mr. Threadgill embraced the accidental opportunity to ingratiate himself with this large contingent of the jury, and that he, unintentionally, it may be, placed in their hands a most valuable piece of testimony, which the other side had no means

of knowing or rebutting, or of explaining. The bare fact that a party to a cause is in close, familiar conversation with jurymen trying the cause, exhibiting himself to them in a most favorable way, and cultivating their regard, is in itself a circumstance of the most suspicious character. A verdict taken under circumstances like these "has the appearance of anything but fairness, and, let it be once understood that such things are permissible, and we will be treated to the spectacle of litigants vying with each other, in both private and public places, in attempts to win the good will and favor of the jury, and the administration of the law greatly scandalized thereby." *Vollrath v. Crowe*, 9 Wash. 374, 37 Pac. 474. "However harmless might be the conduct of the plaintiff and of the jurors in this case, we feel called upon, in this and every case when the separation of the jury and the parties is not preserved with the utmost care, to evince, in the most decisive manner, our purpose to shut up every avenue through which corruption, or the influence of friendship, could possibly make an approach to the jury box." *Springer v. State*, 34 Ga. 379.

The bill sets up another reason for reopening this verdict; that is, the charges of misconduct against the juror Wright. These charges have not been sustained.

At the hearing the question of jurisdiction was not raised, nor is it raised in the pleadings. It has, however, been considered by the court. The first duty of a federal court is to inquire if a cause is within its jurisdiction. The complainant had lost all ground of relief at law when discovery was made of the facts stated in the bill as ground for setting aside the verdict. This gives jurisdiction to this court sitting in equity. *Knifong v. Hendricks*, 3 Grat. 212; *Lawless v. Reese*, 3 Bibb, 486; *Pelzer Manuf'g Co. v. Hamburg-Bremen Fire Ins. Co.*, 62 Fed. 1, 71 Fed. 826; *Johnson v. Towsley*, 13 Wall. 84; *Marshall v. Holmes*, 141 U. S. 598, 12 Sup. Ct. 62.

Another question was raised by the court at the hearing, not by any of the counsel. It was developed in the progress of the cause that the judgment at law had been carried to the supreme court of the United States on writ of error, and was there pending under a supersedeas. This question has been set at rest by *Johnson v. Railway Co.*, 141 U. S. 610, 12 Sup. Ct. 124, following *Parker v. Judges*, 12 Wheat. 561. The circuit court sitting in equity can entertain a bill of this kind notwithstanding the writ of error. Let the injunction issue as prayed for in the bill. But, as it does not conclusively appear that the error committed by the defendant was with the design to corrupt the jury, the costs of the case will be paid by the complainant.

SANDS v. E. S. GREELEY & CO.

(Circuit Court, S. D. New York. February 6, 1897.)

1. EQUITY PRACTICE—INTERVENTION IN RECEIVERSHIP CASES.

Interventions by persons interested in the funds of a receivership will not be permitted if their rights may be conserved without it, since such interventions multiply the number of litigants, and, if begun in the case of one creditor, cannot be consistently denied as to others, thereby resulting in unnecessary expense and confusion of proceedings.

2. SAME—AUXILIARY RECEIVERSHIPS—INTERVENTION BY NONRESIDENT CREDITORS.

In cases of auxiliary receiverships for nonresident corporations, creditors who reside without the jurisdiction where either the original or auxiliary proceedings are pending are not entitled to intervene, and become technical parties, either for the purpose of asserting a claim to equal rights with resident creditors, or of placing themselves in position to object to the claims of other creditors, or to examine and dispute the propriety of the receivers' action. Their proper course is to file their claims with the receivers, and, if rejected by them, to present them to the master. They will then have the same opportunity as other creditors to overhaul the receiver's accounts, and raise all these questions before the master and before the court on the coming up of his report.

Jones & Loughlin, John L. Hill, and Perkins & Jackson, for the motion.

Frederick G. Dow and Charles Rushmore, opposed.

LACOMBE, Circuit Judge. This court is always chary as to allowing intervention by persons interested in the funds of a receivership. It does not grant such relief when all the rights of the parties applying may be conserved without it. Intervention implies the making of a new and independent party to the litigation, with an independent attorney, and, in many cases, an independent counsel. If one creditor is allowed to intervene, there is no reason why another similarly situated should not be accorded the same privilege; and it would soon come to pass that the orderly conduct of the proceedings would be obstructed by the large number of parties to be formally notified of each step, and the expenses of administration, with allowances to attorneys and to counsel for the many separate creditors, would be unnecessarily increased. The several petitions for leave to intervene are therefore refused, and the motions denied. Inasmuch, however, as the argument has covered many subjects, and it has been made apparent that the procedure in this circuit in cases similar to the one at bar is apparently not familiar to all who have appeared in this case, it seems appropriate to file a brief memorandum upon the disposal of these motions.

The receivers of this corporation were not appointed under a regular creditors' bill after judgment had been obtained against the defendant, and execution returned unsatisfied. The circumstances attending their appointment are as follows: E. S. Greeley & Co. was a Connecticut corporation. It had for some time transacted business in this state, and had considerable tangible property here, in the shape of a plant, a leased building, tools, raw material, manufactured and partly manufactured articles, and cash in bank. Possibly it also had property in other states, but that circumstance is not material. It became financially embarrassed to such an extent that, in the opinion of its officers and directors, it was practically insolvent, and, being of the opinion that a further effort to prosecute its business could only operate still more disastrously for all concerned, its officers and directors decided to wind up its affairs. Since it was a Connecticut corporation, the proper tribunal to take charge of such proceeding was the court of that state,

and to such tribunal application was made for the appointment of receivers. Such appointment was at once made, and, by the operation thereof, all of the assets of the corporation in the state of Connecticut passed to the receivers. Of course, the Connecticut appointment gave the receivers no authority to seize the assets of the corporation in this state. There were many creditors here who had dealt with the corporation, and given it credit, because of the large amount of tangible property which it was known to hold in this state. As soon as any of these creditors might be advised of the insolvency,—and they would be so advised as soon as news of the appointment of receivers in Connecticut might reach here,—they could secure themselves by at once beginning suit in the state courts, and levying attachments upon the property here. Under these circumstances, the Connecticut receivers applied to this court for an order appointing them receivers of this court in an action brought by a resident of this state against the corporation. It was apparent that, if the property were seized and sold under attachment, it would be disposed of at a ruinous sacrifice, leaving no balance available for the creditors who were not in a position to secure themselves by attachment; but it seemed highly probable that if receivers were appointed to take charge of the assets here, and dispose of them without undue haste, a sufficient sum would be realized to pay all the resident creditors in full, and leave a surplus over for transmission to the court which was winding up the corporation. At the time this appointment was applied for, it was shown that some, at least, of the resident creditors, wished to have it made. None of them have ever made any objection, and, upon the hearing of these motions, resident creditors to a considerable amount appeared, and expressed approval of the action of this court.

The questions raised upon these motions, and upon which petitioners wish to have a formal hearing and judicial determination, are these:

1. Creditors who are residents of Pennsylvania, or of states other than New York or Connecticut, insist that the New York assets which have been collected by the New York receivers should be distributed ratably among all the general creditors of the corporation, no matter in what state they may reside, nor where the contract upon which their claims arise may have been made. It has been the practice in this court in receiverships of this character to carefully provide for the protection of the creditors of the insolvent corporation who may reside within this jurisdiction. Inasmuch as this court, by seizing the property, has deprived the residents of this state of the remedies they would have possessed under state law, it would seem to be eminently just and equitable to afford them this protection. And that protection should be afforded by the federal courts in like circumstances was the opinion of the four justices of the supreme court who acted concurrently in disposing of the questions which arose under the Northern Pacific Railroad receivership. Property in similar proceedings in this court has been collected, disposed of advantageously, the resident

creditors paid, and the surplus transmitted to the court of the state of which the corporation was a citizen, and where the receivers were originally appointed for the purpose of winding up its affairs. It is wholly unnecessary at this stage of the proceeding to enter into any discussion as to the propriety of this method of administration. Logically, it comes up for determination when distribution is about to be made. If any creditor, not a resident of this state, believes that he is entitled to participate in such distribution, he may submit proof of his claim to the receivers. If they reject the claim, as, under the practice prevailing here, they undoubtedly will, such creditor is entitled to have the propriety of such action passed upon by the master to whom, in the first instance, all disputed questions as to allowance or disallowance of claims are to be presented. If the master's decision be adverse to the creditor, he may review it upon exceptions to the report; and, if such exceptions be overruled by the circuit court, such determination is a final decree, from which he may appeal to the circuit court of appeals. In this way the creditor's right to share in the distribution is judicially considered and decided as a question of right, unembarrassed by any exercise of discretion, as would be the case if the same question were presented upon a petition for intervention.

2. Counsel for nonresident creditors further insists that, in addition to the opportunity of formally presenting their claim to share in the proceeds, they are entitled to be put in a position where they may criticise or object to the claims of others, and may examine and dispute the propriety of the receivers' conduct. Except in one respect, to be noted hereafter, the ordinary proceedings of the receivers may safely await the time when their accounts and transactions are sent to the master for investigation. Under the practice in this circuit, the master gives notice of the opening of the hearing before him, touching the receivers' administration, to all who have filed claims, or to their representatives, and abundant opportunity is afforded to all who are interested either as direct distributees of the New York assets or as distributees of whatever surplus fund may be left for transmission to the court of original jurisdiction. The ordinary disbursements of receivers in collecting and preserving a fund are of such a character as not to require any special investigation in advance of this one by the master, the bond in each case being made sufficiently large to insure a response to whatever sums may be surcharged upon the account. No distribution by the receivers is made until the master has investigated and made his report; and thus, upon his investigation, the creditor who has filed a claim, whether it be allowed or disallowed, may have the opportunity of questioning the propriety of allowing any other claim or claims. Intervention, therefore, is unnecessary to protect any rights of creditors in this respect.

3. In this particular receivership there have been some extraordinary expenditures by the receivers. They have been allowed to proceed with the business so far as to complete the manufacture

of articles which the corporation was under contract to furnish, thus in some instances making a slight profit on the transaction, and at all events avoiding damages for breach of contract. They have also been allowed to work up such raw material and partly manufactured materials as they had on hand into finished products, in the belief that they could thus be better disposed of. In a few instances they have been allowed to provide the raw material, and fill orders received from old customers of the corporation of undoubted solvency, in the belief that in that way the good will of the corporation, which seemed to be a valuable asset, might be preserved, and the opportunity of selling the entire plant, with such good will, at a favorable price, be greatly increased. This was done with the assent of most of the resident creditors; certainly with the expressed dissent of none. Inasmuch as some of the non-resident creditors now question the advisability of such action, it would be appropriate, in advance of the hearing before the master, to provide for a hearing by the court of the question whether such business should continue, all parties interested having the opportunity to be present and submit their views. In this particular case, however, such proceeding is not now necessary. The various items of work which have been undertaken from time to time by the receivers have been practically now completed. There is in contemplation no further effort to carry on the business. Satisfactory arrangements have been made whereby the premises now occupied will be vacated, certainly by the 1st of May, and probably by the 1st of April, and it is the expectation of the receivers to be able to wind up their business and present their accounts on or before that date.

4. Some of the nonresident creditors insist that their position is different from that of others, by reason of the circumstance that the contracts out of which their claims arose were made in this state, and, therefore, that they, equally with the resident creditors, were entitled to avail of process of the state courts by attachment, etc., at the moment when this court took the res into its possession. This same question has been presented recently to this court in two receiverships, but it was not decided, for the reason that no opposition was made to the claim of nonresident creditors thus situated. Objection was not made in these cases, for the reason that the New York assets were abundantly sufficient to pay all claims filed here, including those of nonresidents holding New York contracts, and leave a considerable surplus for transmission to the state of which the corporation was a citizen, and where its affairs were being wound up. This particular question is prematurely raised at this stage of the case. Creditors who believe that they are entitled to share in the distribution may file their claims with the receivers, and, whether the same be allowed or disallowed, they will have the same opportunity as all the other creditors to overhaul the receivers' account, to present their own claims before the master, and to object to the allowance of any other claims, as they may be advised.

GRAPE CREEK COAL CO. v. FARMERS' LOAN & TRUST CO. et al.
(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 365.

RES JUDICATA—FORECLOSURE—REVERSAL AFTER SALE.

A foreclosure sale was had pending an appeal without supersedeas from the foreclosure decree. The decree was thereafter reversed, whereupon the court below in part reversed its decree, but confirmed the sale, and required the purchasers to pay an additional sum in cash upon their bid, which was done. The mortgagor did not appeal from the latter decree, nor assign any errors questioning the confirmation of the sale upon an appeal taken by another party, to which it also was a party. *Held*, that the validity of the sale was res judicata, so that the mortgagor could not maintain a subsequent suit to set it aside.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

The bill in this case was filed by the Grape Creek Coal Company for the purpose of setting aside the sale made under the decree of foreclosure which was reversed by this court in *Grape Creek Coal Co. v. Farmers' Loan & Trust Co.*, 24 U. S. App. 38, 12 C. C. A. 350, and 63 Fed. 891. In that case, this appellant, being the mortgagor, was the principal respondent. The appellees here, who were respondents below, besides the Farmers' Loan & Trust Company, the trustee in the mortgage, are Joseph J. Asche, P. J. Cronan, and A. D. Irving, who, being themselves holders of bonds secured by the mortgage, and acting as a committee for other holders of the bonds, became the purchasers of the property at the decretal sale. The sale was made and reported to the court before the appeal was taken, which was done without the execution of a supersedeas bond. Pending the appeal, on November 2, 1893, the circuit court entered a decree approving the sale, and granting a deficiency judgment, and, on December 18th ensuing, required the purchasers to pay to the master \$15,000, in addition to the sum of \$10,000, paid at the time of the sale. By a supplemental return, the fact of the sale was brought into the record, but this court, as its opinion shows, refused to consider what should be the effect of reversing the decree of foreclosure on the rights or title of the purchasers at the sale. The mandate having gone down, the parties filed a stipulation to the effect that Asche, Cronan, and Irving were, at the time the decree was entered and when the sale was made, holders in their own right of bonds secured by the foreclosed mortgage, and made the purchase for themselves and for a large number of holders of the bonds, whom, as a committee, they represented; that they paid upon the purchase, in cash, \$25,000 (\$10,000 at the time of sale, and \$15,000 under a later order of the court), of which sum \$13,650 had been paid to the bondholders, and the remainder disbursed by order of the court; and that the sale under the decree "was fairly conducted, and the purchase made by said purchasers was made in good faith, except as it may be influenced by the facts recited in this stipulation." Thereupon, on September 12, 1894, the court entered an order or decree reversing its prior decrees and judgments in the particulars inconsistent with the opinion of this court, and in all other respects approved, ratified, and confirmed them. That decree, brought here upon the appeal of the Farmers' Loan & Trust Company, this court, on January 26, 1895, affirmed. 13 C. C. A. 87, 65 Fed. 717. To the bill in this case, which was filed on December 20, 1894, a plea was interposed, reciting the facts stated above, and setting up the decree of September 12, 1894, as a prior and final adjudication that the sale was valid and should stand. That plea the court sustained, and, the appellant declining to amend, ordered the bill dismissed. Error is assigned upon the sustaining of the plea, and upon the dismissal of the bill.

C. H. Remy and J. B. Mann, for appellant.

Herbert B. Turner and William Burry, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The contention of the appellant is that the purchasers at the foreclosure sale, having purchased for themselves and other holders of bonds secured by the trust deed upon which the decree of foreclosure was predicated, were not innocent purchasers, but were in privity with the Farmers' Loan & Trust Company, the trustee in the deed, upon whose complaint the decree was rendered; and, consequently, that the reversal of the decree ipso facto annulled the sale and the order of court by which it had been confirmed. *Robinson v. Manufacturing Co.*, 67 Fed. 189; *Kingsbury v. Stoltz*, 23 Ill. App. 413; *Freem. Judgm.* § 482; *Railroad Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. 10; *Ballard v. Searls*, 130 U. S. 50, 9 Sup. Ct. 418. Whether that was the effect of the reversal of the decree was a question which, by a motion for restitution, or in any appropriate mode, the appellant had the right to submit, and, upon an agreed statement of the pertinent facts outside of the record, did join in submitting, to the circuit court for decision. That court, reversing the original decree only in part, reaffirmed the sale, and directed the master to execute a deed to the purchasers. If that action was not a full compliance with the mandate of this court, or was for any reason erroneous, the remedy was either by another appeal or by an application to this court to enforce compliance with its mandate. The appellant sought relief in neither form, and in the appeal prosecuted by the Farmers' Loan & Trust Company, to which it was a party, assigned no cross error. It is estopped by the record. The matter is *res judicata*.

It is no objection to the force of the estoppel that the purchasers at the sale were not formal parties to the record when the decree of September 12th, reconfirming the sale, was entered. It is essential to the theory of the bill that the purchasers, being in privity with and represented in the suit by the complainant, the trustee in the deed by which their bonds were secured, acquired no better title than if they had been parties by name. Under the conditions and reservations of the decree, by virtue of which the sale was made, they had been required to pay an additional cash sum upon their bid, and had complied with the order; and even if, prior to the sale, they were strangers to the suit, it would seem clear that, by purchasing at the sale, they came under the power of the court, for the purposes of all orders touching their rights in the property until the sale should be consummated by a deed executed by the order or with the approval of the court. *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950; *Stuart v. Gay*, 127 U. S. 518, 8 Sup. Ct. 1279.

The decree below is affirmed.

KNIGHTS TEMPLARS' & MASONS' LIFE INDEMNITY CO. v. JACOBUS.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 355.

INSURANCE—REINSTATEMENT OF POLICY HOLDER.

By a resolution of the board of directors of a beneficial association, properly passed, provision was made for the reinstatement of policy holders in default for more than 30 days by furnishing a certificate of good health and a medical examination which should prove satisfactory to the company. J., being in default for that length of time, forwarded to the company such a certificate and examination with the required assessment, but the medical director refused to pass on the examination, because of its "not being accompanied by an application," J. being informed that his new examination came too late to reinstate his policy, as same had been canceled, and that a new policy would have to be issued, for which a blank application was inclosed. J. acquiesced, and made the new application, by which he agreed that no liability was assumed by the company until the policy should be actually issued. J. died before the application was acted on. *Held* that, as the certificate and examination for reinstatement were unobjectionable, the lapsed policy was revived thereby as effectually as if a certificate of reinstatement had been issued, and J., by making the new application, was not precluded from asserting that there had been a reinstatement.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This suit was brought by Pauline Jacobus, the widow of Oscar I. Jacobus, a citizen of Wisconsin, against the Knights Templars' & Masons' Life Indemnity Company, a corporation of Illinois, to compel the latter to issue and pay a policy or certificate of insurance upon the life of her husband. The averments of the bill and answer need not be stated, because the hearing was upon an agreed statement of facts and a stipulation that the pleadings, if found at variance, should be considered as amended so as to correspond to the agreed statement.

The essential facts were these: The Knights Templars' & Masons' Life Indemnity Company was organized under the act of the general assembly of the state of Illinois, approved June 18, 1883 (1 Starr & C. Ann. St. p. 1348, § 123), whereby it is required that the incorporators sign and acknowledge a certificate of association, in which shall be stated "the object of incorporation, with its plan of doing business clearly and fully defined," which certificate shall be submitted to the auditor of public accounts, who, if he finds it "sufficient and satisfactory," must indorse his approval, and file the certificate and approval in the office of the secretary of state. In the year 1889, Oscar I. Jacobus, who had permitted a prior membership to lapse, became again a member under certificate of membership or life insurance policy No. 7,448, by which, on conditions and warranties stated, the company promised to pay \$5,000 to the widow, children, or heirs of the member, unless he should have directed otherwise. On the back of the policy was printed the "constitution" of the company, of which the sixth article, concerning assessments, is as follows:

"Section 1. Upon notice and satisfactory proof of the death of a member (should it be necessary to make an assessment), the company, or such person as the board may direct, shall send by mail, to the last recorded post-office address of every member, a notice containing the name and residence of the deceased member, and the amount due from the member to whom said assessment is sent. The party sending such notice may employ a suitable person, persons, or corporation, in any town or city, who may act in serving such notices either personally or by mail. A notice so sent or served shall be deemed and taken to be a lawful and sufficient notice for the payment of the assessment required.

"Sec. 2. Should any one fail to forward, as indicated in the notice, the amount thus due, for a period of ten days after the date of said notice, he shall forfeit

his membership and all benefits arising therefrom. Any one having thus forfeited his membership may be reinstated, he being alive, within thirty days after the date of said notice, by the payment of all arrearages, and may be reinstated to membership subsequent to the thirty days, upon such terms as the board of directors may fix.

"Sec. 3. Any member may make a deposit in advance, for the payment of his assessments, which money shall be used for no other purpose by the company; and, in case of the member's death before it is so needed, the unused balance shall be paid back with the policy."

On October 13, 1891, the board of directors of the company, acting within its power, passed the following resolutions: "Resolved, that no policy holder of this company, who is over the age of 56 years (excepting the holder of a limited term policy), who is delinquent more than thirty days in the payment of any assessment or annual due, shall be reinstated to membership; and, further, that no policy holder who is under the age of 56 years, at the time of his being thirty days delinquent, shall be reinstated without first having furnished a certificate of good health signed by himself, and also a medical examination which shall prove satisfactory to this company, the acceptance of which new medical examination shall be governed by the same rules as apply to an original application for membership, and also by the payment of all arrearages: provided, that any holder of a limited term policy may be reinstated upon the same terms as herein stipulated for life policy holders under the age of 56 years."

On March 3, 1893, notice of an assessment was mailed to and received in due course by Oscar I. Jacobus; but he neglected to respond, and, the assessment remaining unpaid, on March 14, 1893, the following letter (unessential parts omitted) was sent him:

"Chicago, Ill., March 14, 1893.

"O. I. Jacobus, Edgerton, Wis.—Dear Sir and Bro.: A notice of assessment No. 82, amounting to six dollars, was mailed to your address March 3, 1893, with the ten days' grace provided in the policy. This assessment still remains unpaid. Article 6, section 2, of the constitution, printed on the back of your policy, reads as follows: [See supra.] Under this article, it can be paid, if you are living, any time prior to 30 days from the date of the original notice. Until such payment is made, you are carrying your own risk in case of death. Your receipt is now at this office, and will be mailed to you, and your policy reinstated upon receipt of the amount due, as hereinabove stated. We desire you to remain with us, and assure you our best efforts will be put forth to secure the greatest benefit to our policy holders at the least expense. Please let us hear from you on receipt of this, as to your wishes in the matter.

"Respectfully,

W. H. Gray, General Manager."

No response to that letter having been received, and the assessment not having been paid, on April 3, 1893, the certificate of membership, policy No. 7,248, was formally canceled on the books of the company, and on the same day the following letter was sent to Jacobus:

"Chicago, April 3, 1893.

"O. I. Jacobus, Edgerton, Wis.—Dear Sir and Bro.: Your policy has been canceled for nonpayment. By a resolution of the board of directors, governing reinstatements of persons under fifty-six years of age, you will now be required to furnish a new medical examination satisfactory to the company, and sign the certificate of good health as per the inclosed forms. If it is your pleasure to reinstate your policy, give this your prompt attention. In addition, if the policy is reinstated, you will be required to pay \$18.00, the amount delinquent at this date. * * * With best wishes, and trusting to hear from you at an early date, I am,

"Yours, respectfully,

W. H. Gray, General Manager."

To that letter Jacobus made no response until April 27, 1893, when he mailed a letter, which was received the next day by the general manager of the company, inclosing a "P. O. order for \$18.00 and medical examination," for which he asked a receipt. The medical examiner's report, it is agreed, "was carefully, skillfully, and honestly made, and was true." It was made by Dr. James A. Lord, at the request of Oscar I. Jacobus, upon a printed blank sent to

Jacobus by the defendant, inclosed in the letter of April 3, 1893, the regular custom of the company in admitting persons to membership or reinstating lapsed members under new medical examination being to allow the applicant to be examined by his local physician, and to refer the application and the examination so made to the company's medical director, whose duty it was to examine such application and medical examination, and pass upon the same, before a new certificate of membership could issue, or a lapsed certificate of membership be reinstated. Whether Jacobus knew this custom, there is no evidence, except the inferences, if any, to be drawn from his several memberships in and communications and correspondence with the company as in the statement of facts set forth. In this instance the examination was forwarded from the home office of the company in Chicago to its only medical director, Dr. J. L. White, at his office in Bloomington, "in accordance with such custom, very soon after it was received by the defendant"; but, by reason of its "not being accompanied by an application," it was not examined or passed upon by White, and the company had not issued any new policy or certificate of membership to Jacobus before his death.

No further communication passed between the parties until May 3, 1893, when the company, acting by its general manager, mailed to Jacobus the following letter:

"Chicago, May 3, 1893.

"O. I. Jacobus, Esq., Edgerton, Wis.—Dear Sir: Your new examination received at this office, but too late to accept same and reinstate your policy, as same has been canceled off the company's books. However, we will issue you a new policy, which is the best we can now do for you, for the sum of what one assessment would amount to, or \$6.00. I inclose herewith a blank application for that purpose, which you may fill out carefully on the members' side, sign same, and forward it to this office. Your examination of recent date will answer if attended to immediately. In the meantime we hold your remittance of \$18.00 at this office, subject to your order or the above. With best wishes, I am,

"Yours, respectfully,

W. H. Gray, Genl. Mgr."

This letter, with the inclosed printed blank application, Jacobus received the next day, and, "having duly filled up and signed" the application, inclosed it in the following letter, which on May 5, 1893, he mailed to the company:

"Edgerton, Wis., May 5th, 1893.

"W. H. Gray, Genl. Manager, 1303 Masonic Temple, Chicago—Dear Sir: Inclosed please find application filled out as per your letter of the 3rd inst.; if anything left from remittance, place it to my credit.

"Yours, Resp.,

O. I. Jacobus."

The letter and application were received by the company the next day. In the printed part of the application, preceding the signature of the applicant, is the following expression: "I further understand and agree that no liability whatever is assumed by the company under any circumstances, until after the policy or membership hereby applied for has actually been issued at the home office by the officers of the company." The answers of Jacobus to questions in the application and the certificate of health at the end thereof were truthful and correct so far as he knew. For several months prior thereto he was in apparent good health, without premonitions of disease, and continued so until the evening of May 6, 1893, when he became ill, and on the 10th died, after an unsuccessful attempt by surgery to relieve him of a stricture of the intestines. He was at his death under 56 years of age.

Clark Varnum, for appellant.

John S. Cooper (S. M. Millard and C. P. Abbey, of counsel), for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

If it were true, as contended, that the policy upon the life of Jacobus had lapsed for every purpose, and that, when he died, he was simply an applicant for insurance, under a new policy, as if he had never before been a member of the association; it would seem to follow necessarily that the decree of the circuit court was wrong, though it is urged, on the other hand, that, under the circumstances, the last application should be deemed to have been made in order to obtain reinstatement under the lapsed policy, and not to procure the execution of a new one, and that on that theory the provision in the printed part against liability before actual issue of the policy would be inapplicable and without significance. That question it is not necessary to decide. It is not true, as asserted, that, under the lapsed policy, "there were no contractual relations between the company and Jacobus." At the end of 10 days from March 3d, when notice of the assessment was mailed, the policy ceased to be effective as a contract of insurance; but for 20 days longer there was an absolute right to procure reinstatement "by the payment of all arrearages," and even after that time, under the resolution of the board of directors, the same privilege was allowed to one who had "furnished a certificate of good health signed by himself, and also a medical examination" satisfactory to the company. Jacobus complied fully with all these requirements. He sent the requisite sum of money and a certificate of good health and a medical examination, to neither of which was there made at the time, nor has there been suggested since, any objection. By the letter of April 3d he was told that his policy had been canceled, and that he would "now be required to furnish a new medical examination satisfactory to the company, and sign the certificate of good health as per inclosed forms." He was not told, and could not properly have been told, that any new application was necessary, and the failure of the company's medical director to pass on the examination because of its "not being accompanied by an application," and the statement in the letter of May 3d that the examination had been received too late to be accepted as a basis of reinstatement, because the policy had been canceled, were without justification, and therefore without effect to hinder the reinstatement of the policy. The money to pay arrearages was already in the possession of the company, and it does not appear that there was unreasonable delay in forwarding the required certificate of health and medical examination. The certificate and the examination in form and substance were unobjectionable, and if the medical director of the company had examined the latter, as it was his duty to do, he must have approved it. He could not have rejected it upon capricious grounds. *Miesell v. Insurance Co.*, 76 N. Y. 115. It follows that, upon the receipt by the company of the certificate and the examination, the right of reinstatement was complete, and that, in the contemplation of equity, the lapsed policy was revived, as effectually as if a certificate of reinstatement had been issued or an entry of like purport made upon the books of the company.

It is said that Jacobus acquiesced in and agreed to the statement that his former policy had been canceled, and that his only

method of again becoming insured was by means of a new application and a new policy. If the new policy had been issued and accepted, there would doubtless have been a waiver of all rights under the old one, but, the negotiations for new insurance having failed, there is in the situation no element of estoppel which could have barred the assertion by Jacobus, or can now bar the assertion by his widow, that the lapsed policy had been revived. In no respect is the company in a worse position on account of the new application.

The objection is made that the decree proceeds on the theory of a new application for a new policy, and not of a renewal or reinstatement of the lapsed one; but that is not clearly so, and the objection does not go to the merits. In substance, the decree is right, and therefore is affirmed.

MORSE v. SOUTH et al.

(Circuit Court, D. Kentucky. April 15, 1897.)

1. EQUITY PLEADING—MULTIFARIOUSNESS—WAIVER OF OBJECTIONS.

When the objection of multifariousness is not taken to a bill which from its nature is open to that objection, and the cause is submitted upon one of its aspects alone, the other being apparently abandoned, it may be heard and decided as submitted.

2. FEDERAL JURISDICTION—CITIZENSHIP—QUIETING TITLE.

Where one tenant in common brings a suit against his co-tenant and others for partition of the land held in common, and to quiet the title as against claims of the defendants other than his co-tenant, but does not press it as a bill for partition, it may be sustained as a bill to quiet the title of the complainant's undivided interest, notwithstanding there is a want of diverse citizenship between him and the defendant, his co-tenant.

3. QUIETING TITLE—GENERAL EQUITY RULE—KENTUCKY STATUTE.

The Kentucky statute (section 2361, Ky. St.) giving a right of action to restrain trespasses on land of which the plaintiff is not in possession, has not changed the general equity rule that a suit to quiet title cannot be maintained except by one who has both the legal title and possession.

4. TAXATION—LISTING AND ASSESSMENT.

Complainant, claiming lands in Kentucky under a sale for taxes, showed by the records that the lands were assessed to one F. from 1792 to 1810; that they were sold in 1811 by the register of the land office for the taxes of 1810, and, not having been redeemed, were conveyed in 1815 to complainant's predecessor in title. It was shown, however, by the defendant, that prior to March 1, 1796, F. had conveyed to others all his interest in the lands by deeds duly executed, which were duly recorded in the clerk's office of the court of appeals on April 11, 1796. *Held*, that there was no legal assessment of the lands to F. for 1810, since he had then ceased to have any interest therein; that the fact that, prior to the requirement of the listing of nonresidents' lands with the state auditor by the act in force March 1, 1796, the lands had been properly assessed to F. by the county tax commissioners, did not justify a continued assessment thereof to him after the recording of his deeds; and, accordingly, that no title passed under the sale and conveyance for the taxes of 1810.

5. SAME—SALE OF LANDS STRUCK OFF TO STATE.

One who claims land under a sale made by an agent of the auditor of Kentucky, pursuant to the act of 1840, as amended March 10, 1843, authorizing the selling of lands stricken off to the commonwealth for taxes, must show not only proper public notice of the sale, but that the agent, before

making it, made diligent search and inquiry for the former owner, his heirs, or persons in adverse possession, and, upon such search and inquiry, failed to find them.

Wm. H. Holt and W. J. Hendrick, for complainant.

Thos. H. Hines, Jas. B. Marcum, and Wm. B. Dixon, for defendants.

BARR, District Judge. This suit in equity is brought against the heirs of J. W. South, and also against William Strong, H. C. Duff, and the heirs of Alfred Marcum. The purpose of the suit, according to the allegations of the bill, is to have a partition between the complainant and the heirs of J. W. South of certain lands alleged to be the unsold portion of the land patented to Thomas Franklin by the state of Virginia, on January 26, 1787, and which are alleged to be jointly owned by the complainant and said heirs. The bill, as against the defendants Strong, Duff, and the heirs of Alfred Marcum, is for the purpose of quieting complainant's title to certain lands therein described, which are alleged to be a part of the unsold land patented to Thomas Franklin in 1787. The bill likewise seeks an injunction to prevent the defendants Strong, Duff, and the heirs of Alfred Marcum from disturbing complainant's possession or cutting timber on the lands described in the bill, and to recover damages for certain alleged cuttings of saw logs. There is no description of unsold lands in the Franklin patent, except those which are described and alleged to be claimed by the defendants Strong, Duff, and the heirs of Alfred Marcum. The bill is perhaps multifarious, in that it is a bill *quia timet*, and also for a partition of the unsold lands in the Franklin patent, as between the complainant and the defendants J. W. South's heirs; but the objection of multifariousness has not been taken, and the case as prepared and now submitted is upon its aspect as a suit *quia timet*. J. W. South's heirs have not answered the bill, nor have they been subpoenaed, and it may be assumed that, as the case has been submitted generally, that part of the bill which seeks a partition has been abandoned. The heirs of J. W. South are alleged to be tenants in common with the complainant, each being a half owner in the lands in controversy. In the present controversy the heirs of South and the complainant have a common interest, as they are alleged to be joint owners with the complainant of the land the title of which is sought to be quieted, and said heirs have the same citizenship as that of Strong, Duff, and the other defendants. But, as complainant could bring an action of ejectment for his undivided interest in the lands in controversy, he can, we think, maintain a bill to quiet the title for his undivided interest in this land, notwithstanding the want of diverse citizenship between South's heirs and the other defendants.

The bill alleges that complainant and the heirs of J. W. South are tenants in common, and have a fee-simple title in the land in controversy, and the actual possession thereof. Complainant claims, and seeks to sustain by testimony, a derivative title, as follows: (1) A patent issued by the commonwealth of Virginia, January 26, 1787, which granted to Thomas Franklin 116,656 acres of land lying between the North and Middle Forks of the Kentucky river, in what

was then the county of Fayette. This land is described in said patent as commencing at the junction of said rivers, and running with the meanders thereof many miles, and thence, by a line which is described therein, from one river to the other. (2) That Thomas Franklin's interest in said patented lands was sold by M. Hardin, as the register of the state of Kentucky, to John Wilson, in the year 1811, for taxes due by said Franklin on said land for the year 1810; that said land thus sold was not redeemed, and was conveyed by John M. Foster, then register of the land office of the state of Kentucky, to said Wilson, the purchaser thereof, by deed dated December 6, 1815. (3) That the interest of John Wilson in the lands in the Franklin patent which remained unsold in the county of Breathitt was sold for taxes for the years 1836-45, on September 21, 1846, by John Hargis, agent of the then auditor of Kentucky, for taxes due and unpaid by said Wilson, and that at said sale J. W. South and Daniel Breck, Jr., became the purchasers thereof; and subsequently the land thus purchased was conveyed to said South and Breck, by the auditor of the state, in equal shares, and that said deed was recorded in said Breathitt county clerk's office, and subsequently destroyed by fire. (4) That the interest of Daniel Breck in said land was sold and conveyed to N. C. Morse, Sr., who is the father of the complainant, by deed dated September 13, 1865. (5) That the interest of N. C. Morse, Sr., in said land, was sold in a chancery proceeding brought in the Kenton circuit court, state of Kentucky, and purchased by one Charles Evans, and, the sale being thereafter confirmed, was conveyed to him by a special commissioner of said court; that said Evans subsequently sold his interest in said land, which was five-twelfths, to the complainant, which deed was subsequently lost, and the complainant, not being a party to the proceeding in the Kenton circuit court, inherited one-twelfth part of his father's (N. C. Morse's) interest in said land, and thus is a half owner of the interest in said land in controversy. (6) The deed of the auditor to South and Breck having been destroyed by fire, a suit was instituted in the Breathitt circuit court to have a conveyance substituted by the auditor for the one destroyed; and in that proceeding the court ordered a special commissioner (Little) to make the substituted deed of conveyance. This deed is dated 25th October, 1882, and is made to the heirs of J. W. South, he having previously died, and to the complainant and Charles Evans. The bill alleges that the complainant and the defendants, the South heirs, have had possession of the land in controversy, by themselves and those under whom they claim, for a number of years before the filing of the suit, and had, at the time of filing of the suit, the actual possession, and that said defendants Strong, Marcum's heirs, and Duff claim to be the owners of the land which is described in the bill; that they have been trespassing upon said lands, by cutting logs therefrom; and that they are without any legal or equitable right whatever; and the value of the logs thus taken is alleged.

The defendants William Strong and the Marcum heirs and Duff have answered, and have put in issue all of the material allegations of the bill, except that the commonwealth of Virginia patented to

Thomas Franklin the 116,656 acres, as described in the bill. They deny that any title passed either to John Wilson by the conveyance made by J. M. Foster, as register, on December 6, 1815, or that any title passed by the sale of the land for taxes alleged to be due by John Wilson, and the conveyance thereof made by the auditor's agent in 1846; and they deny that the deed of October 25, 1882, made by Special Commissioner Little, conveyed any title to complainant or to Evans, or to the defendants the South heirs, or that said sale was legally made. They deny that taxes were ever regularly or legally assessed against either Thomas Franklin or John Wilson; and they deny that the complainant has any fee-simple or any title in said lands in controversy or any part thereof; and they deny that said complainant and said South heirs have had actual possession of the land, or any part thereof, at the time of the institution of the suit, or at any other time. Defendants allege that they are the owners of the land in controversy, claiming the same by continuous, notorious, and adverse possession, by well-marked boundaries, for a time more than sufficient to give them title. The defendants William Strong and the heirs of Alfred Marcum claim ownership by adverse possession by a marked boundary, by William Strong, commencing in 1845, and again by William Strong and Alfred Marcum's heirs, commencing in 1872. They claim adverse and notorious possession, commencing in 1872, with boundaries which are described in two surveys made on the 10th of December, 1872, one for 190 acres, and the other for 250 acres, and for which patents from the commonwealth of Kentucky were immediately applied and issued after a contest with J. W. South by caveat proceedings,—the 190-acre tract by patent dated March 26, 1891, issued to the heirs of Alfred Marcum, and the other dated October 1, 1891, issued to the heirs of Alfred Marcum and William Strong; and it is claimed that the patent for the 190 acres was applied for in the name of William Strong as well as the Marcum heirs, but that Strong's name was omitted from said patent by oversight. These boundaries are substantially the boundaries which are set out in the bill of complaint. The defendant Duff sets up a similar claim, and files patents issued from the commonwealth of Kentucky.

It will be seen that the issues thus made go to the title and the possession of the complainant, and also the claim of ownership by the defendants, based upon adverse possession. The complainant cannot maintain his action to remove a cloud upon his title and quiet possession on general principles of equity, without clear proof of both possession and the legal title in himself.

It is said in *Frost v. Spitley*, 121 U. S. 556, 7 Sup. Ct. 1131:

"Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet possession of real estate, is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff. *Alexander v. Pendleton*, 8 Cranch, 462; *Peirsoll v. Elliott*, 6 Pet. 95; *Orton v. Smith*, 18 How. 263; *Crews v. Burcham*, 1 Black, 352; *Ward v. Chamberlain*, 2 Black, 430. As observed by Justice Grier, in *Orton v. Smith*: 'Those only

who have a clear legal and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on title.' 18 How. 265. A person out of possession cannot maintain such a bill, whether his title is legal or equitable; for, if his title is legal, his remedy at law, by action of ejectment, is plain, adequate, and complete, and, if his title is equitable, he must acquire the legal title, and then bring ejectment. *U. S. v. Wilson*, 118 U. S. 86, 6 Sup. Ct. 991; *Fussell v. Gregg*, 113 U. S. 550, 5 Sup. Ct. 631."

This is also the rule in Kentucky. In *Packard v. Valley Co.*, 28 S. W. 779, the court say:

"The general rule and one well settled in this state is that in order to maintain an action quia timet the plaintiff must have both title and actual possession."

See *Armitage v. Wickliffe*, 12 B. Mon. 494; *Campbell v. Disney*, 93 Ky. 41, 18 S. W. 1027.

It is true this general equity practice will be modified in some respects so as to conform to a state statute when that statute enlarges the equitable rights, and allows the holder of a perfect legal title to be quieted in his title, although he may not have at the time actual possession of the land to which he has a perfect legal title. Thus, in *Holland v. Challen*, 110 U. S. 16, 3 Sup. Ct. 495, the supreme court sustain a bill quia timet where the complainant had a perfect legal title, but did not have the actual possession. This was a suit in the state of Nebraska, where there was a statute authorizing such a proceeding without actual possession. See, also, *Clark v. Smith*, 13 Pet. 195.

The state of Kentucky has legislated upon this subject, but has not, we think, changed the equity rule as herein indicated. The Kentucky legislature enacted March 9, 1854, thus:

"That hereafter it shall and may be lawful for any person having both the legal title and possession of lands to institute and prosecute by petition in equity in the circuit court of the county where the lands or some part thereof may lie against any other person setting up a claim thereto, and if the plaintiff shall be able to establish and does establish his title to said lands, the defendant shall be by the court ordered and decreed to release his claim thereto, and to pay the plaintiff his costs."

And on the 10th of March, 1854, the following:

"That the owner of any land in this state may maintain the appropriate action to recover damages for any trespass or injury committed thereon, notwithstanding such owner may not have the actual possession of the land at the time of the commission of the trespass." Approved March 10, 1854 (Sess. Acts 1853-54, pp. 149, 167).

The first of these acts was not repealed by the General Statutes of Kentucky, and is still, as we understand, the law of the state. *Kincaid v. McGowan*, 88 Ky. 91, 4 S. W. 802. But the act of March 10, 1854, was repealed by the General Statutes, which covered the same subject-matter. See *Hillman v. Hurley*, 82 Ky. 629. After the decision of the court of appeals in *Hillman v. Hurley*, the legislature re-enacted the act of March 10, 1854, in substance as follows:

"The owner of land may maintain the appropriate action to recover damages for any trespass or injury committed thereon, or to prevent or restrain any trespasses or other injuries thereto or thereon, notwithstanding such owner may not have the actual possession of the land at the time of the commission of the trespass." Act 1888 (Ky. St. § 2361).

The right of action given by the act of 1888 to "prevent or restrain any trespasses or other injuries thereto or thereon" should, we think, be construed to give an equitable remedy by injunction to prevent or restrain such trespasses or injuries, but only in aid of common-law actions, and not as an independent equitable jurisdiction, under which the question of title to real estate or the right of possession should be tried.

The next inquiry, then, is as to complainant's title. The complainant, to sustain his title under the tax sale to John Wilson, has read an authenticated copy of the certificate signed by Mark Hardin, register of the land office of Kentucky, dated November 5, 1811, and also a certificate of the auditor of the state of Kentucky, George Madison, dated December 5, 1815. These certificates show that Hardin, as register, sold the tract of land described as Thomas Franklin's 116,656 acres, third rate, lying in the county of Clark, and on the Kentucky river, being entered, surveyed, and patented to Thomas Franklin for taxes due thereon for the year 1810 and costs, and that John Wilson became the purchaser thereof at the sum of \$146.07, which was the amount of the taxes for that year and the costs. The certificate of Madison shows that the tract thus sold had not been redeemed. The complainant also read a conveyance from John M. Foster, then register of the land office of the state of Kentucky, dated December 6, 1815, conveying to the said John Wilson the whole of the tract which had been patented by Thomas Franklin. In this deed of conveyance the certificates of Hardin, as register, and Madison, as auditor, are copied, and made a part thereof. He also files as exhibit what purports to be a copy from the books of the auditor's office for the assessment of this land for the years 1792 to 1810, both inclusive. This copy is filed in the deposition of L. C. Norman, who was then auditor of the state of Kentucky, and the only evidence in regard to this assessment is the transcript, and what Norman says. He is asked: "If the records of your office show any assessments of the lands, or any of them covered by it [the patent], please state all you know on that subject." Answer: "I have a copy of the patent named before me. The records show an assessment to Thomas Franklin from 1792 to 1888, to Thomas Franklin first, and afterwards to others, who held the lands or part of them. I file attested copy of the record, showing all about it, marked 'L. C. N.' I have no personal knowledge of the facts. I speak only of what the records show." This record, thus filed, purports to be an assessment of this Thomas Franklin patent, or parts thereof, from 1792 to 1888. The assessment is first to Thomas Franklin from 1792 to 1810, both inclusive, and from 1811 to 1838, both inclusive, to John Wilson. These exhibits are all of the evidence offered to sustain the complainant's title under the sale for taxes for the year 1810.

In the case of *Allen v. Robinson*, 3 Bibb, 328, the Kentucky court of appeals have said, in regard to such sales and conveyances:

"The sale and conveyance of the register, when legally made, passes to the purchaser the legal title; and, in a contest involving the validity of such a sale, the register's deed (as he is an officer of the government, presumed by law to

do his duty) shall be taken as *prima facie* evidence that the requisitions of the law have been fulfilled; but as the register derives his authority to sell lands for the nonpayment of taxes from the law, to make his deed effectual to pass the title, that authority must be strictly pursued, and, although the deed will *prima facie* prove the correct exercise of the authority, it can be repelled by proof that the law was not regularly pursued in making the sale."

See, also, *Hickman v. Skinner*, 3 T. B. Mon. 211.

The defendants deny that this property, thus sold, belonged to Thomas Franklin, or that it was legally assessed in 1810, and insist that the alleged sale is void, and passes no title. To sustain this contention, they have read copies of a deed from Thomas Franklin to Abraham Fowler, dated August 12, 1793, and a deed from said Franklin to Benjamin Walker, dated December 13, 1795, and certain conveyances to the parties to whom the land was subsequently conveyed. The deed from Thomas Franklin to Abraham Fowler conveys all of Franklin's interest in the tract of land patented to him by the commonwealth of Virginia, on the 26th of January, 1787, and in the same deed another tract of land containing 108,344 acres, but excepting and reserving out of said tracts of land 30,000 acres which is undivided. The deed itself does not indicate what proportion of the 30,000 acres should come out of the 116,656 acres, and what should be taken out of the 108,344 acre tract; but this is not material, as, subsequently, whatever reservations were made were conveyed to another party. Franklin, in the conveyance to Benjamin Walker, conveyed the 30,000 acres, which was reserved in the deed to Abraham Fowler. He describes it in said conveyance as the undivided rights and shares of Samuel Osgood, Maria Osgood, and Daniel Bowen in the lands granted to him, the said Thomas Franklin, by the state of Virginia, in trust for them and others. The deed to Abraham Fowler was acknowledged before the mayor of the city of New York, August 2, 1794, and again acknowledged before Edward Shipping, a justice of the supreme court of Pennsylvania, March 14, 1796. And the deed to Benjamin Walker was acknowledged by Franklin before Edward Shipping, a justice of the supreme court of Pennsylvania, January 11, 1796. Both of these deeds were put to record in the clerk's office of the court of appeals of Kentucky on April 11, 1796. The defendants also read authenticated copies of conveyances from Abraham Fowler and wife to Theodosius Fowler, dated February 6, 1795, conveying an undivided 54,150 acres of land in the Thomas Franklin patent of 116,656 acres. This deed was properly acknowledged in the city of New York by the grantor, and put to record in the clerk's office of the Kentucky court of appeals on April 11, 1796. And a conveyance by Benjamin Walker and wife to Richard Harrison and Joshua Ogden Hoffman, dated March 7, 1796, conveying the 30,000 acres of land conveyed to said Walker by Thomas Franklin. This land thus conveyed is described as being the undivided rights and shares late of Samuel Osgood, Maria Osgood, and Daniel Bowne (Bowen), in the land granted to Thomas Franklin, of Philadelphia, in trust for them and others, and by him conveyed to said Benjamin Walker, by indenture dated 13th of December, 1795. This deed was legally acknowledged in the city of New York, March 9, 1796, and recorded

in the clerk's office of the court of appeals April 11, 1796. And also a copy of another conveyance by Benjamin Fowler and wife to Richard Harrison and Joshua Ogden Hoffman, March 1, 1795, conveying an undivided interest in the Franklin patent of 116,656 acres. This deed was acknowledged in the city of New York March 21, 1795, and put to record in the clerk's office of the court of appeals of Kentucky, April 11, 1796. And another conveyance by Theodosius Fowler to Richard Harrison and Joshua Ogden Hoffman, dated January 8, 1796, conveying an interest in the said Thomas Franklin patent. This deed was acknowledged in New York City, March 8, 1796, and recorded in the clerk's office of the court of appeals of Kentucky, April 11, 1796. And another conveyance from Richard Harrison and Joshua Ogden Hoffman to Effenham Embree, dated October 11, 1813, in which they conveyed to said Embree the undivided 30,000 acres conveyed to them by Benjamin Walker on March 7, 1796, in the Franklin patent. This deed was properly acknowledged in the city of New York, October 11, 1813, and recorded in the clerk's office of the general court of Kentucky, July 8, 1814.

It will be seen from these deeds that all of the right, title, and interest of Thomas Franklin had been conveyed to other parties, and these deeds duly and legally acknowledged,—one on August 2, 1794, and again the same deed reacknowledged March 14, 1796; and the other deed duly and legally acknowledged January 10, 1796, and both of them recorded in the clerk's office of the court of appeals of Kentucky on the 11th of April, 1796, which recording gave constructive notice of the conveyances. It follows that there was no legal assessment of the land patented to Thomas Franklin as his after the conveyance thereof was made by him to others, and the said conveyances legally recorded in the state of Kentucky. A legal assessment is indispensable to a proper levying of tax. It is said by Mr. Cooley: "The necessity of an assessment is undoubted; it is the first step, and is the foundation of all that follows." See *Cooley, Tax'n*, 259. In *Parker v. Overman*, 18 How. 142, the supreme court says: "A legal assessment is the foundation of the authority to sell; and, if this objection be sustained, it is fatal to the [tax] deed." In that case there was a fatal objection to the authority of the officer making the assessment. See, also, *Pillow v. Roberts*, 13 How. 475.

It is insisted, however, on the part of the complainant, that the assessment once properly made of this patented land against Thomas Franklin continued, notwithstanding he conveyed his entire right, title, and interest therein. This contention necessitates a brief review of the then tax law of Kentucky. Under the first act of the state of Kentucky, after it became a state, all lands were listed and classified by tax commissioners, who were appointed in each county for that purpose, and the tax itself was collected by the sheriff, and there was no distinction as to assessments between lands owned by residents and nonresidents. Act approved June 26, 1792 (1 Litt. Laws, 63). By an act of Kentucky approved December 19, 1795 (1 Litt. Laws, 321), which became effective March 1, 1796, it is provided for the first time that all nonresidents shall enter their lands

with the state auditor, under the same rules and regulations as in case of residents. It is also provided that these taxes shall be paid to the treasurer of the state, instead of to the sheriff, and, if the taxes are not paid by the nonresidents, the sheriff of the county where the lands lie shall sell the land in the same manner and under the same regulations as residents' lands are sold for taxes. It is provided in this law that the auditor shall keep a book for the purpose of receiving and entering the lands of nonresidents for taxation, and that the taxpayers shall enter their lands for taxation therein; but there is no provision made in this law for a book in which transfers are to be noted, nor is there any provision declaring to a nonresident party that the assessment shall be continuous from year to year until changed by him or other parties in interest. By an act approved February 28, 1797 (1 Litt. Laws, 653), which is entitled "An act to amend and reduce into one the several acts establishing the permanent revenue," the provisions of the acts of December, 1795, as to nonresidents' lands, are substantially re-enacted, and, in addition, it is provided that the auditor shall keep a book of transfers, and "every nonresident who has entered his lands with the auditor may, on transferring the same to any other person or persons, have the alterations made with the auditor, and charged to the person or persons to whom transferred, and such person shall be chargeable with the tax of such land or lands thereafter." This law also provided for the sale of the lands by the sheriff for unpaid taxes. This is the first law which provides for a book of transfers in which sales and conveyances are to be entered, so that the property may be taxed as against the successive owners. The next act is an act approved December 21, 1799 (2 Litt. Laws, 324). This is an act entitled "An act to amend and reduce into one the several acts establishing the permanent revenue." It re-enacts the provisions of the previous law as to the entry for taxation of nonresident lands by the auditor, and for a transfer book and the mode of payment, which was to the treasurer; but it changed the officer who was to sell the property for the nonpayment of taxes from the sheriff of the county where the land lies to the register of the state, and provided that the register, when the tax was certified to him as unpaid, should proceed on the third Monday in November in each year, at public auction, at the state house at Frankfort, to sell lands for unpaid taxes, under like regulations as residents' lands are sold by the sheriff. This act also provides for a transfer book in which nonresidents who had sold their lands or conveyed them could have their transfers entered; but it was not compulsory for them to do so, nor is there any declaration in the statute that the assessment should continue against the first party assessed, unless such transfer were made in the auditor's book. This act of 1799 gave the register the same power to execute conveyances for the lands sold by him as the sheriff had who sold the lands of residents of the state for the nonpayment of taxes.

We think it quite clear that no title passed under the sale of the register in 1811 and the conveyance in 1815, for the taxes due and assessed against Thomas Franklin on these lands, which lands

had been conveyed by him many years before, and the deeds showing the conveyances recorded as early as April, 1796. The record from the auditor's book in regard to assessment is very brief indeed, and unsatisfactory; but it is quite evident that part of that record is made up from assessments which were originally made before the tax commissioner, and not before the auditor, and that, if there ever was any return of the lands patented to Thomas Franklin made in the auditor's office, it was not made by Thomas Franklin, or by any one representing or authorized by him, because there was no provision for a return of nonresidents' lands to the auditor prior to the act of December 19, 1795, which went into effect March 1, 1796, and at that time, according to the record of transfers filed, Thomas Franklin had ceased to have any interest in the land, although these conveyances were not put to record in the state of Kentucky until April, 1796.

In the case of *Bell v. Fry*, 5 Dana, 341, the court of appeals had occasion to consider the effect of the register's deed like the one at bar. The court says:

"The register's deed purporting to convey the land in question to Achilles Sneed in consequence of a sale of the said lands for taxes charged thereon from 1792 to 1798 was ineffectual to pass the title under Fry's patent, because the land was sold and conveyed as the land of Joshua Fry, and for taxes charged to him, when he had conveyed it to Vancouver by deed regularly executed, acknowledged, and recorded in 1790, two years before any portion of the taxes for which it was sold were charged or became payable; and it does not appear but that the taxes for the same year were paid by the real owner of the land. The court therefore did not err in refusing to instruct the jury peremptorily that this deed barred the plaintiff's action."

By the very terms of the register's deed, it only conveyed the right, title, and interest of Thomas Franklin, and this was in accordance with the law under which the lands were sold for taxes. There is no evidence in the record which proves or tends to prove that John Wilson either took or ever had actual possession of the land which was thus attempted to be conveyed to him by Foster, as register of the state of Kentucky. The only evidence on this subject is that he made quite a number of conveyances, but there is no evidence whatever that he took actual possession of any of the land in the Thomas Franklin patent, claiming the same by well-marked boundaries; so that the complainant's title must rest, if at all, upon the tax sale of 1846 and adverse possession thereafter.

The sale by John Hargis, as agent of the auditor, made in September, 1846, for taxes alleged to be due from John Wilson could not, of course, pass a title to South and Breck if John Wilson had no title. We are inclined to think, however, that the attempted sale made in September, 1846, is fatally defective for other reasons. The transcript filed by Norman, auditor, of the assessment of this land, shows that there was no assessment thereon for the years 1839, 1840, 1841, 1842, 1843, 1844, and 1845. The copy of the certificate of John Hargis, agent, indicates that the land was sold by him for taxes for the years 1836 to 1845, both inclusive. The record of

assessment filed by Norman would indicate that there was no assessment for taxes for the years 1839 to 1846, and the certificate of John Hargis recites that the land had been forfeited for the nonpayment of taxes for the year 1839. The act approved December 7, 1822, provided that it should be the duty of the auditor; when three years' taxes and interest became due on lands, to advertise the same for three successive months previously to the 1st of November in the newspapers of the public printer twice each month, stating the amount of taxes, interest, and costs due on each tract; and, if the same be unpaid on any tract or tracts as aforesaid, the same shall be stricken off to the commonwealth, and all the right, title, and interest of such nonresident shall thereby invest in the commonwealth; nevertheless, said land may be redeemed as provided for in the act of December 5, 1820. If this be considered as forfeiting the rights of John Wilson to the state of Kentucky for taxes for the years 1836 to 1838, there is no evidence in the record to show that that which is required by the act of 1822 was ever complied with. Hence there is no evidence to show that the interest of Wilson, if he had any, in the land patented to Thomas Franklin, was assessed for 1839 to 1845, or that it was stricken off to the state under the provisions of the act of 1822, after proper notice. But considering the proceeding by John Hargis, agent, as under the act of 1840, as amended by the act approved March 10, 1843, the record is likewise fatally defective in showing that any title passed by such alleged sale. The act of 1840, as amended by the act of March 10, 1843, authorized the selling of property which had been stricken off to the commonwealth, but provided that the auditor may authorize his agent to sell the same to the former owner, or his heirs or assigns, for the taxes due thereon, with the interest and charges, with 10 per cent. thereon; and further, when no former owner or heirs or assigns could be found to redeem, and there was then any one in possession of such land, or any part thereof, under adverse title, such person in adverse possession shall have the right to quiet his title by paying the amount of the taxes, interest, and charges, with 10 per cent. thereon; and section 3 of the amended act provides "that when there shall be no former owner or his heirs or assigns willing to redeem, and no one in adverse possession willing to purchase, the auditor may direct the agent or attorney to sell the land, in one or more tracts, to suit purchasers for as much as it will bring at public sale, provided it shall not be sold for less money than the amount due the commonwealth, with interest and charges." Thus, the right of the auditor to direct a sale is dependent on the effort to find the original owner, or the heirs or assigns, and allow him or them to redeem, or to give the occupant in adverse possession the opportunity to quiet his title, and his refusal to avail himself of it; and then the law provides for the advertising of the sale and the place of sale, which seems to have been done, but there is no evidence here that any effort was made either to find John Wilson or his heirs, or to inquire whether there was any one in the adverse possession of said land, or any part thereof. This record shows that ir

this large territory, which was thus sought to be sold, there were a great number of persons who were in the actual possession of part of it, and that they claimed adversely to Wilson's title.

The court of appeals had occasion to construe the act of 1840 before the amendment of 1843, but when it was as to tax sales substantially as after the amendment, in the case of Bishop v. Lovan, 4 B. Mon. 116. In that decision it declared that it was necessary to be shown that the former owner or heirs were sought to be found before the property could be sold for taxes, and in that case the court say:

"If the agent's right to sell to a third person is not dependent upon the prior positive refusal of the former owner, his heirs or assigns, and also of the occupant, upon due and proper notice, it was at least certainly the duty of the agent to have made diligent search and inquiry for them, and each of them, before he sold; and upon such diligent search and inquiry had failed to find either, and only upon such facts being made to appear could his sale be sustained, if ever it could be sustained upon such proof, which we are not now prepared to concede. The agent is a private individual, and is not a public officer. He executes no bond for the faithful discharge of his duties or the indemnification of those who may be injured by his failure to do his duty, nor is he required to take an oath, nor does he act under the sanction of an official oath. No presumption will be indulged in, therefore, in favor of the regularity of his acts, but the person claiming title under his sale must show that he has done everything which the law requires to be done to authorize the sale; and, as that was not shown in this case, the instruction of the court was proper, and the judgment is affirmed." Page 120.

The case at bar is entirely bare of any evidence showing any effort to find Wilson or his heirs, if dead, or to make an offer of redemption to any person who might be in actual and adverse possession of any part of this land. It is true that the record shows that the proper public notice was given by publication in the newspaper, and that the sale actually took place, and that William Strong was present at the time of the sale; but there is no evidence at all of any effort to find either John Wilson, or his heirs at law, or to make any offers to the several occupants within this patent of Thomas Franklin. This was an immense body of land; as the record shows, being perhaps one-third of the county of Breathitt, having on it, perhaps, that proportion of the inhabitants of the county. Nor is there any direct evidence of the appointment of John Hargis as agent of the auditor previous to the sale in September, 1846. There is no direct or exact evidence as to the contents of the deed which he subsequently executed to J. W. South and Daniel Breck. We therefore do not know what recitals, if any, there were in that deed. The proceeding in the Breathitt circuit court, at the instance of J. W. South's heirs, to substitute a new deed for the deed which had been executed by John Hargis, does not at all change or strengthen the complainant's position. The title to this land was not then in Fayette Hewitt, then the auditor of the state, even assuming that the land had been forfeited. But this land could not have been constitutionally forfeited to Kentucky without office found, under the act of 1825, as was decided by the court of appeals of Kentucky in *Marshall v. McDaniel*, 12 Bush, 381.

If I am correct in the conclusion that no title passed by these tax

sales, either the sale of 1811 or that of 1848, then the only remaining question is whether or not the complainant has acquired title by adverse possession. The legal effect of the sale by John Hargis in 1846, although it passed no title, may be considered as giving color of title to the entry of J. W. South and Daniel Breck, if they took actual possession of the land in controversy, and held the same continuously, notoriously, and adversely. This record upon the subject of possession both by the complainant and the Souths, and also by the defendant, is very voluminous; but, after a careful reading of the testimony, I am perfectly satisfied that neither the complainant, J. W. South, nor his heirs, have ever had actual possession of the land in controversy, which was continuous, notorious, and adverse for 15 years. There is evidence to show a claim of title by J. W. South and Daniel Breck, and by their heirs and assigns, of lands within the Thomas Franklin patent, and that they conveyed several tracts of land within said patent. These conveyances, however, were generally to occupants of the land claiming adversely. There is also evidence that shows that J. W. South individually in his lifetime, and his heirs since his death, held the actual possession of two tracts of land with marked boundaries, that are near, if they are not adjoining, the land in controversy. But these tracts were not entered by South under his alleged purchase at tax sales in 1846, nor were they held under said sale by South for himself and Breck or Breck's vendees. There is no evidence of an actual possession of the land in controversy by South and Breck and those claiming under them for any continuous time, although there is evidence showing an occasional mining of coal; said mining not continuing from season to season, but once or twice in a series of years, and also of an occasional cutting of timber on the land in controversy. But there is certainly not sufficient evidence to prove an actual, continuous, notorious, and adverse possession for 15 years, or, indeed, for any number of years; and, as the complainant has not the legal title, it must follow that his bill cannot be sustained.

This view makes it unnecessary to consider either the title of the defendants or their claim to title arising from adverse possession, as the relief, if granted at all, must be upon the strength of complainant's own title. It follows from this view that the complainant's bill should be dismissed, with costs; and it is so ordered.

**CENTRAL TRUST CO. OF NEW YORK v. CITIZENS' ST. R. CO.
et al.**

(Circuit Court, D. Indiana. April 23, 1897.)

1. CONSTITUTIONAL LAW — SPECIAL AND LOCAL LEGISLATION — CLASSIFICATION OF CITIES.

The constitution of Indiana provides (article 4, § 23) that in certain enumerated cases, and "in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state"; and also (article 11, § 13) that "corporations other than banking shall not be created by special act, but may be formed under general laws." In 1897 the legislature of Indiana passed an act to amend

its general law for the incorporation of street-railroad companies by adding to the clauses giving directors of such companies power to make by-laws regulating the rate of fare a proviso that in cities having more than 100,000 population according to the United States census of 1890 the rate of fare should not be more than three cents, with other restrictions on companies in such cities, and penalties for their enforcement. There was but one city in the state having a population of more than 100,000 according to the census of 1890. *Held*, that the act was special and local, and was accordingly unconstitutional and void, and was not such an amendment as could be made under a reservation of a right to amend the original act for the incorporation of street-railroad companies.

2. INJUNCTION—RESTRAINING CRIMINAL PROCEEDINGS.

When criminal prosecutions are threatened under color of an invalid statute for the purpose of compelling the relinquishment of a property right, the remedy in chancery is available, and a preliminary injunction may properly issue.

Butler, Notman, Joline & Mynderse, Ferd. Winter, Miller & Elam, Benjamin Harrison, and W. H. H. Miller, for complainant.

John W. Kern, for defendants.

Wm. A. Ketcham, for defendant Wiltsie.

Jas. B. Curtis, for defendant city of Indianapolis.

Mason & Latta, for defendant Citizens' St. R. Co.

SHOWALTER, Circuit Judge. This is a motion for a preliminary injunction. Complainant, a New York corporation, is mortgagee to the extent of some \$3,000,000 in bonds of all the property of defendant the Citizens' Street-Railroad Company, an Indiana corporation, operating a railroad in the streets of defendant the city of Indianapolis. Defendant Wiltsie is the prosecuting attorney for that district of Indiana which includes the city of Indianapolis. Defendant railroad company was organized under the general incorporation law of Indiana first enacted in 1861, and entitled "An act to provide for the incorporation of street railroad companies." It succeeded by purchase to the railroad property and rights in the streets of Indianapolis acquired pursuant to certain ordinances of that city of a former company organized under the same act for the purpose of constructing, operating, owning, and maintaining a railway in certain streets of Indianapolis. Section 9 of the general incorporation law above mentioned is in the words following:

"The directors of such company shall have power to make by-laws for the management and disposition of stock, property and business affairs of such company not inconsistent with the laws of this state; to prescribe the duties of officers, artificers and servants that may be employed; for the appointment of all officers for carrying on all business within the objects and purposes of such company; and for regulating the running time, fare, etc., of such road or roads."

Section 11 of the same law is as follows:

"This act may be amended or repealed at the discretion of the legislature."

By agreement with the city of Indianapolis pursuant to certain ordinances in that behalf, accepted by defendant railroad company, the rate of fare to be charged could be five cents for each passenger, and such was the rate at the time this bill was filed. In March, 1897,

the legislature of Indiana passed an act entitled and worded as follows:

"An act to amend section nine of an act entitled 'An act to provide for the incorporation of street railroad companies,' approved June 4, 1861, the same being section 4151 of the Revised Statutes of 1881, and adding supplemental sections thereto regulating the fare to be charged and collected by any street railroad company organized under the provisions of said act in any city having a population of 100,000 or more, according to the United States census of 1890, and making it a misdemeanor to demand, charge, receive, or collect from any passenger upon the same a cash fare of more than three cents, providing for the transfer of passengers from any line to another, and for the issuance of transfer tickets or passes, and authorizing such company to make reasonable regulations for the transfer of such passengers.

"(Approved March 6, 1897.)

"Section 1. Be it enacted by the general assembly of the state of Indiana, that section nine of an act entitled 'An act to provide for the incorporation of street railroad companies,' approved June 4, 1861, the same being section 4151 of the Revised Statutes of 1881, be and the same is hereby amended so as to read as follows:

"Section 9. The directors of such company shall have power to make by-laws for the management and disposition of stock, property and business affairs of such company not inconsistent with the laws of this state, and prescribing the duties of officers, artificers and servants that may be employed, and for the appointment of all officers for the carrying on all business within the objects and purposes of such company and for regulating the running time, fare, etc., of said road or roads: provided, however, that in cities in this state having a population of 100,000 or more, according to the United States census of 1890, the cash fare shall not exceed three cents for any one trip or passage upon the street railroad or roads of the same, and every passenger upon such road or roads shall, upon his or her request or demand, without any further cash fare or charge, be transferred from the line upon which he may take passage to and upon any other line or lines in such city owned, controlled or operated by such company to which he paid his cash fare, and such company, its officers, servants, agents or employes shall, upon the request or demand of any passenger, give a transfer ticket or pass to such passenger entitling him to passage upon the line or lines to which he desires to be transferred, so that he may have one continuous trip or passage over and upon any two of its lines, without any additional cash fare or charge to the point nearest his destination: Be it further provided, however, that such directors may provide reasonable regulations for the transfer of such passengers as to place where such transfers shall be made and when such transfer tickets shall expire, but every passenger desiring to be so transferred shall be given a reasonable opportunity to do so and to be carried upon the line to which he desires to be transferred. And should any street railroad company in any such city charge, receive or collect more than three cents cash fare, or refuse or neglect to transfer passengers as herein provided, then said company shall forfeit and pay to the person from whom it receives, charges or collects the said cash fare in excess of three cents, or whom such company refuses to transfer as herein provided, the sum of one hundred dollars, to be recovered in a civil action in any court of competent jurisdiction; and the city in which such railroad company is doing business, running and operating its line or lines of road or roads may, upon the failure of such street railroad company to comply with any of the provisions of this act, declare the rights, terms, contracts and franchises of such company to use and occupancy of the streets, alleys, and highways of such city for street railroad purposes forfeited and at an end and may proceed to oust such company from the use and occupancy of such streets, alleys and highways, and may contract and let to any other street railroad company the use and occupancy of such streets, alleys and highways for street railroad purposes, the same to be granted and let in accordance with the provisions of this act and the laws governing cities having a population of 100,000 or more, according to the United States census of 1890.

"Sec. 2. That it shall be unlawful for any company organized under the provisions of this act and owning, controlling, running or operating any street railroad or system of street railroads in any city having a population of 100,000 or more, according to the United States census of 1890, or any officer, agent, servant or employé of such company to demand, charge, receive or collect from any passenger upon its road or system of roads a cash fare of more than three cents for any one trip or passage upon the same, and for any violation of the provisions of this section, such company, officer, agent or employé, shall, upon conviction thereof, be fined in any sum not less than fifty dollars and not more than five hundred dollars.

"Sec. 3. That it shall be unlawful for any company organized under the provisions of this act, and owning, controlling, running or operating any street railroad system or street railroad in any city having a population of 100,000 or more, according to the United States census of 1890, or any officer, agent, servant or employé of such company, to refuse or neglect to transfer any passenger upon the same, after he shall have paid his fare, from any of its line or lines upon which he may have become a passenger to any other of the lines of such company owned, controlled, run or operated by it in such city and to which he may have requested or demanded to be transferred; or neglect or refuse to give to any passenger after he shall have paid his fare, upon demand or request, a transfer or pass ticket, entitling such passenger to be transferred or carried upon any other of its lines in such city to the point of his destination thereon, or who shall neglect or refuse to receive and carry any passenger after he shall have received a transfer or pass entitling him to be transferred and carried by and upon some line or lines other than that upon which he originally took passage, shall, upon conviction thereof, be fined in any sum not less than fifty dollars and not more than five hundred dollars."

The theory of the bill is that the enactment last above set forth is not within the reservation expressed in section 11 of the act of 1861; that the act of 1861 as amended and in force prior and up to March, 1897, being the general law of the state for the incorporation of street railroads, is the charter of the defendant railroad corporation; that said charter cannot, under the constitution of Indiana, be amended by any enactment which is special to any particular street-railroad corporation or to any particular community or locality in Indiana; that the amendment of 1897 is confined in its operation to the city of Indianapolis and to the defendant railroad corporation and to other street-railroad corporations now or hereafter organized for carrying passengers over the streets of that city; that, if the scheme, as proposed in said amendment, be carried into effect, complainant, which is mortgagee of the railroad property of defendant corporation in Indianapolis to the extent of some \$3,000,000 of outstanding bonds, will be irremediably injured in its security; that by the amendment of 1897 the state of Indiana would violate its engagement to the defendant railroad company as expressed in the general law for the incorporation of street-railroad companies; and this in contravention of the national constitution, which declares that no state shall pass any "law impairing the obligation of contracts." On this latter ground, as well as by reason of the nonresidence of complainant, the controversy, it is said, falls within the judicial power of the United States.

Section 22 of article 4 of the constitution of Indiana provides that, except in reference to certain stated matters, "the general assembly shall not pass local or special laws." Section 23 of the same article is: "In all cases enumerated in the preceding section, and in all other cases where a general law can be made ap-

plicable, all laws shall be general and of uniform operation throughout the state." By section 13 of article 11 of the constitution of Indiana it is declared that "corporations other than banking shall not be created by special act, but may be formed under general laws." There is obviously no discretion in the legislature of Indiana whereby that body might, as the basis of a special law for the formation of street-railroad corporations, declare that a law for that purpose which is "general and of uniform operation throughout the state,"—that is, which is applicable to like conditions whenever and wherever such conditions may exist in the state,—could not "be made applicable." The question here is whether or not the amendment of 1897 is a "general law," within the sense of section 13 of article 11 of the constitution of Indiana. This amendment provides "that in cities in this state having a population of 100,000 or more, according to the United States census of 1890, the cash fare shall not exceed three cents," etc. There is but one city in Indiana which answers this description, namely, the city of Indianapolis. No matter how many cities there might be now or may be hereafter in Indiana containing populations respectively of 100,000 or more, the act in question could never apply to any other than the city of Indianapolis. The permanency of the law, and its application to conditions as they arise, and not merely its scope for the time being, is to be considered in applying constitutional tests. The question here is the same as it would be if in fact there had been in Indiana at least two cities each containing 100,000 inhabitants, and the act in question had been expressly limited in its operation to one, leaving the street-car service of the other and of the remaining cities of the state subject to the old law. Could it be said, on the hypothesis last made, that such a law touching the incorporation of street-railroad companies was general and of uniform operation throughout the state? Under the amendment of 1897 the field is open to all persons to organize street-railroad companies, even in the one city identified in that amendment. But the generality and uniformity of operation under like conditions insisted on in the constitution as essential to a law for the formation of corporations must apply to the business for which corporate organization is granted, as well as to the bare privilege of becoming incorporated. A corporation is not formed until its functions or business, as well as the mere right to be a corporation, are identified under the law. To make a corporation, the legislature must declare not only that certain persons may be incorporated, but that in the corporate capacity they may do something,—carry on some specified business. A classification which is germane to the subject-matter, as I understand it, may be provided in a law for the formation of corporations; but an arbitrary specification of a single locality in a business which is not local, whereby one set of statutes would apply in one place and another to a like business in a different place, is not within the organic law of Indiana. What may be called "intramural passenger traffic" is not a business local to any one city in Indiana. A classification of street-railroad companies by reference to the matter of populous-

ness in cities is suggested in the amendment of 1897. But the limitation by the one census—that of 1890—defeats the classification. The vice of the amendment is that it puts street-car service in one city under one set of conditions and sanctions, while the same business in other cities of the state, no matter how populous they are or may become, must be carried on under another. In *Mode v. Beasley*, 143 Ind. 312, 42 N. E. 728 (decided in 1895), the supreme court of Indiana said:

"Nearly every legislature, if not every one, from that time [1868] to the present has been passing acts that were strictly local under titles and enacting clauses purporting to make them general in their operation throughout the state. A conspicuous example of this class of acts is what is generally known as the 'Charter of Indianapolis,' approved March 6, 1891. But the city of Indianapolis is not named in the act. Both the title and the body thereof purport to make the act general, and of uniform operation throughout the state, by providing 'that all cities of this state which had a population of more than 100,000 inhabitants, as shown by the last preceding United States census, shall hereafter be governed by the provisions of this act.' And then follows the balance of the first section and the other 134 sections of the act, all of which are expressly confined in their operation to the city of Indianapolis by the part of section 1 above quoted, as if the city of Indianapolis had been named as the only place where said act was ever to have any operation or effect whatever. It is to be noted that the act is confined to cities which had a population of more than 100,000 inhabitants as shown by the last preceding United States census. This and all courts in the state judicially know, and the legislature knew, that the city of Indianapolis was the only city in the state at the passage of the act that the last census report showed had more than 100,000 inhabitants. And, no matter how many cities in the state might, by subsequent increase of population, exceed in number the 100,000 mark, still the act could not apply to them, because Indianapolis alone had a population of over 100,000 by the United States census at the time of passage of the act. Hence the legislative intent is made clear and undoubted that the act was designed never to have any effect or operation anywhere in the state outside of the city of Indianapolis, while it purports to be a general act. And yet no one can entertain a reasonable doubt of the constitutionality of the act, not because it purports to be general, but because it is on a subject on which the applicability of a general law has been left by the constitution to the exclusive judgment of the legislature on inquiry into the facts."

By the last sentence above quoted the supreme court of Indiana apparently means that municipal corporations are not within the prohibition of section 13 of article 11. The language of that section, to quote it once more, is, "Corporations, other than banking, shall not be created by special act, but may be formed under general laws." The specification "other than banking" indicates corporations for business purposes and private gain as referred to. The conjunction of words, "municipal corporations other than banking," would be meaningless. In *Trust Co. v. Harless*, 131 Ind. 452, 29 N. E. 1062, the supreme court ruled, in effect, that a law conferring additional powers on corporations engaged in supplying natural gas could not be special, but must be general and of uniform operation. That court has also ruled that the question whether or not "a general law can be made applicable" when it arises under section 23 of article 4, quoted above in this opinion, is conclusively determined by the legislature. The sense of these holdings, I take it, is that the question whether or not "a general law can be made applicable" never can arise when the subject-matter

of legislation is a law for the formation of corporations within section 13 of article 11. This latter section is itself an express declaration by the people of Indiana in their organic law that "corporations, other than banking, may be formed under general laws"; and there is no discretion on the subject, either in the legislature or the court. To hold that the legislature may—as under section 23 of article 4—declare that "corporations, other than banking," cannot "be formed under general laws," would be to annul section 13 of article 11 of the constitution of Indiana. The members of the legislature themselves in the amendment of 1897 evidently did not deem it in their power to make a special law. By obvious inadvertence the attempted classification was wrongly worded. If it be the law of Indiana that the legislature has this power, then individual charters to individual corporations may once more be granted at pleasure by that body. But this is what section 13 of article 11 was meant more especially to prevent. The language is that "corporations [in the plural] shall not be created by special act," meaning, when read in the light of the antithesis shown in the remainder of the sentence, to prevent any special act, though any combination of persons to the statutory number might become incorporated thereunder. The inhibition is not merely against individual charters to individual corporations, but against any act which is special as distinguished from one which, with reference to the business to be done by corporate organization, is general, and of uniform operation, under like conditions throughout the state. The prevention of possible legislative discrimination or favoritism in business enterprises, and the permanency of property rights secured by the requirement of generality and uniformity in the law of corporate organization, was apparently the intent of the people of Indiana in making their constitution.

It is argued with much insistence that, as respects the legislative power to amend by special enactment, a distinction exists between an amendment which embodies the grant of a new and additional power to a corporation already extant and one which restricts a power previously given; and it is said in this connection on the one side that the amendment of 1897 is, in effect, a restriction on the powers previously vested in the defendant railroad company, and, on the other, that the amendment is rather the extinguishment of all right to make the five-cent charge as provided in the contract between the company and the city of Indianapolis, and the substitution therefor of a grant to the company allowing it to fix a three-cent rate. But, however this may be, the reservation by section 11 of the act of 1861 is of power to amend "this act." The old statute, with the amendment, must, if the amendment be valid, be now read as a whole. So understood, and on the assumption of validity, it constitutes the law of Indiana for the incorporation of street-railroad companies. But, so understood, the entire law would be special and local. As concerns cities other than Indianapolis, it would be special and local, because it could not apply to the city of Indianapolis. As concerns Indianapolis, it would be special and local, because it could have no operation upon street-

railroad business by corporations in any other city in the state at any time. If such a statute had been originally enacted as a whole, it would have been in conflict with the constitution. The legislature cannot first make a law which is in reality general and of uniform operation, and afterwards amend it so that by force of the amendment it ceases to be general and of uniform operation. The legislature can make no amendment which, if put into the statute originally, would have invalidated the whole. Following the pronouncement of the supreme court of Indiana in *Mode v. Beasley*, my opinion is that the amendment of 1897 is unconstitutional and void. It is not an amendment within the reservation of the eleventh section of the act of 1861.

I may here add that the words of classification in section 5454 of the Revision of 1894 are not the same as the words used in the amendment here in question, nor as the words used in the statute commented on in the quotation from *Mode v. Beasley*; while sections 5477-5479 are restrictions on the powers of municipal corporations. It occurs to me to suggest also that, while the words which follow the last semicolon in section 9 as amended in 1897 seem to imply a grant to the city of Indianapolis, yet, since the national as well as the state constitutions provide against any law impairing the obligation of contracts, the legislature could hardly authorize the city, by either a general or special law, to break its contract with the railroad company.

Counsel urge that this bill does not show a cause of action cognizable in chancery against Mr. Wiltsie, the district attorney, since its purpose is to restrain him from instituting criminal prosecutions under color of the amendment of 1897. But this complainant is seeking to protect a property right, and it seems to be law that, when such prosecutions are threatened under color of an invalid statute for the purpose of compelling the relinquishment of a property right, the remedy in chancery is available. *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, and *Lottery Co. v. Fitzpatrick*, 3 Woods, 222, Fed. Cas. No. 8,541, in each of which apprehended criminal prosecutions were enjoined, are to the point. Even in the *Case of Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, cited by the attorney general, the rule as here stated is plainly recognized; nor do I find it disputed in any case.

It is also contended that this suit cannot be maintained because the state is, in effect, a party defendant, and under the eleventh amendment to the national constitution a state cannot be sued; and, further, that section 720 of the Revised Statutes of the United States inhibits the relief prayed for in this bill as against defendants Wiltsie and the city of Indianapolis. But under the ruling of the supreme court of the United States in *Pennoyer v. McConaughy*, 140 U. S. 1, 11 Sup. Ct. 699, and *Reagan v. Trust Co.*, *supra*, this is not a suit against the state of Indiana, within the sense of the eleventh amendment, nor does it fall within the terms of section 720. It seems to me, on principle, as well as on the very distinct authority of *Reagan v. Trust Co.* (a case which parallels this in nearly every aspect) and *Lottery Co. v. Fitzpatrick*, the

present controversy falls within the judicial power of the United States vested in this court. But counsel for defendants insist that, at all events, a preliminary injunction ought not to issue. They say, if the defendant railroad company will obey the law, and reduce its fares to three cents, the damage prior to final hearing will be inconsiderable or nothing. But, suppose the alleged law to be invalid, and suppose the defendant railroad company declines to obey it. In the Reagan Case, above cited, the same argument could have been used, yet there the preliminary injunction was issued. So, also, in *Lottery Co. v. Fitzpatrick*, wherein is discussed at length the question whether or not the preliminary injunction should issue. How can the point as to the validity of the amendment of 1897 be presented on any subsequent hearing more distinctly than on this? My opinion is that, where proceedings in effect destructive of a vested property right are threatened by a defendant in official position under color of a void statute, the preliminary injunction ought to issue.

The suggestion by the learned attorney general that, in any event, this court ought not to consider the case made by this bill until the supreme court of Indiana has pronounced upon the specific enactment in contention, is one which I have no right to entertain. It is ordered that the injunction issue as prayed.

**LONDON & S. F. BANK v. WILLAMETTE STEAM-MILL, LUMBERING
& MANUFACTURING CO.**

(Circuit Court, S. D. California. March 23, 1897.)

No. 703.

1. RECEIVERS—DIVIDENDS—DELAY OF CREDITOR.

Delay of a creditor, resulting from proceedings taken at the receiver's request, to reduce his claim to judgment, is not negligence, and will not prevent the creditor from receiving dividends in proportion to those already paid to others, before further dividends are declared.

2. SAME—SECURED CLAIMS—SURRENDER OF SECURITIES.

In the federal courts, a creditor holding collateral securities cannot be compelled to surrender them before participating in dividends declared by the receiver.

3. FEDERAL COURTS—STATE LAWS.

State laws relating to insolvency and assignments for creditors do not control the federal courts, in receivership cases, in respect to the right of a creditor holding collateral security to receive dividends without first surrendering the collateral.

This was a suit in equity by the London & San Francisco Bank against the Willamette Steam-Mill, Lumbering & Manufacturing Company, in which a receiver has been appointed for the defendant corporation. The cause is now heard on the motion of a creditor to require the receiver to pay it dividends in proportion to those already paid to others.

Frank W. Burnett, for complainant.

H. C. Dillon, for defendant.

Sheldon Borden, for receiver.

WELLBORN, District Judge. This is a motion of San Gabriel Valley Bank, a creditor of the defendant, and holding certain securities, that the receiver be directed, before paying further dividends to other creditors, to pay to said bank such proportion of its claim, recently filed, as has heretofore been paid, respectively, on the claims of the other creditors. On this motion two suggestions have been made by the attorney for the receiver: First, that payments to said San Gabriel Valley Bank be limited to dividends hereafter declared; second, that said bank be required to surrender to the receiver its securities, before participating in any dividend.

Answering the first suggestion of the receiver, I would say that, in my opinion, the San Gabriel Valley Bank should receive, before further dividends are declared to other creditors, the same proportion of its claim as such other creditors have received on their claims respectively. As I understand the facts, said bank is not chargeable with negligence in presenting its claim, but whatever delay there may have been resulted from proceedings, taken at the request of the receiver, to reduce said claim to judgment.

With reference to the second point, it will be observed that, while circumstances may justify the expectation that the defendant's debts will be ultimately paid in full, yet the pending question must be determined as though the estate now being administered by the receiver were insolvent. The rule applicable to such a case, as recognized by the federal courts, is that the creditor who holds collateral securities cannot be compelled to surrender them until full satisfaction of his debt, and is entitled in the meantime to receive the same dividends as unsecured creditors. *Wheeler v. Walton & Whann Co.*, 72 Fed. 966; *Merrill v. Bank*, 21 C. C. A. 282, 75 Fed. 148; *Bank v. Armstrong*, 8 C. C. A. 155, 59 Fed. 372.

Counsel for the unsecured creditors, in his brief, invokes the principle of equity "that, where one of the creditors of an insolvent has two funds against which he can proceed, and the other creditors can proceed only against one of those funds, the former creditor must first exhaust the fund against which the other creditors cannot proceed before he can come in and share pro rata with them out of the fund which alone is available to them." In the case last above cited (*Bank v. Armstrong*) the court refer to this rule as follows:

"It is a rule of equity that, where a creditor holds two securities, one of which he has in common with others, and the other of which he holds for his sole use, he may be required to collect his debt first out of the security for his sole benefit, so that those who hold in common with him may have more to apply to their debts. But this rule can never be invoked where he who has the two securities cannot pay himself in full out of both. He was given the two securities to pay his debt, and he cannot be deprived of this primary equity for the benefit of some one else, who is less fortunate in his security. 3 Pom. Eq. Jur. § 1414; Story, Eq. Jur. § 564b."

Again, in the same case, and at page 378, 59 Fed., and page 161, 8 C. C. A., it is said:

"The other cases cited, and especially *Greenwood v. Taylor*, 1 Russ. & M. 185, seem to rest on the rule of equity requiring a creditor with two funds as security, one of which he shares with others, to exhaust his sole security

first. As already said, the rule has no application when its operation would prevent the creditor from paying his whole claim."

Counsel for the unsecured creditors further relies, in support of the point raised by the receiver, on analogies drawn from the statutes of California relating to insolvency and assignments for benefit of creditors. In federal courts, state laws cannot control the question, but it must be determined according to general principles of equity. Said motion is allowed.

NEWMAN v. VIRGINIA, T. & C. STEEL & IRON CO.

(Circuit Court of Appeals, Fourth Circuit. May 5, 1897.)

No. 209.

1. **ACTION TO RECOVER LANDS—ADMISSIBILITY OF EVIDENCE—HARMLESS ERROR.**
In an action under the North Carolina statute to recover lands, the admission of a will for the purpose of showing title in plaintiff to an undivided one-fourth interest in the lands, even if erroneous because of defective execution of the will, is not prejudicial error where it otherwise appears that plaintiff has title to an undivided three-fourths interest; since, under the state decisions, plaintiff, as owner of such interest, could maintain the suit for its own benefit and that of its co-tenants.
2. **SAME—WILL AS EVIDENCE—PRESUMPTIONS ON PROBATE.**
When a copy of a will which has been admitted to probate is offered in evidence, the presumption arises that the requirements of the statute have been complied with, and that the evidence given when the will was offered for probate was of such a character as to authorize its admission to record.
3. **APPEAL AND ERROR—ASSIGNMENTS OF ERROR.**
Assignments of error as to the admission or rejection of evidence will not be considered when they fail to set out the full substance of the evidence admitted or rejected, in disregard of the requirements of rule 11 of the circuit court of appeals. 21 C. C. A. cxii., 78 Fed. cxii.
4. **ACTIONS TO RECOVER LAND—ADMISSIBILITY OF EVIDENCE.**
In an action to recover lands under the North Carolina statute a bond for title is admissible in evidence in connection with oral testimony showing occupation thereunder.
5. **SAME—BOND FOR TITLE—SUFFICIENCY OF DESCRIPTION.**
The description in a bond for title, which is offered in evidence, is sufficient where it locates the land on a certain ridge in a particular county, designating the same as a square of 100 acres, and alludes to it as the same land that had been sold to a certain person, and by him transferred to another.
6. **SAME—TRIAL—SUBMISSION OF ISSUES.**
In an action to recover land under the North Carolina statute the issues to be submitted to the jury are to a great extent in the discretion of the court. No particular form is required, but it is essential that the real matters in controversy raised by the pleading should be fairly presented.
7. **APPEAL AND ERROR—EXCEPTIONS—ASSIGNMENTS OF ERROR.**
Exceptions which refer to the charge of the court as a whole instead of pointing out only the several matters of law excepted to are insufficient, and the defect cannot be remedied in the assignments of error.
8. **SAME.**
Assignments of error in relation to instructions asked and refused will be disregarded when they neither quote nor refer to the evidence that shows the relevancy of the propositions of law propounded therein.

9. SAME—BILLS OF EXCEPTIONS.

A bill of exceptions relating to the refusal of instructions must show affirmatively the errors alleged, that they were prejudicial, and that timely objections were made thereto, and the grounds clearly stated; otherwise it is fatally defective.

In Error to the Circuit Court of the United States for the Western District of North Carolina.

Alf. S. Barnard, for plaintiff in error.

Charles A. Moore, for defendant in error.

Before FULLER, Circuit Justice, GOFF, Circuit Judge, and BRAWLEY, District Judge.

GOFF, Circuit Judge. This is a writ of error to the circuit court of the United States for the Western district of North Carolina. The defendant in error instituted its suit in said court against the plaintiff in error, demanding judgment for the possession of a certain tract of land, and damages for its detention. A like suit was also brought in said court by the defendant in error against William Outhbertson and a number of others for the recovery of the possession of said land, and for damages. These suits were brought under the provisions of the statute of the state of North Carolina, and the complaints filed therein alleged the ownership in fee of the defendant in error in two adjoining tracts of land, situated in the counties of Mitchell and Watauga, in the state of North Carolina, described in the complaints with great particularity, but not necessary to be fully set forth at this time. It was alleged in the complaints that the defendants named therein were wrongfully in the possession of said land, and that they were unlawfully withholding the same from the plaintiff; that they were receiving the rents and profits thereof, and destroying and removing the timber, greatly to the damage of the true owner. Judgment for the possession of the land and for damages was prayed for under the provisions of the statute mentioned. The defendants to said suits duly appeared and filed their answers in both cases, in which they denied each and every of the allegations in said complaints contained, and they demanded judgments that the plaintiff in said suits take nothing by virtue of its writs, and that they, the said defendants, recover their costs. The court then entered an order directing that for the purposes of the trial of the plaintiff's title, and the location of the grants under which the plaintiff claims, the said two cases should be consolidated and tried as one cause, each defendant to be entitled to a separate issue upon his own title after the determination of the issue as to boundary and location of the plaintiff's title. The land sued for in both cases was the same, and the contention was over its true location. The defendant in error claimed that the land was located to the south of the Wilkes county line, while the plaintiff in error insisted that if the land could be located at all, all of it would lie to the north of that line, and that he had never been in the possession of any of the land situated north of said line.

The plaintiff below claimed title to the land in controversy under two deeds, one made by J. Evans Brown, and the other by Dwight M. Lowry and wife, and by certain other conveyances and devises, by

which it connected itself with a grant made by the state of North Carolina to one William Cathcart, dated the 20th of July, 1796, and also by reason of continuous, open, notorious, and uninterrupted adverse possession thereof by it and those under whom it claimed for 20 years and more prior to the commencement of said suits, and by reason of continuous, open, notorious, and uninterrupted adverse possession for 7 years and more under color of title thereto, prior to the commencement of said suits. The defendants below insisted that the grant made by the state of North Carolina to William Cathcart was not so located as to include the land claimed by them; that the plaintiff below could not connect itself by due and proper conveyances with said grant; and that it could not show title by adverse possession, either with or without color of title. The cases so consolidated were, without objection, tried together at the June term, 1896, of said court at Asheville. During the trial the plaintiff below offered in evidence a copy of the said grant to William Cathcart, and also certain deeds, wills, and other evidence, for the purpose of showing a complete chain of title from the state to the plaintiff, and also to establish title by adverse possession, both with and without color of title. The defendants below offered no evidence at the trial, and the issues submitted to the jury by the court were: First. Has the plaintiff shown title to the land embraced in the grant he claims, to the 59,000-acre grant, as therein described? Second. Is the tract described in the grant—the 59,000-acre tract—within the black lines on the official plat in evidence in this case? The jury answered both of the issues so submitted in the affirmative, and on this finding the court entered judgment against the defendants. A writ of error was then sued out, and the assignments of error, 19 in number as shown in the record, are now before us for consideration. However, the plaintiff in error has abandoned all of said assignments except five, which have been fully discussed by counsel.

The first relates to the action of the court in admitting as evidence a copy of the last will and testament of William Cathcart, over the objection of the defendant below. The defendants insisted that the probate thereof "did not show affirmatively that the said will was executed in accordance with the requirements of the laws of North Carolina," and that, therefore, it was not proper evidence. In disposing of this objection it is well to consider the purpose for which the said copy was offered. It was introduced to connect the devisees therein named with a suit in equity that had been instituted and prosecuted to final decree in the court of equity of Buncombe county, N. C., some years before, the object of which suit was to secure the sale of the lands described in the grant for 59,000 acres from the state of North Carolina to William Cathcart, and of other lands in which the heirs at law of said Cathcart were interested, all of whom were parties thereto, as were also the devisees mentioned in said will, or their heirs. Therefore all the parties having an interest in said lands were before the court, which decreed the sale of the same, appointed a commissioner to make such sale, which was duly made, reported, and confirmed. So it appears that the devisees named in the will of William Cathcart were also of the heirs at law of said decedent, and that

they were before the court that directed the sale of the land so devised, and now claimed to be in the possession of the defendants below. Such being the case, we do not see why it was necessary to offer the copy of said will to the jury, and it is also evident that if we should exclude the same, or hold that the court erred in admitting it, nevertheless the plaintiff in error has not been prejudiced, because it plainly appears from the record that the said William Cathcart only owned an undivided one-fourth interest in the lands, and it is not questioned but that the plaintiff below offered a chain of title by which it held the undivided three-fourths of said lands which had been conveyed to the plaintiff by those who were tenants in common with Cathcart; and so, even if the title of Cathcart did not pass by his will, or by the equity suit mentioned, nevertheless the plaintiff, as tenant in common with the heirs of Cathcart, could have maintained in North Carolina its suit, and could have recovered, in its own behalf and for the benefit of its co-tenants, the entire tract of land. *Brittain v. Daniels*, 94 N. C. 781; *Moody v. Johnson*, 112 N. C. 810, 17 S. E. 579; *Foster v. Hackett*, 112 N. C. 546, 17 S. E. 426. Still we are of opinion that there was no error in the ruling of the court below, as the presumption arises that the requirements of the statute had been complied with, and that the evidence given when the will was offered for probate was of such character as to authorize its admission to record. The point insisted on by plaintiff in error concerning the record so offered in evidence has, in effect, been decided against him by the supreme court of North Carolina. *Moody v. Johnson*, 112 N. C. 798, 17 S. E. 578, and cases cited.

The next assignment of error is as to the action of the court in permitting the witness A. C. Avery to testify concerning the declarations of one W. J. Brown referring to the relationship that existed between the said Cathcart and Dale, the Latimers, and other parties to the partition suit in the court of equity in Buncombe county, N. C., and in the suit in the circuit court of the United States for the Eastern district of that state. The objection was that the proposed evidence was hearsay, and that it did not purport to come from a member of the family with which the relationship was said to have existed. Rule 11 (21 C. C. A. cxii., 78 Fed. cxii.) of this court requires that, when the error alleged is as to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. No effort has been made to comply with this rule, so far as the assignment of error we are now considering is concerned; the evidence admitted, nor its substance, not being set forth; consequently the questions referring thereto as discussed by counsel will not be disposed of by this court.

During the trial the plaintiff below offered in evidence a bond for title or a contract to convey a portion of the 59,000 acres of land in controversy, made to L. Trivett by John E. Brown, through his attorney, W. J. Brown, dated in 1881, a copy of which is made a part of the bill of exceptions. The same was offered for the purpose of showing possession of the land by said Trivett, and that he and those claiming under him had held such possession

continuously from the date of said contract. The defendant below objected to the introduction of the same, because "the paper has no legal effect, as it has no description." The objection was overruled, and the bond or contract was admitted in evidence, and such admission is now assigned as error. The position taken by counsel for the plaintiff in error during the argument of this cause before this court that the said paper was offered as color of title is not sustained by the record, is in fact refuted by the bill of exceptions, which certifies that its purpose was, in connection with other evidence, to show possession of the land by said Trivett and those claiming under him "from the date of the contract ever since." The only objection presented for the consideration of the trial judge was that the paper had no legal effect, for the reason that it had no description. No other point will be considered by this court, as the court below ruled on that alone. An appellate court will only pass upon those questions as to which a foundation was laid by a specific objection on which the court below ruled, and concerning which an exception was not only noted at the time, but fully set forth in the bill of exceptions. *Turner v. Yates*, 16 How. 14; *Hanna v. Maas*, 122 U. S. 26, 7 Sup. Ct. 1055; *Improvement Co. v. Frari*, 8 U. S. App. 444, 7 C. C. A. 149, and 58 Fed. 171.

On the question of possession, the contract for the sale of the land, accompanied by oral testimony showing occupation thereunder, was clearly proper. Such evidence was admitted by the court as competent for the jury to consider, its weight being left for their determination. The evidence of Trivett as to his possession under said contract, as well as of others who testified concerning the time and character of the same, was offered, admitted, and not excepted to. Why the paper under which he entered and so held was not admissible it is difficult to conceive, as the evidence connected his possession with the same. The description was sufficient, as it located the land on a certain ridge in a particular county, designated as a square of 100 acres, and alludes to it as the same land that had been sold to one Timothy Price, and by him transferred to Trivett. Under such circumstances parol evidence as to possession and identity was properly heard by the jury.

The plaintiff below having closed its case to the jury, the defendant introduced no evidence, but tendered the following issues as proper to be submitted to the jury: (1) Is the plaintiff the owner and entitled to possession of the land described in the pleadings? (2) Is the defendant in the unlawful possession of said lands? (3) What damage has the plaintiff sustained? The court refused to submit such issues, and presented the following for the finding of the jury thereon: (1) Has the plaintiff shown title to the land embraced in the grant he claims to the 59,000-acre grant as therein described? (2) Is the tract described in the grant—the 59,000-acre tract—within the black lines on the official plat in evidence in this case? To this the plaintiff in error objected. In order to fully comprehend and properly dispose of the questions raised

by this objection, it is necessary that we understand what the record discloses concerning the same. In the order consolidating the cases, we find this language:

"It is ordered by the court that, for the purpose of the trial of the plaintiff's title and the location of the grants under which the plaintiff claims, these two causes be consolidated, and tried as one cause, each defendant being entitled to a separate issue upon his own title after the determination of the issue as to boundary and location of plaintiff's title."

The plaintiff below expressly waived damages, and consequently it was not necessary to submit the issue relating to that matter asked for by the defendant below, and the court very properly declined to do so. As to the question of possession, it appears that it was admitted during the trial that the plaintiff in error was in possession of parts of the land in controversy. The question of possession was thus eliminated. It is evident from the record that the plaintiff below claimed to own two adjoining tracts of land, and that it insisted that they were located inside the lines of the 59,000-acre grant, which it claimed was located as shown by the black lines laid down on the official map used by the jury. The real controversy was, therefore, as to the true location of the 59,000-acre grant. If the jury found that the land was located as claimed by the plaintiff, the defendant admitting possession, and damages being waived, then the only further finding required was as to the title; and, as we see the case, the answer of the jury would have been the same to either the issue tendered by the defendant or the one submitted by the court, relating to the question of ownership and title. No particular form is required of the issues to be submitted to a jury, but it is essential that the real matters in controversy raised by the pleadings should be fairly presented. *Cuthbertson v. Insurance Co.*, 96 N. C. 480, 2 S. E. 258; *Code N. C. §§ 395, 396*. Of necessity, these issues are to a great extent left to the discretion of the presiding judge. *Emery v. Railroad Co.*, 102 N. C. 209, 9 S. E. 139; *State v. Mitchell*, 102 N. C. 347, 9 S. E. 702; *Lineberger v. Tidwell*, 104 N. C. 506, 10 S. E. 758; *Everett v. Williamson*, 107 N. C. 204, 12 S. E. 187; *Bradsher v. Hightower*, 118 N. C. 399, 24 S. E. 120. That the court below wisely exercised the discretion reposed in it under the North Carolina statutes and practice in submitting the issues to the jury is fully shown by all the facts offered to the jury and recited in the record, but not deemed essential to be now referred to in detail.

The other assignments of error remaining to be disposed of are those relating to the refusal of the court below to give certain instructions asked for by the defendant, and to the charge of the court to the jury. As to these assignments, we are compelled to sustain the position assumed by the counsel for the defendant in error, that this court cannot consider the same. The exceptions and the assignments referring to the charge are to the same as a whole, which is specially prohibited by rule 10 of this court. 21 C. C. A. cxi., 78 Fed. cxi. So far as the bill of exceptions is concerned, there is an absolute disregard of the requirement that the

several matters of law excepted to, and those only, shall be inserted, and the effort to remedy this in the assignments of error will not be permitted. Nor does it appear that the exceptions to particular parts of the charge, referred to in the assignments of error, were made and the attention of the court called to them at the time the charge was given. The reasons requiring this to be done have been so frequently stated by the courts that we must decline to again enumerate them. *Van Gunden v. Iron Co.*, 8 U. S. App. 229, 3 C. C. A. 294, and 52 Fed. 838; *Improvement Co. v. Frari*, 8 U. S. App. 444, 7 C. C. A. 149, and 58 Fed. 171. So far as the assignments relate to instructions asked for and refused, they neither quote nor refer to the evidence that shows the relevancy of the propositions of law propounded by such instructions, and therefore we presume that no such testimony was before the jury, in which event it is evident that the court below did not err in refusing to give them. *Improvement Co. v. Frari*, *supra*. The bill of exceptions in this case does not show affirmatively the errors alleged, and that they were prejudicial; nor does it show that timely objections were made, and the grounds thereof clearly stated, so far, at least, as the question relating to the refusal of the court to give such instructions is concerned; and therefore it is fatally defective, and will not authorize us to consider and dispose of the points based thereon presented by counsel for plaintiff in error.

We deem it proper to refer to the fact, shown by the record, that after the jury had returned its findings on the issues submitted the court inquired of the plaintiff in error if he, under the terms of the order of the court theretofore entered, desired to try before the court and jury any separate issue upon his own title, and that he refused to tender such issue. The judgment complained of was then entered, and, as we find no error, the same is affirmed.

UNION PAC. RY. CO. v. REED.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1897.)

No. 863.

1. **DEEDS—DEFECTIVE EXECUTION—RATIFICATION.**

A deed ratifying a former deed, which did not pass the title because of its defective execution, cannot affect a title acquired under a deed to a third person between the date of the original deed and the date of the ratification.

2. **LOST INSTRUMENTS—EVIDENCE.**

A lost instrument cannot be proved by a certified copy of its record, in the absence of a statute which expressly authorizes the admission of such evidence.

3. **RECORD OF DEEDS—EVIDENCE.**

Under the territorial statutes of Nebraska (Sess. Laws 1856, c. 31, §§ 5, 14, 17, 23), and Consol. St. Neb. 1891, §§ 4337, 4338, a power of attorney acknowledged before the mayor of a city in another state was not entitled to record in the absence of a certificate of a clerk of court as to the mayor's official character and genuineness of his signature; and under Consol. St.

Neb. 1891, §§ 4337, 4338, a certified copy of the record of such an instrument was not admissible in evidence; nor was its admissibility affected by Laws Neb. 1887, c. 61, § 4, providing that all deeds theretofore executed and acknowledged in accordance with the provisions of that act should be legal and valid.

4. SAME—FEDERAL COURTS—STATE DECISIONS.

A decision of the highest court of a state construing the registration statutes of a state as to the competency as evidence of the records of deeds establishes a rule of property, and is binding upon the federal courts, no question of right under the constitution and laws of the nation and no question of general or commercial law being involved.

In Error to the Circuit Court of the United States for the District of Nebraska.

W. R. Kelly and E. P. Smith, for plaintiff in error.

Herbert J. Davis, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge. This was an action for the recovery of the possession of specific real property, and the writ of error challenges a judgment in favor of Lewis S. Reed, the defendant in error, who was in possession. The Union Pacific Railway Company, the plaintiff in error, had never been in possession of the premises, but relied upon its legal title and its right of possession thereunder for a recovery. In the pleadings upon which the case was tried, each party claimed the title, and the only question at issue at the close of the trial was whether or not the railway company had proved any title to the demanded premises in itself. That question is presented here upon this state of facts, which was found by the court below, after a trial without a jury: Samuel Frodsham owned the land in controversy on February 23, 1857. The railway company could not prove the original of a power of attorney to sell and convey this land made by him to one Birkett, a record of which, under the date of May 25, 1858, was found in the register's office of the county in which the land was situated, and it offered in evidence a certified copy of that record. This copy disclosed the fact that the acknowledgment of the instrument was taken and certified in the state of Missouri by the mayor of the city of Savannah, in that state, and that there was no certificate attached to it, made by the clerk or other proper certifying officer, that the signature of the mayor was genuine, or that the instrument was executed or acknowledged according to the laws of the state of Missouri. The plaintiff then introduced in evidence the record of a deed of the premises by Birkett, as attorney in fact of Frodsham, under this power of attorney, to one Davis. This deed was dated and recorded on May 22, 1858. It then deraigned its title from Davis, and also introduced in evidence a deed dated February 19, 1894, from Frodsham and his wife to itself, in which the grantors recited, ratified, and confirmed the power of attorney to Birkett and the deed from him to Davis, and conveyed the land to the railway company. The defendant proved that Frodsham made a deed of the land to one Van Wyck on May 23, 1857, and that this deed was duly recorded on the same day; but the plaintiff, in rebuttal, introduced

evidence that this deed was in fact a mortgage, and that Van Wyck had never paid any taxes or exercised any acts of ownership over the property. The defendant also proved that on June 24, 1882, Frodsham made a deed of all his right, title, and interest in the land to one Jones, for the consideration of \$10, and that on July 23, 1883, Jones conveyed the land by a quitclaim deed to the defendant Reed, who was then in possession. Other facts were found by the court below, but none of them strengthen the title of the plaintiff, or affect the decisive issue in the case.

A plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of his adversary's. The defendant in this case has been in possession of the premises in dispute for many years, and the plaintiff was never in possession. The only question, therefore, upon the facts found, is whether or not the plaintiff has established a legal title in itself. The briefs and arguments in this case devote much space and time to a consideration of the legal effect of the evidence relative to the deed from Frodsham to Van Wyck in 1857. Counsel for the plaintiff in error insist that it did not show any outstanding title, and that, at most, it was only a mortgage, which did not convey the legal title. In our view of this case, it is unnecessary to consider any of these questions, and we lay them aside. The case of the railway company cannot be stronger than it would have been if that deed had never been made, and we will consider and dispose of it upon that assumption. We also lay out of the case the deed of 1894, from Frodsham and wife to the plaintiff, because this is a question of title, and that deed could not by any possibility have conveyed any title to the property. If the deed from Frodsham to Davis, in 1858, conveyed the title, it had passed through Davis to the plaintiff long prior to 1894. If the deed to Davis did not convey the title, then it was vested in Frodsham in 1882, and his quitclaim deed of all his right, title, and interest in the land to Jones on June 24th of that year conveyed it to Jones, and it passed through him to the defendant. When this deed was made, in 1894, Frodsham had no title or interest in the property. The title was either in the railway company or in Reed, and no act of attempted ratification or conveyance by Frodsham could affect the title of either. *Cook v. Tullis*, 18 Wall. 332, and cases cited.

The crucial question in the case, therefore, is whether or not the deed to Davis conveyed the title of Frodsham, and that depends on the sufficiency of the proof that Birkett had a power of attorney from Frodsham to make the deed; for it was not made by Frodsham himself, but by Birkett, as his attorney in fact. The only proof of that power was a certified copy of its record in the office of the register of deeds of Douglas county, Neb., where it appears to have been recorded on May 25, 1858. The competency of this copy depends on the provisions of the statutes of Nebraska, for a lost instrument cannot be proved by a certified copy of its record, in the absence of a statute which expressly authorizes the admission of such evidence. The statutes of Nebraska in force at the time when this power of attorney purports to have been executed and recorded provided that, unless the acknowledgment of such an instrument without the territory of

Nebraska was taken before a commissioner appointed by the governor of the territory for that purpose, it should have attached thereto "a certificate of the clerk or other proper certifying officer of a court of record of the county or district within which it was taken, under the seal of his office, that the person whose name is subscribed to the certificate of acknowledgment or proof was at the date thereof such officer as he is therein represented to be, that he is well acquainted with the handwriting of such officer, and that he believes the signature of such officer to be genuine, and that the deed is executed and acknowledged, or proved according to the laws of such state or territory" (Sess. Laws Neb. 1856, p. 241, c. 31, § 5; Laws Neb. 1855, p. 245, § 56); that the certificate of acknowledgment and the certificate provided for by section 5, supra, should be recorded together with the instrument; and that, unless so recorded, neither the record nor the transcript thereof should be received in evidence; and that deeds should not be deemed lawfully recorded unless they had been previously acknowledged or proved in the manner provided in that chapter (Sess. Laws Neb. 1856, c. 31, §§ 14, 17). Section 23 of the same chapter provided that "it shall be no objection to the record of a deed that no official seal is appended to the recorded acknowledgment or proof thereof if, when the acknowledgment or proof purport to have been taken by an officer having an official seal, there be a statement in the certificate of acknowledgment or proof that the same is made under his hand and seal of office, and the records show by a scroll or otherwise that there was such a seal, which shall be presumptive evidence that the official seal was attached to the original certificate." In 1887 the legislature of the state of Nebraska amended certain sections of their statutes relative to the execution and acknowledgment of deeds, and enacted that "all deeds heretofore executed and acknowledged in accordance with the provisions of this act shall be and are hereby declared to be legal and valid." Laws Neb. 1887, p. 562, c. 61, § 4. The statutes in force at the time of the trial provided that the certificate of the proof or acknowledgment of every instrument affecting real estate, and the certificate of the genuineness of the signature of any officer, in cases where such certificate was required, should be recorded together with the deed so proved or acknowledged, and that, unless the said certificates were so recorded, neither the record of the instrument nor the transcript thereof should be read or received in evidence, but that the record of an instrument duly recorded, or a transcript thereof, might be read in evidence, with the like force and effect as the original instrument, whenever the original was known to be lost, or did not belong to the party wishing to use the same, or was not within his control. Consol. St. Neb. 1891, §§ 4337, 4338.

A glance at these provisions of the statutes is sufficient to show, not only that they fail to authorize the introduction in evidence of a certified copy of the record of the power of attorney in question, but that they expressly prohibit its introduction. Sections 5, 14, 17, c. 31, Laws Neb. 1856. They made the certificate of the proper certifying officer that the person whose name was subscribed to the certificate of acknowledgment was the mayor of Savannah, that his signa-

ture was genuine, and that the power of attorney was executed and acknowledged according to the laws of Missouri, and the record of this certificate with the power of attorney, conditions precedent to the right to record this power at all. They made such a certificate and the record of it prerequisites to the right to record any instrument affecting real estate, which was acknowledged without the territory before any other officer than a commissioner appointed by the governor of Nebraska; and this instrument was not acknowledged before such a commissioner. The power of attorney had no such certificate attached to it. Section 4338, Consol. St. Neb. 1891, which was in force during the trial of this case, provided that the certificate of the genuineness of the signature of an officer, where such certificate was required, should be recorded with the instrument acknowledged, and that, unless it was so recorded, neither the record of the instrument, nor the transcript thereof, should be read or received in evidence. The conclusion is irresistible that the power of attorney was never entitled to record, and that neither the record of it nor the certified copy of that record, which was offered in evidence, constituted any legal proof of its existence. *Prentice v. Forwarding Co.*, 19 U. S. App. 100, 115, 116, 7 C. C. A. 293, 302, and 58 Fed. 437; *Morton v. Smith*, Fed. Cas. No. 9,867; *Lowry v. Harris*, 12 Minn. 255 (Gil. 166); *O'Brien v. Gaslin*, 20 Neb. 347, 30 N. W. 274; *Greenwood v. Jenswold*, 69 Iowa, 53, 28 N. W. 433; *Ely v. Wilcox*, 20 Wis. 523, 526; *Fisher v. Vaughn*, 75 Wis. 609, 615, 44 N. W. 831, 833.

It is strenuously argued by counsel for plaintiff in error that section 23 of chapter 31, *supra*, which provides that it shall be no objection to the record of a deed that no official seal is appended to the recorded acknowledgment, if there is a statement in the certificate of acknowledgment that it is made under the hand and seal of office of the person who took the acknowledgment, and the records show, by a scroll or otherwise, that there was such a seal, relieves the copy of the record of this power of attorney of the objection we have been considering. But the only effect of that section was to relieve the record of certain instruments affecting real estate from the objection that the official seal of the officer taking the acknowledgment did not appear thereon. It had the effect to relieve the record of the objection that the official seal of the mayor of the city of Savannah did not appear upon the face of the page on which it was recorded. That is not the objection to this evidence which we have been considering. The objection is not that the official seal of the mayor of the city of Savannah does not appear upon the record, but that the certified copy of that record is no evidence, under the statutes, that the power of attorney there recorded ever existed. No number of official seals would relieve the certified copy of this objection, while the certificate of the genuineness of the signature of the mayor, and of the execution and acknowledgment of the power according to the laws of the state of Missouri, was still wanting.

It is also contended that the want of this certificate is cured by the amendment found in section 4 of chapter 61 of the Laws of Nebraska of 1887, to the effect that all deeds theretofore executed and acknowledged, in accordance with the provisions of that act, should be, and

were thereby declared to be, legal and valid. But the objection here is not that this power of attorney was not legal and valid. It is that there is no competent evidence in this record that there ever was any such power. The act of 1887 does not affect the objection. It does not provide that the unauthorized record of this instrument in 1858 should become a legal or sufficient record, nor that a certified copy of that record should become evidence of the original power of attorney in the teeth of the express prohibition of the use of such evidence, by section 14 of chapter 31 of the Session Laws of Nebraska of 1856, and by section 4338 of the Consolidated Statutes of Nebraska of 1891. The act of 1887 has no effect upon the question at issue in this case. The difficulty with the plaintiff's case is that, when the trial closed, it had introduced no competent evidence that there was a power of attorney from Frodsham to Birkett, and the case stood as though no such power had ever been given, and as though the deed to Davis under that power had never been made. In this state of the proof, the evidence was that the title remained in Frodsham until 1882, when it passed to Jones, and through him to the defendant, Reed.

The statutes that have been under examination are too plain for construction. If they were not, the highest judicial tribunal of the state of Nebraska has repeatedly interpreted them, and has reached the same conclusion at which we have arrived. *O'Brien v. Gaslin*, 20 Neb. 347, 30 N. W. 274; *Hoadley v. Stephens*, 4 Neb. 431; *Irwin v. Welch*, 10 Neb. 479, 6 N. W. 753; *Trust Co. v. Reiter*, 66 N. W. 658, 663. These decisions constitute a rule of property in the state of Nebraska, and are of controlling authority in the national courts. The construction by the highest judicial tribunal of a state of its constitution or statutes, which establishes a rule of property, is controlling authority in the courts of the United States, where no question of right under the constitution and laws of the nation, and no question of general or commercial law, is involved. *Brashear v. West*, 7 Pet. 608, 615; *Allen v. Massey*, 17 Wall. 351; *Lloyd v. Fulton*, 91 U. S. 479, 485; *Sumner v. Hicks*, 2 Black, 532, 534; *Jaffray v. McGehee*, 107 U. S. 361, 365, 2 Sup. Ct. 367; *Peters v. Bain*, 133 U. S. 670, 686, 10 Sup. Ct. 354; *Randolph's Ex'r v. Quidnick Co.*, 135 U. S. 457, 10 Sup. Ct. 655; *White v. Cotzhausen*, 129 U. S. 329, 9 Sup. Ct. 309; *Chicago Union Bank v. Kansas City Bank*, 136 U. S. 223, 235, 10 Sup. Ct. 1013; *Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012; *Madden v. Lancaster Co.*, 27 U. S. App. 528, 535-537, 12 C. C. A. 566, 570, and 65 Fed. 188, 192; *Ottenberg v. Corner*, 40 U. S. App. 320, 22 C. C. A. 163, and 76 Fed. 263, 269. The judgment below must be affirmed, with costs, and it is so ordered.

KIMBALL et al. v. PALMER.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1897)

No. 205.

CARRIERS—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

For a shipper of poultry on a freight train to attempt to get on top of the box car next to the caboose, for the purpose of walking over the tops of the cars to the car containing his shipment while the train is in motion, is manifestly dangerous; and he cannot recover for a resulting injury, unless it is clear that it was necessary for him to do so.

In Error to the Circuit Court of the United States for the Western District of Virginia.

R. M. Page and A. Fulkerson, for plaintiffs in error.

J. W. Read and A. F. Bailey, for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge. This case comes up by writ of error to the circuit court of the United States for the Western district of Virginia. The plaintiffs in error (defendants below) are the receivers of the Norfolk & Western Railroad Company, one of the divisions of which runs from Bristol, Va., and crosses the Baltimore & Ohio Railroad at Shenandoah Junction. The defendant in error (plaintiff below), a dealer in poultry, had hired a car from the plaintiffs in error to transport poultry from Bristol to Washington, and his car, which formed a portion of a freight train which left Bristol, was to have been, when it reached Shenandoah Junction, switched off from the Norfolk & Western to the Baltimore & Ohio road. The plaintiff below was in the caboose attached to the train, with several other passengers, dealers in live stock, who had cars in said train. As the train was approaching the junction, the conductor aroused the passengers, including the plaintiff, telling them that it was time to go to their cars. The plaintiff below did not rouse himself immediately, and did not prepare to get out until the train was very near the junction, and when it was slacking to go on the siding. He then, with others, went out of the forward door of the caboose, and started to climb a ladder on the box car nearest to it, intending to proceed over the tops of the cars to his poultry car, some cars off. As he was ascending the ladder, there were indications that the train was about to stop. He hastened up the ladder, but, as he reached the top, the train stopped with a sudden and violent jerk, and he was caught between the projecting top of the caboose and the freight car next to it, and was seriously hurt. There was evidence tending to show that any one in the caboose could have gotten on the ground, and have walked along the train of cars to any car he wished. There was evidence also tending to show that it was the custom for persons who had cars (parts of the train) to visit them by getting on the tops of the cars. There was evidence also tending to contradict this evidence of such a custom. There was evidence also tending to show that there was some defect in the bumper of the box car next to the caboose,

with evidence also tending to show the contrary of this. The plaintiff below, having thus been injured, brought his action. His declaration contained two counts. The first count, stating the leading facts, charged that the plaintiff was injured because of the carelessness, negligence, defective appliances, default, and unbecoming conduct of the defendants, and because, while the caboose was in motion, the plaintiff was required to leave the caboose, he being a passenger therein, and ordered to go forward to the car of poultry. The second count charged, as the cause of the injury, that the said caboose was not properly provided with bumpers and deadwood, and that there was not sufficient space left between it and the top of the next box car. Testimony was taken. The case was submitted to the jury, the requests of the defendants to charge having been refused, certain instructions were given by the court. The jury found for the plaintiff below, and the cause is here on the assignments of error.

It is unnecessary to discuss but two of these, the fourth and the fifth. The fourth assignment of error is as follows:

"Fourth. The court erred in refusing to give the instruction asked by defendants, which instruction was as follows: 'The court instructs the jury that if they believe from the evidence that the plaintiff, at the time he sustained the injury complained of, was a passenger on a freight train of defendants' road by reason of being in charge of a car load of poultry; and if they further believe from the evidence that it was the custom or habit of shippers in charge of shipments of poultry, when the train arrived at or near Shennadoah Junction, to go to the cars containing their shipments by passing from the caboose over the tops of intervening cars while the train was in motion; and if they further believe from the evidence that the defendants made no objection to such practice on the part of such shippers; and if they further believe from the evidence that the injury complained of was received by the plaintiff while climbing to the top of a car of the train in question, while said train was in motion, for the purpose of going to the car containing his shipment, or for the purpose of going upon the train of the connecting railroad, by which the car containing his shipment would be carried forward; and if the jury further believe from the evidence that, if the plaintiff had not attempted to climb to the top of the car adjoining the caboose, he would not have sustained the injury complained of,—the jury should find for the defendants, unless they further believe from the evidence that it was necessary for the plaintiff to go over the said train, while it was in motion, for the purpose of reaching the car containing his shipment, or for the purpose of going upon the train of the connecting railroad by which the car containing his shipment would be carried forward.'"

The refusal to give this instruction was error. The effort of the plaintiff in attempting to get on the top of the box car next the caboose, for the purpose of walking over the tops of the other cars to his car, was attended with manifest danger, especially as the train was in motion. *Railroad Co. v. Lindley*, 42 Kan. 714, 22 Pac. 703. Nothing could justify the attempt except its necessity. It is the duty of the carrier to carry his passengers safely. It is equally the duty of the passenger (a reasonable being) to avoid all unnecessary risks. *Hickey v. Railroad Co.*, 14 Allen, 429. "A man is guilty of culpable negligence when he does or omits to do an act that an ordinarily prudent person in the same situation, and with equal experience, would not have done or omitted to do, or when he voluntarily exposes himself to a danger which there was no occasion for him to incur in the proper discharge of his duties." *Railway Co. v. Carpenter*, 12 U. S.

App. 398, 5 C. C. A. 554, and 56 Fed. 454. In the present case there was evidence bearing upon the question whether it was necessary for the plaintiff to go over the tops of the cars, or whether he could not as well have walked on the ground. This question should have been submitted to the jury.

The court also erred in giving instruction No. 1 to the jury, which is made the fifth assignment of error. It is in these words:

"It was not fault in the plaintiff if, being a shipper in charge of poultry on a freight train, he was passing from one car to another over the tops of the cars, if he exercised caution in doing so, and had not been warned against doing so by the conductor of the train."

Nothing would justify a person in getting upon and passing over the tops of the cars while in motion, unless it was the usual method (perhaps the only method) by which the separate cars could be reached. This question was the subject of contradictory testimony. Both sides produced witnesses to sustain, the one its assertion, the other the contradiction. This charge of the court assumed that it was an admitted fact.

The case must go back for a new trial. It is ordered that the judgment below be reversed, and that the case be remanded to the circuit court, with instructions to grant a new trial.

GLEN MANUF'G CO. v. WESTON LUMBER CO.

WESTON LUMBER CO. v. GLEN MANUF'G CO.

(Circuit Court, D. New Hampshire. March 24, 1897.)

1. BOUNDARIES—LINE SUPPLIED.

Under a deed to 10,000 acres of land "to be surveyed off and bounded north by Irving's location, south by Stark, and east Dummer and Millsfield, and to extend far enough west to a line to be surveyed parallel with the line on Dummer and Millsfield to include said ten thousand acres," it appearing from the evidence that the parties understood at the time that the 10,000 acres would not extend westerly of a line drawn parallel with the Dummer and Millsfield line from Stark to the southwest corner of Irving's location, and that 10,000 acres will not be included if such a line is drawn, the deed must be accepted as calling for a line parallel with Dummer and Millsfield drawn from Stark far enough west to include 10,000 acres when intersecting a line extending from the southwest corner of Irving's location on the course of the south line thereof, as the necessary extension of the south line of Irving's location may and should be supplied in order to allow the deed to operate as the parties intended.

2. SAME—PAROL AGREEMENT ESTABLISHING LINE.

Under the New Hampshire rule that in cases of disputed and uncertain boundaries an executed parol agreement establishing a dividing line between adjoining owners of real estate is binding, the line must be actually run to constitute an execution of the agreement, a verbal execution not being sufficient to satisfy the rule.

3. SAME—TRESPASS.

Where the owners of a large body of land, conveyed 10,000 acres of it "to be surveyed off," neither one who holds under them the remainder of the land, nor a subsequent purchaser of the 10,000 acres, can recover in trespass against the other until the deed is made certain by the location of the contemplated dividing line.

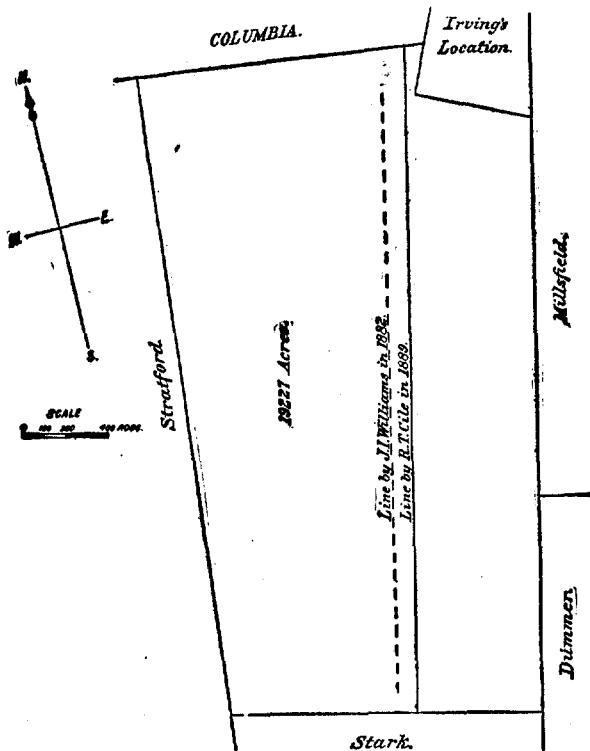
These were actions of trespass, brought the one by the Glen Manufacturing Company against the Weston Lumber Company, and the other by the Weston Lumber Company against the Glen Manufacturing Company. Jury waived.

Harry Bingham, John M. Mitchell, and A. S. Batchellor, for Weston Lumber Co.

I. W. Drew and F. S. Streeter, for Glen Manuf'g Co.

Before ALDRICH and BROWN, District Judges.

ALDRICH, District Judge. The Libbys and Dudley F. Leavitt were owners in common of the township of Odell, in the county of Coos, and on the 4th day of October, 1882, in the words following, conveyed to Sumner W. Thompson "ten thousand acres of land in



Odell, in said county of Coos, to be surveyed off and bounded north by Irving's location, south by Stark, and east Dummer and Millsfield, and to extend far enough west to a line to be surveyed parallel with the line on Dummer and Millsfield to include said ten thousand acres." The term, "off the easterly side of said township," used in the conveyance from the Libbys to the Weston Lumber Company, and which counsel for the Weston Lumber Company strenuously urge, was not employed in the earlier deed from the Libbys and Leav-

itt to Thompson, under which the rights of the parties must be determined, and can, therefore, have no bearing upon the question of construction presented by this controversy. The Glen Manufacturing Company is, and was at the time of the alleged trespasses, owner of the interest conveyed to Thompson, and the Weston Lumber Company was the owner of the remaining portion of Odell. At the time of the conveyance to Thompson, the township of Odell and the outlying territory was a remote wilderness, and its chief value consisted in standing timber, and the parties to the deed had comparatively little, if any, actual knowledge thereof, but acted in respect to the conveyance mainly upon information gathered from surveyors, and from maps and plans of Odell and the surrounding townships. Putting ourselves as near as may be in the situation of the parties to the deed, and considering all the evidence relating to the transaction, we find, as a matter of fact, that the parties understood at the time that the 10,000 acres would not extend westerly of a line drawn parallel with the Dummer and Millsfield line, from Stark to the southwest corner of Irving's location. It therefore follows, conclusively, of course, that the parties did not understand, and did not intend, that any part of the 10,000 acres were to extend further north than the south line of Irving's location. The term "ten thousand acres," however, being absolute and controlling, and used in connection with the later expression in the description, "to extend far enough west to a line to be surveyed parallel with the line of Dummer and Millsfield to include said ten thousand acres," if it turns out, as the parties now concede, that there is not 10,000 acres between Irving's location on the north, Dummer and Millsfield on the east, Stark on the south, and a line from thence drawn to the southwest corner of Irving's location, then the deed must be accepted as calling for a line parallel with Dummer and Millsfield, drawn from the north line of Stark from a point far enough west to include 10,000 acres when intersecting a line extended from the southwest corner of Irving's location on the course of the south line thereof. This follows from the fact that Irving's location is expressly named as the north bound of the land conveyed; and, finding the intention of the parties from the deed and the surroundings, we must say that the parties did not intend to go further north than Irving's location, and did intend to go far enough west to include 10,000 acres; and, it being necessary, as is conceded, in order to include 10,000 acres, to go further west than a line drawn from Stark to the southwest corner of Irving's location, then, to give effect to the intention of the parties, we find that a line should be supplied from the southwest corner of Irving's location, drawn on the course of the south line thereof, until it intersects the necessary west line of the 10,000 acres extended from the north line of Stark. Ascertaining the intention of the parties as a question of law and fact under the New Hampshire rule, we find this to be the effect of the deed, and that the necessary line may well be supplied under the doctrine of *Land Co. v. Saunders*, 103 U. S. 316, 322; *Winnipisiogee Paper Co. v. New Hampshire Land Co.*, 59 Fed. 542, 547.

The deed now under consideration conveys a parcel of land to be surveyed off from a larger tract, and by its express terms provides for

a survey to be subsequently made, and the important question in controversy is whether the contemplated divisional line has been established. Being aided in the construction of this provision by the acts of the parties under the deed, we find that the parties understood that the grantor should make the survey, and establish a dividing line which was to become a boundary. The Glen Manufacturing Company, the defendant in one case and plaintiff in the other, relies upon a line which is called the "Williams Line," and insists that it was established as an "agreed line" under the deed, and, if it is not an "agreed line" in the sense in which that term is understood, that it was a survey authorized, made, and acquiesced in by the grantors in the Thompson deed, and therefore controlling as a boundary line; while, on the other hand, the Weston Lumber Company, plaintiff in one case and defendant in the other, relies upon a line called the "Gile Line," which leaves the Stark town line at a point considerably more than 100 rods east of the starting point of the Williams line, and extending parallel with the Dummer and Millsfield line northerly to Columbia line, passing to the westward of the southwest corner of Irving's location, to a point on Columbia line about three-fourths of a mile north of the south line of Irving's location. The Weston Lumber Company insists upon this line as one inclosing 10,000 acres from actual measurements, and as a line based upon the survey contemplated by the deed, and, in answering the calls thereof, one which becomes an established boundary line between the parties. Speaking generally, the territory in dispute is a tract of land considerably more than 120 rods in width and something more than 9 miles in length, and it is sufficient, for the purposes of the questions now presented, to say that both parties have cut and removed large quantities of timber from the disputed territory.

We will first give our attention to the line contended for by the Glen Manufacturing Company, and in respect to this we find that in October after the conveyance Thompson called for a survey, and, after conference between Leavitt and George W. Libby (who was authorized to act for the other Libbys), agreed that Williams, who was to be paid, and was subsequently paid, by the Libbys, should establish the divisional line contemplated by the deed, and that the 10,000 acres should be ascertained by a calculation based upon the lines of the outlying territory already marked, and the courses and distances as shown by plans thereof and upon one Bucknam's survey, and measurements of the west line of Dummer and Millsfield, which was the east line of Odell. It was understood that Williams, after making his calculations as to how far it would be necessary to go west on the Stark line to include the 10,000 acres, should run north to the south line of Irving's location. Soon after the conference between Leavitt and Libby, this means of ascertaining the bound was submitted to Thompson, who approved of it, and furnished men to assist in measuring and marking the line. Williams, in making his calculations on paper, taking the town lines and measurements as a basis, found that Irving's location did not extend far enough west to form a complete northern boundary of the 10,000 acres, and with Leavitt's assent (though not known to the Libbys at the time), and for the pur-

pose of plotting the 10,000 acres on a plan, drew an imaginary line from the southwest corner of Irving's location parallel with the Stark line to intersect his supposed west line, which was to run north from the Stark line. This tentative scheme for ascertaining the 10,000 acres, and for establishing a boundary thereof, was submitted to Thompson by Williams as one assented to by Leavitt; and, Thompson approving, Williams proceeded to lay off the 10,000 acres in accordance therewith by running a line north from Stark, and marking the trees in the line, extending this line parallel with the line of Dummer and Millsfield, and, upon measurements, to a point from which he supposed in running easterly parallel with the north line of Stark he would connect with the southwest corner of Irving's location, thereby closing in the 10,000 acres. At this point the work was interrupted by a storm and lack of provisions, and Williams, desiring to ascertain definitely by further surveys and measurements whether he was, as a matter of fact, rather than supposition, at a point from which he could close in upon the southwest corner of Irving's location, left the work unfinished. He submitted what he had done to Thompson, who said it was all right, so far as he was concerned, as it would be a long time before he would get up there for timber, and that they could close it up at some other time. What had been done was also submitted to Leavitt and to George W. Libby, who said it was all right, as it was so far up in the wilderness beyond any line where they were reaching with logging operations that there was no hurry about it. As a matter of fact, as subsequent investigations disclosed, when Williams left his work in 1882, he was not opposite the southwest corner of Irving's location, but considerably north of the point from which he could connect with such corner in accordance with the scheme under which he was operating. We are requested to find, and do find, that Williams, shortly after he came out of the woods, put a line upon a plan running on paper from the southwest corner of Irving's location, parallel with Stark line, to his marked line extending northerly from the town of Stark, and that he sent a copy of this plan to Thompson, and gave a copy to Leavitt; but we do not find that this plan, or a copy thereof, came into the possession of the Libbys. In 1890, Williams, under the direction of parties holding the Thompson interest, ran a line from his unfinished line of 1882 parallel with Stark line to the southwest corner of Irving's location, abandoning the northerly portion of the line run by him in 1882, or so much thereof as extended north of Irving's location. It is not claimed, however, that this work influences the standing of his line of 1882, for the reason that it was after the controversy had arisen, and that he proceeded ex parte, and unauthorized, in what he did in 1890, so far as concerns the supposed agreed line.

We have given the theory of the Glen Manufacturing Company as to an agreed line our most careful consideration, having in view, of course, the well-settled New Hampshire doctrine that in cases of disputed and uncertain boundaries an executed parol agreement establishing a dividing line between adjoining owners of real estate is conclusive upon the parties and all persons claiming under them. Applying this rule as to the binding force of executed parol agreements

to a division of land, even in cases where the necessary New Hampshire conditions of dispute or uncertainty exist, speaking generally, is somewhat exceptional, and we think a party relying upon a supposed agreed line which shall limit or extend the operation of a deed or grant of real estate should at least be required to establish a completely executed agreement and line by clear and unequivocal evidence, not only that the agreement was made, but that it was fully executed. The evidence in this case, we think, does not warrant such a finding. The work was left unfinished, and with considerable uncertainty as to the relation which the point of ending sustained to the southwest corner of Irving's location, the ultimate bound with which the surveyor was to connect his work. The fact that the parties left their attempt to make an agreed line unfinished cannot be supplied by considerations of equity. It remains unfinished and incomplete, and, therefore, like any other incomplete agreement, is not binding. The same views and the same findings dispose of the claim of the Glen Manufacturing Company in respect to this work as a completed survey under the terms of the deed, and we find as a matter of fact that the Williams line is not a controlling divisional line between the parties.

Now, as to the Gile line. This line was ex parte, but should not fail for that reason, provided it answers the calls of the deed. In the first place, we find that the Gile line was not laid upon the ground in accordance with the intention of the parties, as we gather such intention from the deed, aided by the situation and conduct of the parties. We have already found, in connection with the deed in question, that the parties did not contemplate going further north than the south line of Irving's location. The Gile line, therefore, is such a departure from the manifest intention of the parties that it must be found not to be in accordance with the calls of the deed.

Now, as to the merit of the measurements and calculation involved in Gile's survey. The deed contemplates a survey, and the character of the survey is necessarily involved in the construction of the deed which must be made with reference to the situation as disclosed by the evidence, including the character of the territory and the knowledge of the parties. Having in view these considerations, and determining this question as a question of law and fact, we think the survey intended calls for allowances for losses, which experience and observation show, inevitably and necessarily result in measuring wild lands under the conditions disclosed by the evidence in this case. Such allowances are, from the nature of the undertaking, somewhat discretionary, but are nevertheless necessary, in order to get the number of acres called for by the deed. At least a large part of the Gile measurements were made, not on a compass line, but on the lines of marked trees, which were not infrequently a little distance from the true line, thus involving short tangents and angles, and with an effort to level the chain over the uneven and precipitous surfaces without making the usual and necessary allowances; and, as a consequence, we think some loss of land must have resulted. One element of loss would come, as it would seem, from taking up too much of the required distance by measuring on the succession of short tangents

which resulted from angles in his line of measurement produced by running from tree to tree on varying courses, thus getting over too little land. In other words, a straight, horizontal line, which is the true and controlling line, would reach further, and include more land, than a line run under the method adopted by Gile; or, still again, to use a simple illustration, the Gile method was somewhat like the measurement of a chain where you get its length by measuring over and around angles which take up a certain per cent. of its reaching capacity, whereas, if the chain were to be used in measuring land or other surfaces, it should be straightened, and applied extento. Another element of loss would result from the failure to make necessary allowances over the uneven surfaces, for if you were to reduce the uneven surfaces to a level by cuts and fills, and measure upon a straight line on the level surface, the required distance would carry you further than the Gile measurement. Any deviation of the tape or chain from the true line, whether above or below the horizontal, or lateral from the straight line, however slight, in a degree retards the movement over the ground in the direction of the point on the face of the earth which the horizontal line calls for in order to give the area required by a calculation based upon the number of square rods necessary to make an acre of land. In measuring land under open, free, level, and unobstructed conditions, where the sight is unerring, the method of leveling the chain would probably be the best method for ascertaining the length of the horizontal line required. This is doubtless a true method under any conditions where deviations from a true horizontal line can be avoided; but our findings do not relate to such a situation or such conditions. The problem is quite different when the length of a horizontal line is to be ascertained over mountains and mountain gorges, where the chainman is constantly going over rising and descending ground, where the unevenness is sometimes slight and almost imperceptible, and again abrupt, where almost perpendicular ascents are to be overcome, to be succeeded by precipitous declivities in a thickly-wooded and rocky country, where the view is obstructed, and at least imperfect. Under such conditions, it is almost inevitable that the chain is rarely, if ever, at a true horizontal, and error is therefore insidiously, but constantly, accumulating, and, as a rule, is one way, and that way is in the direction of too much length in the line of measurement and too little land. At least the evidence and experience demonstrate that the inconvenience, difficulty, and oftentimes impossibility, of bringing the chain to a proper level, promote error, and that the resulting balance of error is unquestionably and decidedly in favor of the loss of land. If a line 10 miles in length were laid upon a level land surface by careful measurements, and two end lines were laid at right angles therewith on level surfaces, and connected by a second side line over an uneven mountain surface, the most careful and painstaking measurement with attempts to level the chain with the eye over the mountains involved in the second line would ordinarily, and perhaps universally, develop a longer line than the side line on the level ground. The horizontal side lines would, of course, be exactly the same, but the faulty method of measuring over the mountains would develop a fictitious length. The true line

would represent the true acreage, and the fictitious line would include a per cent. of fictitious acreage. Hence, where the acreage to be ascertained is calculated on paper upon the basis of required distances, and the measurements are all upon mountain surfaces, the method in question produces a per cent. of error and loss of land. We therefore think the method involved in the Gile survey was not the proper method for ascertaining the boundary and divisional line between the parties and the land conveyed, and upon all the evidence we find as a matter of fact that the Gile survey does not set off the 10,000 acres which the deed calls for. The testimony satisfies us that long observation and experience among practical surveyors in the locality in question has demonstrated that some reasonable allowance should be made, and ordinarily and customarily is made, for losses which inevitably and necessarily result in measuring land with a tape or chain in thickly-wooded, rough, and precipitous places. This is not to get more acreage than the deed or grant calls for, but to prevent undermeasurement, and to secure the nearest practical and approximate accuracy and exactness. Any other method would disturb and overthrow results and transactions based upon the experience and observations of many years. This is a method or rule of necessity established by experience. The allowances made necessary by the offsets to get around obstructions and by the impossibility of accurately leveling the chain or tape over uneven and precipitous territory are not gratuitous allowances of land, but compensatory allowances of land, supposed to be equal to the estimated error involved in the erroneously elongated line of measurement,—a somewhat inexact and uncertain process, but one involving a necessary element of discretion as an inherent part of the survey and measurement contemplated. The method is not adopted to get more land than the parties intended, or less than the parties intended, but to get the nearest practical approach to exactness and to the acreage called for by the deed. From the nature of the work, there can be no such practical result as absolute exactness. At least an attempt at absolute exactness would present a problem in engineering and surveying more difficult to solve than the parties intended. A more exact result might, perhaps, be reached by triangulation and the use of theodolitic or other nice processes known in engineering and surveying, but this would involve a degree of nicety not ordinarily intended in contemplated surveys of wild lands in the locality in question. The instrument commonly employed is the ordinary compass and chain, not the theodolite; and the method involves an ordinary compass line with careful measurements and reasonable allowance for losses, and this is the practical method intended by the parties, and for which the deed, under the circumstances of this case, calls. The same surveyor with this method, however, cannot measure a line nine or ten miles in length through a rough, wild country, and, removing all marks of such survey and measurement, make a second survey and measurement, reaching precisely the same result. From the necessities of the situation and undertaking, therefore, practical and reasonable exactness is the only result that can be expected. Of course, it goes without saying that, where absolute exactness is possible and reasonable under

the circumstances, such result is the one called for by the deed or grant; but, when this cannot be had, and was not expected, then the nearest practical approach to it is the intended and true result. Holding these views, we must find that the Gile survey, while unquestionably made with care and efforts at exactness under the method adopted, incloses less land than the deed calls for, and less than the parties intended.

In conclusion we find that neither party has established a divisional line, and that neither party is entitled to a verdict upon the evidence as it now stands.

Upon the foregoing findings of fact, we hold that the deed does not convey any land north of a line extended on the course of the southerly line of Irving's location. We also hold, upon the findings, that the deed operates as a conveyance of land between a line to be extended on the course of the south line of Irving's location and the lines of Dummer and Millsfield and Stark, and that the land conveyed extends far enough westerly to include 10,000 acres; and that the necessary line from the southwest corner of Irving's location to intersect a necessary line drawn from Stark parallel with the east line of Dummer and Millsfield, may and should be supplied in order to allow the deed to operate as the parties intended. *Land Co. v. Saunders*, 103 U. S. 316, 322; *Winnipisiogee Paper Co. v. New Hampshire Land Co.*, 59 Fed. 542, 547.

The Glen Manufacturing Company, in this trial, stands upon a supposed agreed line, rather than upon proof of a true line marking off the exact 10,000 acres in accordance with the deed; and, without determining the question whether it includes more or less than 10,000 acres, we hold that it is not an agreed line, or a completed survey under the deed, and therefore does not establish the extent of the grant or deed. *Bartlett v. Young*, 63 N. H. 265, which is the latest expression of the supreme court of New Hampshire on the subject of agreed real-estate lines, fully recognizes the idea that the agreement must be executed. This, as we understand it, means more than that the parol agreement must be executed so far as words are concerned. It means that there shall be performance under the agreement, if performance is contemplated. If the agreement is to run an agreed line, the line must be run. If there are no monuments, and the agreement is to establish corner-stone monuments, that must be done. In other words, the act or acts contemplated—the thing agreed to—must be executed. That is what is meant by executed parol agreements binding upon parties and their descendants in title to real estate. A rule of departure from this requirement would be fraught with more uncertainty, greater insecurity, and greater danger than could be foretold. The element that removes the agreement from the operative effect of the statute of frauds is not that the word-agreement is executed, but that the act affixing the agreed boundary to the land itself is executed. In one case it would be a naked parol agreement, and in the other a parol agreement, strengthened and executed by connecting it with the land by the erection of monuments which become a part of the land as physical and visible

boundaries. Placing a line upon a plan is not a compliance with the requirements of this rule. The rule that a deed is certain which can be made certain (*Corbett v. Norcross*, 35 N. H. 99; *Wells v. Iron Co.*, 47 N. H. 235, 239; *Land Co. v. Tilton*, 19 Fed. 73, 77), and that unsurveyed lands may be conveyed by a paper-plan allotment, is based upon the idea that the plan by express reference becomes a part of the deed itself. It is quite another thing where a party relies upon a plan not referred to by the deed, and not signed by the parties. The doctrine that a deed is certain which can be made certain does not apply to a plan not referred to in the deed, and one which is founded in naked parol; and the doctrine of executed agreed lines does not mean that agreements are executed which can be executed. The agreement, so far as it related to a line upon the ground from the southwest corner of Irving's location to Williams' west line, was wholly unexecuted, and to that extent rests in naked parol; and therefore, in any future controversy which should develop no line or boundary upon the ground, the only possible answer would be that the parties agreed a line should be run; and this answer that the agreement was to be executed would not bring it within the requirements of the law which gives force to executed parol agreements establishing real-estate boundaries.

The Weston Lumber Company stands upon an *ex parte* line which they say is a true line, and in respect to this we hold, upon the foregoing findings of fact—First, that the line is not the bound contemplated by the conveyance. This ruling is based upon the idea that the line is not laid upon the ground in conformity with the deed in this: that in going north of a line extended on the course of the south line of Irving's location, and to Columbia, it includes territory not intended to be conveyed.

And secondly, if the line extending northerly to Columbia line should, in any event, be held to answer the calls of the deed, then the question would come as to the area of land, and whether the line incloses the number of acres conveyed. Surveys and measurements, as applied to this question, are not absolute, but are competent evidence bearing upon the controverted question of quantity. The problem of ascertaining an unknown and unlocated exterior bound of a definite quantity of land when three of the exterior bounds, but no distances, are given, must be reasonably solved. In such a case, where the method adopted for the solution of the problem involves measurements of the given lines, and a survey and measure of the line to be ascertained and located, the question whether the method adopted was reasonable, and the question whether the particular surveys and measurements involved were reasonable, are questions of fact, which are to be found in the ordinary way upon the evidence in the case. The line called for by the deed is a straight, horizontal line, and the number of acres called for is 10,000, and the means employed for ascertaining this line and its length and the area of land, whether based upon allowances or the method of leveling the chain without allowances, must be reasonable, and the question of reasonableness is to be determined as a question of fact. The means of ascertaining the true horizontal line and its length necessarily involve an element of

discretion, but the means employed must always be fair, and the exercise of discretion always reasonable, under the circumstances of the particular survey and measurement. Reasonable exactness is, of course, required, in order to allow the deed to operate as the parties originally intended it should. The fact is found that the Gile line does not include 10,000 acres of land, so again, and upon this ground, we hold that this line is not the boundary line between the parties.

Under the New Hampshire rule, that a deed is certain which can be made certain, and that such a deed operates as a conveyance, the Glen Manufacturing Company holds a valid title to 10,000 acres of land limited on the west and north by the lines to which we have referred, and such lines exist in contemplation of law, although, upon the evidence and the findings, the whereabouts are not ascertained. The parties holding this deed are, upon the findings, in actual possession of at least some portion of the territory, and in constructive possession of all that the deed conveys; while the Weston Lumber Company, being in actual possession of some portion of the township of Odell, is in constructive possession of all that the Thompson deed does not cover. In each of the cases under consideration the burden is upon the plaintiff to show that the defendant has entered his close, and, failing to establish that his domain includes the territory on which the acts in question were committed, he fails in his proofs, and therefore cannot recover. The parties acted upon the idea (and probably correctly) that the obligation was upon the grantor to make the survey, and locate the 10,000 acres, thereby rendering the deed certain and operative upon a particular part of the township. The grantors of the Weston Lumber Company, having conveyed to Thompson, under whom the Glen Manufacturing Company claim, 10,000 acres of the township of Odell, have so commingled the interests by creating a joint or interdependent constructive possession that neither party can establish exclusive title to the locus in quo, and therefore neither party is entitled to recover in trespass until the deed is made certain by ascertaining the true location of the contemplated divisional line, and this is for the reason, not that neither has title, or that neither has trespassed, but for the reason that neither shows title, nor exclusive right of possession, to the disputed territory as against the other. In other words, neither supplies the burden of proof by showing the extent of his own territory or the limit of his adversary's territory. While the deed is upheld as a muniment of title to the 10,000 acres, the title or right of possession to the particular locus in question is left uncertain upon the proofs. Ordinarily, upon such findings and rulings as are here presented, judgment would pass for the defendant in each case, but, in view of the great length and expense of the trial, and of the holding that the divisional line exists as a matter of law, although incapable of ascertainment upon the proofs and findings, we are inclined to defer judgment to the end that the parties may agree upon a surveyor or surveyors to mark the boundary in accordance with the foregoing findings and the construction which we have given to the deed; and, in the event of the inability of the parties to so agree, we will consider a motion from either side directed to the appointment of a surveyor or surveyors for

that purpose upon consent, and, that failing, to open the case for further and additional evidence as to the whereabouts of the true divisional line, including, perhaps, evidence of a survey upon notice to the adverse party, to be considered in connection with the evidence already before us.

BROWN, District Judge (concurring). I concur in the above findings and rulings, and state certain reasons which have led to the conclusion that the methods of the measurement of the Gile line are such as would deprive the Glen Manufacturing Company of a substantial amount of the land to which under its deed it is entitled. The problem of the surveyor is to measure a line upwards of nine miles in length, through rough and mountainous country, by successive applications of a measuring instrument. A part of the process necessarily involves personal skill and judgment, since the complete operation of measurement includes an observer as well as measuring instruments. Observation must determine at each application of the instrument whether the application is correctly made, whether it is upon the true course, whether there is a departure in any direction from the true theoretical line. Whatever the instruments employed, however scientific the processes, they merely reduce, but do not eliminate, the elements of personal judgment and personal error. The importance of error is to be determined by the practical purpose in hand. At times it may be disregarded, at times compensation should be made for it. It seems to me that upon the evidence in this case there appears the necessity for some allowance or compensation for error in order to reach a result even practically correct. The evidence for the Glen Manufacturing Company is to the effect that in measuring wild lands by a chain or tape error always results, and that the error is invariably one way. Given two points at a considerable distance from each other, a line measured between them will always be longer than the true theoretical line. Errors of measurement consume distance, and the surveyor of an uneven surface covers with his measure a greater distance than the true line. If the sum of his successive measurements is relied upon to give the required length, his terminal will be located at a point on the ground at a less actual distance from the starting point than the correct terminal point. This is obviously so. As a straight line is sought, and as this is the shortest possible distance between two points, no irregularity in the contour of the surface over which the line is extended can shorten it. On the contrary, every elevation, every depression must count one way and only one way; i. e. to elongate the measured line over the true line. In a line of over nine miles in length through mountainous and heavily wooded country every obstacle in the true path, every rock, every mountain, every valley contributes error. Every angle of deviation made to avoid an obstacle adds error. To accept the measurement of the Gile line, in which no allowances for error were made, but which is simply the sum of successive measurements, we are forced to hold that the surveyor who made it had the unerring observation, judgment, and eyesight to keep the tape always upon the true course and true horizontal line. In my opinion it is not satisfactorily proved

that the Gile line was run upon a more accurate or more scientific method than the older lines, which his measurements increase in length from 6½ to 10 per cent., thereby augmenting the land area about 17 per cent. The method lacked what is known as a correction for the personal error of the observer; what in measuring wild lands may be said to be a lack of correction of the personal error under conditions which make error inevitable. The evidence as to the Gile line discloses a confident assumption of accuracy under conditions which do not permit of it. In one respect, at least, the older lines seem to me more scientific than the Gile line, namely, in a recognition of the existence of error, and in an attempt to rectify it. One of the witnesses in favor of the Gile line ventured the opinion that deviations in the surface tend to balance each other. This is clearly not so. As we have seen, the current of error is all in one direction, and there is no tendency towards a correction. On the other hand, it may well be true that where allowances are made by men of experience, errors of judgment can hardly be all one way, and that in a long series of judgments there will be an average of practical accuracy. Without passing, however, upon the accuracy of the older surveys, since under the findings it is unnecessary to do so, I concur in the findings that the Gile line is not located according to the calls of the deed, and is based upon an imperfect method of measurement.

UNITED STATES v. GAY.

(Circuit Court, D. Indiana. April 30, 1897.)

No. 9,230.

1. IMMIGRATION—CONTRACT LABOR LAWS.

The acts of February 26, 1885, and March 3, 1891, are highly penal, and must be so construed as to bring within their condemnation only those who are shown by direct and positive averments to be embraced within their terms. They are to be construed in the light of the evil to be remedied, and are limited to cases in which the assisted immigrant is brought into this country under a contract to perform manual labor or service.

2. SAME—PLEADING.

In an action for the penalty for violation of these laws, a declaration is insufficient which fails to show the character of the labor which the immigrant was to perform, or the terms of the contract, at least in substance, under which he came to this country, and which fails to allege definitely that he actually came here pursuant to the contract, or to set forth the acts done by the defendant to assist or procure his immigration.

Frank B. Burke, for the United States.
Miller, Winter & Elam, for defendant.

BAKER, District Judge. This is an action to recover the penalty of \$1,000, prescribed for the importation of aliens under contract to perform labor and service in this country, in violation of the acts of February 26, 1885, and March 3, 1891 (1 Supp. Rev. St. pp. 479, 934).

The declaration, omitting the caption, is as follows:

"The plaintiff complains of the defendant, and says that the defendant is a resident of the city of Indianapolis, in the state of Indiana, and that heretofore, to wit, on the 20th day of July, 1893, the said defendant did assist and encourage the importation and migration of a certain alien and foreigner into the United States, to wit, one James H. Henderson, who was then and there a native of Scotland and a subject of Great Britain, by promise of employment, through advertisements printed and published in the city of Glasgow, Scotland, and under contract and agreement made previous to the importation and migration of said alien and foreigner, and previous to his becoming a resident and citizen of the United States, by the defendant with the said James H. Henderson, by which said contract and agreement the said James H. Henderson was to perform labor and service in the United States for the sum of twelve dollars per week, and the said defendant further agreed to refund the passage money and cost of transportation of the said James H. Henderson from Scotland to the United States; wherefore plaintiff says the defendant has become liable to a penalty of one thousand dollars, for which sum plaintiff demands judgment against defendant, and for all other proper relief."

To this declaration the defendant has interposed a demurrer, for insufficiency of facts to constitute a cause of action.

The statute in question is highly penal, and must be so construed as to bring within its condemnation only those who are shown by the direct and positive averments of the declaration to be embraced within the terms of the law. It will not be so construed as to include cases which, although within the letter, are not within the spirit of the law. It must be construed in the light of the evil which it was intended to remedy, which, as is well known, was the importation of manual laborers under contract previously entered into, at rates of wages with which our own laboring classes could not compete without compelling them to submit to conditions of life to which they were unaccustomed. *U. S. v. Laws*, 163 U. S. 258, 16 Sup. Ct. 998; *Church of Holy Trinity v. U. S.*, 143 U. S. 457, 12 Sup. Ct. 511; *U. S. v. Craig*, 28 Fed. 795. It is settled by these and other cases that the statute must be construed as limited to cases where the assisted immigrant was brought into this country under a contract to perform "manual labor or service." The declaration does not state the character of the labor or service which the immigrant was under contract to perform, and hence fails to bring the case within the terms of the statute, as construed by the supreme court. The court cannot indulge the presumption that the labor or service which the immigrant was under contract to perform was manual, in the absence of such averment. The declaration does not set out the advertisements, or otherwise state the terms of the contract or agreement alleged to have been entered into. The pleader has contented himself with a mere statement of conclusions, without stating either the advertisements or contract in *hæc verba*, or even attempting to set forth the substance of either. At least, the substance of the advertisements and contract should be set out to enable the court to determine whether they bring the defendant within the condemnation of the statute. *U. S. v. Edgar*, 45 Fed. 44. There is no direct allegation that the immigrant named in the declaration actually came to this country pursuant to the alleged contract for the purpose of performing manual labor or service. Such an averment is essential. *U. S. v. Craig*, 28 Fed. 795, 799. There is no statement of the acts done by the defendant to assist or procure the immigration into this country of the person

named in the declaration. It is not averred that the defendant prepaid the expenses of his passage. It is averred that the defendant agreed to refund the passage money and cost of transportation from Scotland to the United States, but it fails to allege that the agreement to refund was made before the person alleged to have been assisted came to this country. The court is not at liberty to infer that the agreement to refund was made before the immigrant came here. Indeed, it can only be gathered by inference that the alleged immigrant ever came to this country. The declaration is clearly insufficient, and the demurrer is sustained, with leave to amend in 10 days; otherwise, the case will be dismissed.

MACKAYE v. MALLORY.

(Circuit Court, S. D. New York. April 10, 1897.)

1. EQUITY PRACTICE—DISMISSAL FOR WANT OF PROSECUTION.

A motion by complainant to dismiss for want of prosecution will not be granted where it appears that defendant has taken testimony in support of his defense and of his claim on his cross bill, and that the next step in the orderly disposition of the cause is one to be taken by complainant himself, namely, the taking of testimony in rebuttal of the defense to the original bill and in answer to the testimony in support of the cross bill.

2. SAME.

A delay by complainant of 13 years after joinder of issue without taking any testimony gives defendant a right to a dismissal; and this right is not affected by the fact that complainant then died, and his administratrix obtained an order of revivor, for the latter takes the litigation in the same condition in which the deceased left it.

Lewis Cass Ledgard, for the motion.

E. W. Taylor, opposed.

LACOMBE, Circuit Judge. It appears that in the suit commenced in this court by Mallory upon original bill, and in which Mackaye had filed a cross bill, the latter had taken testimony and rested, both in his defense to the original bill and in his proof of the averments of his cross bill. Thereupon the time for Mallory to take his testimony was by stipulation extended for a period as great as had been allowed Mackaye for the putting in of his testimony, namely, about a year and a half, and during the time thus allowed Mallory for completing his proof Mackaye was to be produced for cross-examination when requested by complainant. Nothing more was done in the ensuing 10 or 12 years down to Mackaye's death, but during that whole period it rested with the complainant to take the next step. He might either have taken and closed his proofs, or have notified the other side that he elected to take none, and thereupon, after a sufficient lapse of time, have made motion to dismiss the cross bill for failure to prosecute; but, so long as the next step to be taken in the action was one to be taken by him, he was in no position to move a dismissal on the ground that no steps were being taken to close the case, and he is in no better position to-day than he was at Mackaye's death, since

the next step to be taken in the orderly disposition of the cause is still, as it was then, the taking of complainant's proofs in rebuttal of the defense to the original bill, and in answer to the testimony taken in support of the cross bill. The present motion in this suit must therefore be denied.

In the suit removed from the state court the situation is different. No evidence whatever has been taken by either party. There is a statement in the affidavit of Mackaye's former counsel that he expected that the testimony in the cross-bill suit would be used in this suit, and that there was some conversation or understanding about it. But his recollection on this point seems to be rather vague, and there is no pretense that there ever was any written stipulation to that effect, or any oral arrangement spread upon the record. We have, then, a case where issue was joined in December, 1881, and no testimony taken by the complainant in support of his bill down to the day of his death, in February, 1894. Under these circumstances defendants were clearly entitled to dismiss the action for failure to prosecute, and there is no reason for holding that they have lost their right to make such motion because his administratrix has subsequently obtained an order of revivor. She takes up the litigation in the condition in which deceased left it, except so far as any laches of her own may have still further embarrassed it. Defendants in this suit are therefore entitled to an order dismissing the complaint for failure to prosecute.

DELLS LUMBER CO. v. ERICKSON.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 359.

1. MASTER AND SERVANT—QUESTION FOR JURY.

B. had authority and was accustomed to hire and discharge workmen employed in a planing mill, and there were other circumstances tending to show that he exercised and had the authority of a superintendent. E., whom he had hired, continued in the service under his promise to repair machinery of which complaint was made, and was injured. There was another employé who determined what repairs should be made. *Held*, that it was a question for the jury, if the point was controlling, whether B. was exceeding his powers when persuading E. to continue in the service.

2. SAME—PROMISE TO REPAIR.

Where the master is negligent in furnishing defective machinery, and one who continues in the service under a promise by another servant to repair is injured, it is immaterial whether the servant making the promise had authority to do so, provided the injured servant, upon reasonable grounds, supposed him to have.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

V. W. James and C. Porter Johnson, for plaintiff in error.

T. F. Frawley and A. C. Larson, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. John Erickson, the defendant in error, recovered judgment against the Dells Lumber Company, plaintiff in error, for personal injuries sustained in the employment of that company while operating a matcher in the company's planing mill at Eau Claire, Wis.,—his foot having been caught and crushed between pulleys under that end of the machine near which he was required to be when operating it. The gist of the declaration is that the negligence of the company which caused the injury consisted in omitting to equip the matcher with a spring to hold the boards being matched against the guides, and in omitting to cover or guard the pulleys; that by reason of the absence of the spring the plaintiff was compelled to press with all his strength against the boards to keep them moving in a straight line under the knives; that, while so engaged, a board broke under his hand, causing him to fall and his foot to be caught between the revolving pulleys. When the evidence was all in, the plaintiff in error moved the court to direct a verdict in its favor, but the motion was denied. Whether that ruling was right is the chief question in the case, and its determination depends upon the inquiry whether the defendant in error should be regarded as having assumed the risk of injury from the unguarded pulleys. That the omission to cover the pulleys, or in some mode to guard the operator of the machine against danger from them, was a breach of the company's duty to provide its employé a safe place in which to work is too clear for controversy; but it is contended that Erickson had become aware of the danger, and that by continuing in the service he assumed the risk. The accident occurred on Tuesday, and it appears that, on the Saturday next preceding, Erickson complained to John Bonk, whom he supposed to be the superintendent of the mill, about the condition of the matcher, and declared his purpose to quit work unless a spring was supplied and the pulleys covered, whereupon Bonk requested him not to quit, and promised that the spring should be supplied and the pulleys guarded. The promise, it is insisted, was not binding upon the company, and was unavailing to Erickson as an excuse for continuing to work under conditions of known danger, because Charles Charlesson, the foreman in the mill, was the one who had charge of the machinery, and determined what repairs and alterations should be made, while Bonk, instead of being the superintendent, was only a fellow servant of other employés, and possessed of no authority to promise that repairs or additions to the machinery of the mill should be made. Erickson testified that he believed Bonk to be the superintendent, and other witnesses asserted a like understanding. It is undisputed that Bonk had authority and was accustomed to hire and discharge the workmen employed in the planing mill. He hired Erickson and fixed his wages, as he did the wages of others, and there are other circumstances in evidence which tended to show that he exercised and had the authority of a superintendent. It was therefore a question for the jury, if the point were controlling, whether he was exceeding his powers when persuading Erickson to continue in a service for which, if he quit, another must have been employed. We are of opinion, however, that the important inquiry was not so much what authority did Bonk really possess, as what

Erickson supposed him to have. If the danger to be avoided had been a newly-developed one, of which the company was without notice, as in the case cited of *Railway Co. v. Benford* (Tex. Sup.) 15 S. W. 561, where the injury was caused by the going out of an electric light, or in *Holmes v. Clarke*, 6 Hurl. & N. 359, where the fence about dangerous machinery had broken after the injured servant had taken employment, the rule contended for would not be unreasonable,—that the servant continuing to work in the face of the new danger should be deemed to assume the risk, regardless of any promise of a fellow servant, or of any unauthorized person, to remove the source of danger. In such a case there would be lacking an essential element of liability on the part of the master,—notice of the existence of the condition of danger, or such lapse of time as would be equivalent to notice. See *Railroad Co. v. Kenley* (Tenn. Sup.) 21 S. W. 326. In this case there is no question of notice. The ground of the master's liability existed from the beginning, and the sole question is whether the servant, who otherwise would be indisputably entitled to indemnity, must be declared to have consented to take upon himself the consequences of the master's known delinquency. There is no reason for imputing to him an intention to do so. Believing, as he reasonably might, that Bonk had all the authority which he assumed to have, his remaining in the dangerous service was an act of the same quality as if his belief had been well founded. His excuse for incurring the risk of further work upon the machine, viewed with reference to his own conduct, is no less meritorious than if the promise to put a guard about the pulleys had come from Charlesson, or some other of unquestioned authority to make it. The dictates of ordinary prudence, of course, are not to be disregarded, and no promise, by whomsoever made, can justify the incurring of imminent and obvious risks; but while the possibility of injury from the exposed pulleys here in question was obvious, and the company's responsibility for failing to provide a suitable guard clear, the danger was not imminent, and under ordinary circumstances was easily avoided, if the operator was watchful. A like hurt, or serious injury of any kind, had never been received before by any one engaged in operating the machine; and it was therefore not a grossly reckless, or even plainly imprudent, act on the part of Erickson to resume work upon the machine on Tuesday, though he found the pulleys yet unguarded, and no spring provided to keep the boards against the guides. To say the least, the question whether he should be deemed to have assumed the risk involved, or to have been lacking in due care for his own safety, was properly left to the determination of the jury. It was manifestly a question for the jury whether the defendant in error was guilty of contributory negligence by reason of the manner in which he held the particular board which he was feeding to the machine when the accident occurred. It follows, too, from what has been said, that the court did not err in refusing to instruct that unless Bonk was in charge of the planing mill "so as to represent the defendant," the complaint made to him was a complaint to a fellow servant merely, and not binding on the master. The exceptions reserved to the introduction of evidence present no question of importance. The judgment of the circuit court is affirmed.

WRIGHT v. SOUTHERN RY. CO. et al.

(Circuit Court, W. D. North Carolina. April 30, 1897.)

1. MASTER AND SERVANT—NEGLIGENCE OF FELLOW SERVANTS.

A railroad employé, who starts upon a trip on a hand car on his own business or pleasure, assumes the risk of injury from a fast mail train, which he knows to be due, and cannot recover against the company for injury received while attempting, pursuant to an order of the foreman, to get the hand car off the track in the immediate presence of the approaching train.

2. SAME—CITY ORDINANCES REGULATING SPEED OF TRAINS.

City ordinances limiting the speed of railway trains are not for the protection of railway employés, but merely for that of persons crossing its tracks on the streets and highways.

3. SAME—FELLOW SERVANTS.

The conductor and engineer of a railway train which collides with a hand car are fellow servants of an employé riding upon the car so that he cannot recover for an injury resulting from their negligence.

4. SAME—STATE STATUTES—RETROACTIVE EFFECT.

State statutes modifying the common-law doctrines recognized by the federal courts in regard to fellow servants will not be construed to have a retroactive effect in the absence of express provision to that effect.

5. PRACTICE—NOLLE PROSEQUI.

Leave to enter a nolle prosequi as to certain defendants will not be granted after the court has rendered an opinion granting a motion to direct a verdict for defendants, though such verdict has not yet been formally rendered.

B. F. Long and L. S. Overmon, for plaintiff.

Charles Price, G. F. Bason, and L. C. Caldwell, for defendants.

DICK, District Judge. (A civil action to recover damages for the death of plaintiff's intestate by reason of the negligence of the defendant companies.) At the close of the plaintiff's case, the counsel of defendants declined to introduce evidence in defense, and made a motion to the court for an instruction to the jury to render a verdict for the defendants on the issues of fact submitted to them. This motion is, in substance, a demurrer to the evidence, and admits the truth of the matters of fact shown by the testimony. As there is no conflict in the evidence of plaintiff, the question of negligence on the part of defendants is a matter of law to be determined by the court.

The arguments of counsel were elaborate and forcible. Many authorities were cited, and diversities and conflicts of decisions were pointed out and commented upon. The diversities of many of these decisions resulted from the peculiar facts in each particular case. Notwithstanding the confusion in cases involving the liability of railroad companies to employés for injuries caused by the negligence of other employés, there are some principles well settled by numerous decisions of the state and federal courts. A person who enters into the service of a railway company impliedly assumes the risks and hazards usually incident to such employment, including liability to injury caused by the negligence of a fellow servant; and that he will exercise ordinary care to protect himself from obvious danger and injury while engaged in his employment. A railway company, as employer, impliedly engages with an employé that the place in which

he is to work and the tools and machinery which are furnished him shall be reasonably proper and safe, and be kept in such condition during the time of employment, and that he shall be associated with suitable, competent, and sufficient fellow servants. A failure to properly discharge these obligations and duties renders the company liable for any injury resulting therefrom to an employé who may be injured without any contributory negligence on his part. This is a positive obligation on the company, and must be fully performed. If the company intrusts the performance of these special duties to an employé, who fails, by negligence or otherwise, to discharge them properly, he is a representative of the company, and not a fellow servant of another employé who may sustain consequent injury. When a railway company has once complied with its positive and implied obligations to its employés, and then exercises due care and diligence in such matters, it is not responsible for subsequent defects unless it has had actual or constructive knowledge of such defects, and reasonable opportunity to supply the proper remedy. Constructive knowledge will be implied if defects are obvious to ordinary inspection, or have existed for an unreasonable time. There are separate and distinctive departments in railway service in which employés are engaged in different lines of employment, but in this case it is not necessary to consider questions of law as to the relations of employés engaged in these separate and distinct departments, as all the parties connected with the occurrence causing the injury were engaged in the department for the safe, prompt, and successful operation of the business of the railway company in the transportation of freights and passengers.

There are some differences of decision between the supreme court of this state and the supreme court of the United States as to the complex and unsatisfactory doctrines of fellow servants which have so frequently been subjects of discussion in the courts and in state legislatures. The counsel of plaintiff earnestly insisted that the contract of employment between the plaintiff's intestate and the defendant company was made and the service was rendered in this state, and that the construction of the terms of the contract and the legal implication arising from the employment should be in accordance with the laws of this state, where the cause of action arose. In *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, the court expressly decided that the question is not one of local law, to be settled by the decisions of the highest court of the state in which the cause of action arises; but is one of general law, to be determined by reference to all of the authorities, and a consideration of the principles underlying the relations of master and servant. In *Finley v. Railroad Co.*, 59 Fed. 419, I attempted to distinguish the facts and principles involved in the case on trial from those presented in *Railroad Co. v. Baugh*, and follow the decision of the supreme court of this state in *Mason v. Railroad Co.*, 111 N. C. 482, 16 S. E. 698. The circuit court of appeals overruled my views of the law of the case. *Railroad Co. v. Finley*, 12 C. C. A. 595, 63 Fed. 228. I now feel constrained to strictly observe the

positive decisions of United States appellate courts, clearly expressed in learned and elaborate opinions.

The facts in the case now before us on trial are few and simple, as there is no conflict, and only slight and immaterial diversity, in the testimony. The deceased, at the time the injury was sustained, was not engaged in the actual service of the company at the time and place of his usual employment; and his mode of transportation was controlled by himself and fellow servants under well-known circumstances of danger and hazard. He had gone to Salisbury, to receive payment of his wages, and was detained until about 9 o'clock at night. He was desirous of attending a social party at a place near the railway about five miles distant. Before he started on the hand car, he had made inquiry at the station, and knew that the fast mail train was due at Salisbury, and was behind the schedule time of arrival. In his daily business of repairing the track he was constantly exposed to the danger of passing trains, and well knew the hazard of entering upon the track with a hand car when a fast train was due and expected, and had the right of way. His conduct in going upon the hand car with full knowledge of the peril may well be held to have been a voluntary assumption of the risk of injury. When he saw the headlight of the rapidly approaching mail train, he stopped the hand car, and he and his fellow servants got off in safety, and the others escaped injury. His attempt to remove the hand car from the rails was the proximate cause of the disaster. This attempt was made in obedience to a hasty request or order of the section foreman to "save the hand car." In the face of such obvious and imminent danger he was under no obligation to obey the impulsive order of the foreman. He did not exercise reasonable care and caution to secure safety, and his hazardous attempt, under the circumstances, may well be held to be contributory negligence. Even if he thought that he was bound to obey the order, the act of the section foreman was the negligence of a suitable and competent fellow servant in the same line of employment under a common master. *Kirk v. Railroad Co.*, 94 N. C. 625; *Thom v. Pittard*, 10 C. C. A. 352, 62 Fed. 232; *Coulson v. Leonard*, 77 Fed. 538; *Railroad Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269.

It was insisted by counsel of plaintiff that the injury was caused by the negligence of the conductor and engineer of the mail train in not ringing the bell at crossings, and running at a greater rate of speed than was allowed by an ordinance of the city of Salisbury. The rule and regulation for ringing the bell at crossings are intended to give notice to persons passing along the highway, and enable them to avoid danger. The right of a railway train to pass over its track is paramount, but persons have a right to pass over crossings made for highways at suitable times and in proper manner, and, if any injury results to a careful and observant traveler by failure to ring the bell of a passing train, the company would be responsible in damages sustained. The ordinance of the city of Salisbury limiting the rate of speed of passing railway trains was intended to guard against danger and injury to citizens pass-

ing along or across the track for their pleasure or business, and not for the protection of railroad employes, who may well be presumed to know their duties and dangers. But, conceding that the conductor and engineer of the mail train were guilty of negligence in the matters mentioned, they were fellow servants of the deceased, engaged in the same common employment of operating the railway, and securing the safe and prompt passage of trains on the track. State and federal courts have made decisions announcing the doctrine that a conductor, having exclusive control of the management of a train, is a vice principal in relation to other employes of the company, subject to his orders, and acting under him on the same train. As to other employes in the operating department of the company who are not under his orders and control, he is a fellow servant in such a sense as exempts the railroad company from liability for an injury caused by his negligence. *Mason v. Railroad Co.*, 114 N. C. 718, 19 S. E. 362; *Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983.

The counsel of plaintiff, in their argument, called the attention of the court to the recent statute of this state changing and modifying the legal doctrines in regard to fellow servants established in the federal courts and some state courts by judicial decisions founded upon the general principles of the common law. They confidently insisted that, as such statute was manifestly remedial in its nature, and conformed in some degree to the law on the subject announced by the supreme court of this state, it should be construed to have a retroactive effect in this case, at least to the extent of carrying into application the principles of the common law as declared by the supreme court of the state as to the relations of fellow servants. The statute may be expedient, just, and salutary in its objects and purposes, and it shows a manifest legislative intent to remedy what was regarded as existing evils arising from extra state judicial decisions; but, as the statute contains no express provision for retrospective operation, I must conclude to observe the general and sound rule for the construction of statutes, and give this state statute only prospective operation. I may well presume that, if the state legislature had intended to make this important statute retroactive, the purpose would have been clearly, directly, and positively expressed in the body of the statute. If the legislature, in express terms, had given this statute a retrospective operation, then questions of law as to its constitutionality would have been presented to the courts. I will not consider such questions further than to say that, in my opinion, a retrospective operation of the statute in this case would clearly and injuriously affect vested rights acquired by contract, and impose new liabilities, which were not in existence, and were not contemplated by the parties, when they entered into the relation of master and servant for the operation of the railway. At the time this cause of action arose the nonresident corporation defendant was entitled by the laws of the United States to have its obligations, duties, and liabilities passed upon in a federal court, and be

determined by the principles of law declared and established by the supreme court of the United States.

Upon careful consideration of the questions of law and fact involved in this case I am of opinion that the defendants are entitled to an instruction to the jury to render a verdict in their favor on the issues submitted to them.

After the opinion of the court was announced, but before the verdict was formally rendered and entered of record, the counsel of plaintiff asked leave to enter of record a nolle prosequi as to the North Carolina Railroad, defendant. In the course of their argument they stated that plaintiff sought no verdict, and would not further prosecute the suit, as to said defendant, but no leave was asked to enter a nolle prosequi of record. The motion was disallowed upon the ground that it was not made in apt time, as the announcement of the opinion of the court in this case was equivalent to a rendered verdict.

CITY OF LA CROSSE v. CAMERON.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 100.

1. LIMITATION—ADVERSE POSSESSION—COLOR OF TITLE.

Under Rev. St. Wis. 1878, § 4211, providing that possession of land shall be deemed adverse, for the purposes of limitation, where the occupant entered "under claim of title, exclusive of any other right, founding such claim upon some written instrument," an instrument is sufficient to give color of title however defective its execution or acknowledgment, and however insufficient upon its face to convey title, provided it purports to convey title and pretends conformity to the law.

2. SAME.

Though the possession, to be adverse, is required by the statute to be "exclusive of any other right," title to an estate which is less than the fee may be acquired by adverse possession, provided the claim thereto is exclusive of every other right to the same estate, and therefore a city's possession of land under an instrument purporting to dedicate it as a "public square" may be adverse as to the right claimed, though the right of another to the fee be recognized by the city.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

This suit is in ejectment by Daniel Cameron, plaintiff below, defendant in error here, brought on the 3d day of February, 1890, to recover of the city of La Crosse the possession of an undivided five-sixths of certain premises in the city of La Crosse.

The defendant below pleaded: (1) A denial of the plaintiff's title; (2) that the land demanded was dedicated to public use as a public square by a plat made and recorded by the owners of the land in the year 1851, accepted by the public, and ever thereafter so used to the commencement of the action; (3) twenty years' continuous use and occupation by the defendant prior to the suit; (4) that neither the plaintiff nor his grantors were in possession of the premises demanded, or any part thereof, within 20 years before the commencement of the suit, but that the defendant, during 20 years and more before the suit, held the land in trust for the public, and for the uses and purposes of the public square, and exclusive of any other right; (5) that the defendant entered into

possession of the demanded premises under a claim of title thereto exclusive of any other right, founding such claim upon a certain plat known as "C. and F. J. Dunn, H. L. Dousman, and Peter Cameron's Addition to the Town of La Crosse," recorded in the office of the register of deeds of La Crosse on the 19th day of November, 1851, in volume 1 of Deeds, on page 165, upon which plat the demanded premises are described, marked, and designated by the words "Public Square" in writing thereon, and that they had been in continuous occupation and possession of the premises of the defendant for 10 years and more last past before the suit under such claim of title by virtue of that plat and exclusive of any other right; and (6) the general issue.

The premises in question are part of fractional lot 1 in section 8, township 15 N., of range 7 W., in La Crosse county, and otherwise described as the "North half of the northeast quarter" of that section. This fractional lot 1 was patented by the United States to Peter Cameron, of La Crosse, who on May 10, 1850, conveyed an undivided one-half thereof to Francis J. Dunn, Charles Dunn, and Hercules L. Dousman. By deed dated September 18, 1850, recorded November 19, 1851, Peter Cameron conveyed the other undivided one-half to his brother, Daniel Cameron, the defendant in error. On September 11, 1851, Daniel Cameron executed to his brother, Peter, a power of attorney, by which he authorized his brother to execute deeds of partition to his co-tenants, and to receive like deeds from them before or after such partition, and in conjunction with his co-tenants to plat and lay off the whole or any part of the tract into lots, and in so doing to make such reservation or reservations thereof "for public streets, alleys, and landings, and for charitable, religious, and educational purposes as he, or he and they, shall think fit and proper," to sell and convey for such purposes and upon such consideration as he may deem proper all the interest of his principal in the tract or the village lots if platted. Peter Cameron united with the Duns and Dousmans in platting this fractional lot 1 into lots. The plat was executed on the 17th day of November, 1851. It is entitled "C. and F. J. Dunn, H. L. Dousman, and Peter Cameron's Addition to the Town of La Crosse." The surveyor's certificate, dated November 6, 1851, recites that he surveyed the property for C. and F. J. Dunn, H. L. Dousman, and Peter Cameron. Following that certificate is this certificate of acknowledgment:

"State of Wisconsin, La Crosse County—ss.:

"We, Francis J. Dunn, Charles Dunn, and Daniel Cameron, by Peter Cameron, his attorney in fact, do hereby acknowledge the annexed plot of our addition to the town of La Crosse, in said county, as and for our act and deed, for the uses and purposes expressed on the same and contemplated by the law authorizing the laying out of towns and platting and recording the same."

This certificate was dated the 17th day of November, 1851, and was executed by the parties mentioned under their respective hands and seals; the execution by Daniel Cameron being "Daniel Cameron, by Peter Cameron, His Attorney in Fact."

This certificate is followed by another certificate by a notary public, which is as follows:

"State of Wisconsin, Crawford County—ss.:

"This seventeenth day of November, 1851, personally came before the undersigned, notary public in and for said county of Crawford, in the state of Wisconsin, Hercules L. Dousman, Francis J. Dunn, Charles Dunn, and Peter Cameron, attorney in fact for Daniel Cameron, known to me as the identical persons who have laid out the addition to the town of La Crosse and made the annexed plat thereof, and the persons who have signed and sealed the above acknowledgment thereof, and acknowledged the annexed said plat as and for their act and deed, for the uses and purposes expressed on the same and contemplated by the law authorizing the laying out of towns and platting and recording the same, and desire that the same should be certified and made public preparatory to recording the same. In testimony whereof I have hereunto set my hand and notarial seal at Prairie du Chien in said county the day and year last aforesaid.

"[Official Seal.]

D. H. Johnson,

"Notary Public, Crawford County, Wis."

This plat and the certificates were recorded in the office of the register of deeds of La Crosse county, in volume 1 of Deeds, on pages 164 and 165, on November 19, 1851.

On the date of such acknowledgment, November 17, 1851, the Dunns, Dousman, and Daniel Cameron, by Peter Cameron, his attorney in fact, executed to each other deeds of partition; Daniel Cameron releasing to Dousman and the Dunns 84 lots and the others releasing to Daniel Cameron 81 lots. These deeds conveyed all the defined and numbered lots upon the plat, "according to the plat laid out and recorded by Dousman, Francis J. and Charles Dunn, and Cameron." There were also given in evidence 24 deeds, which were severally executed by Daniel Cameron, the plaintiff below, between January 13, 1857, and January 25, 1890, all of which conveyed described lots in Dunn, Dousman and Cameron's addition to La Crosse, "according to the plat of said addition now of record in the office of the register of deeds in and for said county of La Crosse."

The principal contention of fact touching the plat in question is with respect to the designation thereon of the demanded premises. The plaintiff below contended that upon the plat the premises in controversy were left without exterior lines, were not divided into lots, and had no designation upon them. The defendant below contended that the premises upon the plat were left without exterior lines, and were undivided into lots, and had written across the space the words "Public Square." The record of the plat in volume 1 of Deeds, which was introduced in evidence at the trial, shows that upon such record exterior lines had been drawn around this space, and other lines produced, corresponding to the alleys through the blocks in the plat, and that they had been erased, and the words "Public Square" written across the space, and evidence was given tending to prove that these lines were drawn through misprision, and were so drawn and erased at the time of the copying of the plat in volume 1 of Deeds, and that the words "Public Square" were written at the same time, in the same handwriting and with the same ink as the other writings on record; but upon that subject there was dispute. It was also proven that before the month of June, 1858, there was in the office of the register of deeds of La Crosse county no special book provided for recording plats, and that plats left for record prior to that time were transcribed in the books of deeds, or kept in a drawer in the office. On June 5, 1858, the county of La Crosse purchased of John A. Walker, the then register of deeds, a book prepared by him of the plats which had theretofore been recorded or filed in that office. Such book was thereafter kept in the register's office and denominated "Book 1 of Plats," and certified copies of the records of plats were thereafter made from that book as from an original record. This book of plats, made in 1858, shows the plat of Dunn, Dousman & Cameron's addition without the words "Public Square" on the north half of block 15, being the demanded premises. The plat is designated in this book as "C. and F. J. Dunn, H. L. Dousman, and Peter Cameron's Addition to the Town of La Crosse." The evidence tended to show that the record of the plat in the book of plats was copied from the earlier record in volume 1 of Deeds, and is not a new and independent record copied from the original plat, and it was left uncertain at what time the original plat was taken from the office of the register; but the evidence tended to show that such original plat had, before the suit, been destroyed in a fire. The property in question has never been assessed by the city of La Crosse, or taxed for any general or special tax since the year 1851, and has been left unlisted and undescribed upon all assessment rolls and tax lists of the city, except for certain years, in which the premises were entered upon such assessment rolls and designated thereon, either as a "public square" or as a "park," and were not valued or assessed in any such year. In the year 1867 the common council of the city refused permission for the use of the premises as a baseball ground, and in the year 1868 caused certain filling to be done upon the premises. In the year 1870 the common council caused the removal of certain fences which were alleged to encroach upon the demanded premises. In the same year the city laid sidewalks upon Fourth and Fifth streets adjoining the land in question, and graded both of the streets, the expense thereof being paid out of the general fund of the city. In the year 1871 the premises were graded, leveled, and

fenced, and in the year 1872, at the expense of the city, trees were set out upon the premises, and are now growing thereon, a band stand was erected, and thereafter and continuously down to the time of this suit the premises had been looked after, improved, grass sown, and trees trimmed and watered under the authority of and at the expense of the city, and the premises have been used as a public square or park.

The defendant below requested the court to instruct the jury as follows: "If you find, from the evidence, that the defendant, the city of La Crosse, in or about the year 1871, entered into possession of the premises described in the complaint under a claim of title exclusive of any other right, founding such claim upon the recorded plat contained in volume 1 of Deeds, pages 164, 165, as being a conveyance of the premises, protected the same by a substantial inclosure, and has been in continuous occupation and possession of these premises, and usually cultivated and improved them for and during 10 years prior to February 3, 1890, then your verdict should be for the defendant." This instruction was refused by the court, and an exception to such ruling saved, and such refusal is assigned for error.

The court charged the jury upon this subject as follows: "Another question of much importance has been argued, which is whether the 10-years statute of limitation provided for by the statutes of Wisconsin can be pleaded in bar of the action. That statute, in substance, is that when the occupant, or those under whom he claims, entered into possession of any premises under claim of title, exclusive of any other right, founding such claim upon some written instrument as being a conveyance of the premises in question, the premises shall be deemed to have been held adversely. In such case the action to recover must be brought within 10 years. The evidence shows that the city fenced up this property, built sidewalks, graded, and planted trees in 1871, and occupied it as a public square and park continuously up to 1890,—a period of about 18 or 19 years; so that, if the 10-year limitation is applicable to the case, it should be submitted to the jury whether the city has not held the land adversely to the plaintiff 10 years immediately preceding the commencement of the action. The question I have found one of much difficulty, and upon the consideration I have been able to give it I cannot say that it is free from doubt. Still the best judgment I have been able to form is that the instrument under which the city went into possession, claiming title, is not one giving color of title and upon which this statute would run. 'Color of title' is what appears on the face of the instrument to be a good title, but is not in fact. The instrument on the face of it is, in the judgment of the court, not good to convey title. It is apparent from the record, including the power of attorney from Daniel Cameron to Peter Cameron, that Daniel Cameron is a part owner of the land with the two Dunns and Dousman, but the instrument does not profess to be a conveyance by Daniel Cameron." To this portion of the charge the plaintiff in error duly excepted, and assigns the giving of such charge as error.

The court also charged the jury as follows: "The record of the plat is not a conveyance, and does not profess to be a conveyance, except so far as the statute makes it such by a strict compliance with its provisions. All the owners must execute and acknowledge in order to make it binding upon any. Daniel Cameron did not execute. He did not acknowledge before an officer as required by law, so that, while it appears on the face of the record that he was a part owner, it also appears that he did not execute or acknowledge the instrument; and in this case it seems clear that the acknowledgment stands in the place of an execution, as it is all the execution that is provided for. As it appears on the face of the record that Daniel Cameron, being a part owner, did not join in the conveyance, the instrument, while it discloses his interest, does not profess to convey it, and therefore cannot give color of title." To this charge an exception was reserved, and the giving of it is assigned for error.

The court also charged the jury as follows: "The statute could not run upon the instrument as a conveyance of the Dunns, Dousman, and Peter Cameron as the part owners interested, because it appears from the record that Daniel Cameron had an interest, and that Peter Cameron is only acting as attorney without an interest in himself. In order that the statute should run,

it should appear that the city might take possession in good faith under the instrument as a conveyance of the premises. This it could hardly do with the disclosure in the record in regard to the title, and the failure of Peter Cameron to acknowledge for and in the place of his principal." The plaintiff in error excepted to the giving of such charge, and assigns error thereon.

There was much evidence upon the question of common-law dedication and of 20 years' adverse occupation by the city, and there were many exceptions to the introduction of evidence, to the giving of charges requested, to the refusal to give instructions demanded, and to various provisions of the charge as given, which in view of the judgment of this court it is not material to specify. The jury returned a verdict for the plaintiff below.

G. M. Woodward, for plaintiff in error.

J. V. Quarles, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

JENKINS, Circuit Judge, upon this statement of the case, delivered the opinion of the court.

The trial court held that under the power of attorney executed by the defendant in error no authority existed to reserve grounds for a public square, that such a use is not included within the designation of "charitable purposes," and that the enumeration of the cases for which reservation was authorized was in exclusion of all others. The court also ruled that the lawful execution of a plat required by the statute (Rev. St. Wis. 1849, c. 41) is the acknowledgment by the proprietor before the proper officer, and that, failing strict compliance with the statute, there arises no statutory conveyance. It was held that the acknowledgment here was invalid, upon the ground that it purports to be the acknowledgment of the attorney in fact with respect to his own act, and not his acknowledgment of the plat as the act and deed of his principal. Because of these two defects,—the want of authority to reserve land for a public square, and the defective acknowledgment,—the court ruled that the record of the plat does not constitute a conveyance within the provisions of the statute, and is not an instrument giving color of title under which adverse possession for a period of 10 years prior to suit would bar an action by the rightful owner.

The statute as it then stood contains no requirement for any certificate or writing by the proprietors, or any requirement for any execution of the plat by them, other than as therein expressed. The survey and the certificate thereof by the surveyor, the making of the plat, its acknowledgment and the certificate thereof by the officer indorsed thereon, and the record of the plat, are the things required by the statute. It is not doubted that the peculiar mode of conveyance provided for by the statute must be substantially complied with to render the plat operative to vest title. We do not, however, stop to consider the correctness of the ruling that the plat in question was defectively executed or acknowledged, and that it did not therefore pass title, for the reason that, upon the assumption of the correctness of those rulings, we have reached the conclusion that the instrument is one giving color of title within the statute respecting the limitations of actions. These provisions (Rev. St. Wis. 1878, §§ 4211, 4213, 4215) are as follows:

"Sec. 4211. Where the occupant, or those under whom he claims, entered into the possession of any premises under claim of title, exclusive of any other right, founding such claim upon some written instrument, as being a conveyance of the premises in question, or upon the judgment of some competent court, and that there has been a continual occupation and possession of the premises included in such instrument or judgment, or of some part of such premises, under such claim, for ten years, the premises so included shall be deemed to have been held adversely; except that when the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed the possession of any other lot of the same tract."

"Sec. 4213. When there has been an actual continued occupation of any premises under a claim of title, exclusive of any other right, but not founded upon any written instrument, or any judgment or decree, the premises so actually occupied, and no other, shall be deemed held adversely."

"Sec. 4215. An adverse possession of ten years, under sections 4211 and 4212, or of twenty years under the two last preceding sections [4213 and 4214], shall constitute a bar to an action for the recovery of such real estate so held adversely, or of the possession thereof."

Sections 4212 and 4214 prescribe the requisites of possession. The plat in question had upon it a certificate or declaration executed by the proprietors under their respective seals. It was executed by and in the name of Daniel Cameron, by Peter Cameron, his attorney in fact. This certificate acknowledges the plat as the act and deed of Daniel Cameron "for the uses and purposes expressed on the same and contemplated by the law authorizing the laying out of towns and platting and recording the same." It is followed by the certificate of the notary, which states that "Peter Cameron, attorney in fact for Daniel Cameron," and the other proprietors mentioned, are known to him as the identical persons who laid out the addition to the town of La Crosse and made the annexed plat thereof, and the persons who signed and sealed the above acknowledgment thereof (referring to the certificate executed by the proprietors) and acknowledged the plat as and for their act and deed.

It is true that the statute with respect to the execution and recording of plats as it then stood did not require this written declaration by the proprietors. It did not, however, forbid it. It prescribes certain acts the doing of which should be effectual to convey the title; but, to determine whether the instrument in question furnishes color of title, we must look to the whole and to every part of the instrument to see if upon its face it purports to convey a title, and this whether the things apparent upon the instrument are or are not required by the statute. The question is not whether the instrument in law conveys title. If that were the question, the statute of limitations would here have no function and need not be considered. These statutes of repose presuppose defects in or total want of title, and are enacted to establish the claim of one in adverse possession under defective title, or under an instrument which in law conveys no title. The question is, therefore, whether this instrument purports to dedicate this land for a public square, not whether it was in the law effective to dedicate. The acknowledgment was, perhaps, informal, and therefore the execution was in a sense defective. It probably should have appeared that Peter Cameron acknowledged the plat as the act and deed of his principal. Notwithstanding, if we find here the substance of the requirements

of the statute, we need not be concerned with respect to defects in the instrument, for the law required no particular form of acknowledgment. *State v. Schwin*, 65 Wis. 207, 213, 26 N. W. 568. "It is the policy of the law to uphold certificates when substance is found, and not suffer conveyances or the proof of them to be defeated by technical or unsubstantial objections." *Carpenter v. Dexter*, 8 Wall. 513, 526. If this defective execution of the plat be not validated by the curative act (Sanb. & B. Ann. St. Wis. § 2216c), it is clear to our minds that, apart from legal subtlety, the instrument purports to be made in pursuance of and in conformity with the statute, and to be the act of and to be acknowledged by Daniel Cameron, through his attorney, for the purposes therein expressed. It is clear that Daniel Cameron, by his attorney in fact, joined with the other proprietors in the making of the plat. It is also clear that his attorney in fact undertook to acknowledge it for him before the notary, as he had by that attorney acknowledged it in writing under his seal upon the face of the plat. If, upon strict construction or technical reading of the notary's certificate, it must be held that the attorney in fact acknowledged it as his own act and deed, and not as the act and deed of his principal, it is none the less true that so to read it is to sacrifice substance to form. To deny this instrument the quality of color of title, because of this manifest misprision of the notary, would be, we think, to render abortive the statute of limitation under consideration, which only requires possession under claim of title founded upon some written instrument as being a conveyance of the premises in question. The instrument need not be validly executed or acknowledged for the purposes of adverse claim thereunder. It is sufficient if upon its face it purports to conform to the law, and to convey the dedicated premises described therein. Thus, in *Williams v. Association*, 79 Wis. 524, 48 N. W. 665, the objection was made that the plat there in question was void because the acknowledgment was not certified by the officer under his hand and seal, as required by the statute. The court held that the seal of the officer was necessary, and could not be dispensed with, but that (page 530, 79 Wis., and page 666, 48 N. W.) "the plat was certainly an instrument in writing purporting to convey real estate," and that the defect was cured by the act (Sanb. & B. Ann. St. Wis. § 2206a) which validated every instrument in writing theretofore made which purported to convey real estate, which had not been sealed. And so, also, in *Cawley v. Johnson*, 21 Fed. 492, 493, it was ruled that a receiver's receipt upon entry of land was sufficient color of title, under the statute of Wisconsin, to support an adverse possession thereunder; the court saying, "Under the statute, it is not essential that the written instrument should constitute in itself an actual title or conveyance, but only one upon which may be founded a claim of adverse possession as being a conveyance." It is immaterial that the grantor had no title to convey, or had no authority in law or in fact to convey one, or that the instrument was defectively executed. The instrument gives semblance or color of what its effect would be if all necessary requisites of a perfect title and a good conveyance were present. It should be borne in mind that it is not "the instru-

ment which gives the title, but adverse possession under it for the requisite period with color of title." *McMillan v. Wehle*, 55 Wis. 685, 693, 13 N. W. 694. The only quality demanded of the instrument is that it should purport to convey or to dedicate; that it exhibits sufficient upon which a claim of title may in good faith be rested as warrant for entry into possession, for color of title excludes the idea of rightful title. The fact of possession, and the *quo animo* it was commenced or continued, are the only tests. *Smith v. Burtis*, 9 Johns. 175, 180.

We do not deem the question to be one which is now at large. As we read the decisions, it is the settled law of the state of Wisconsin that possession for the requisite period under an instrument absolutely void upon its face will draw to it the protection of the statute. *Jones v. Billstein*, 28 Wis. 225; *North v. Henneberry*, 44 Wis. 306; *McMillan v. Wehle*, 55 Wis. 685, 13 N. W. 694; *Meade v. Gilfoyle*, 64 Wis. 19, 24, 24 N. W. 413; *Kelley v. McKeon*, 67 Wis. 561, 565, 31 N. W. 324; *Whittlesey v. Hoppenyan*, 72 Wis. 140, 145, 39 N. W. 355. However groundless the supposed title may be, it is sufficient for the purpose of adverse possession that the entry be under color of title. However defective its execution or acknowledgment, and however insufficient upon its face to convey title, the instrument none the less purports to convey title, pretends conformity to the law, and is sufficient for color of title under the statute in question. *Northrop v. Wright*, 7 Hill, 476. This conclusion derives support from the language of the statute concerning that adverse possession which is not under a written instrument (Rev. St. Wis. § 4213). There, as under section 4211, the entry and occupation must be "under a claim of title exclusive of any other right." We take it that the phrase employed, "claim of title," means only a claim of right,—a claim to the right of possession,—since otherwise section 4213 would be abortive and without effect, because there can be no legal title to lands by parol. Mere possession is a degree of title, although the lowest and most imperfect. *Bouv. Law Dict. "Title."* Possession, as defined by the statute, and under claim of right thereto, satisfies the requirement of the law; and when that claim is founded upon a written instrument which purports, however imperfectly, to grant the possession claimed, there is color of title sufficient to support the claim and the possession thereunder.

It is, however, urged that the statute of limitations cannot be invoked by the plaintiff in error, because, as it is said, the entry and possession protected by the statute must be "under claim of title exclusive of any other right," which language is construed by counsel to mean that the claim must "usurp the entire dominion, and exclude every other title and every other right." If this construction be correct, the contention of counsel must be sustained, because the instrument under which possession was taken and is claimed purports to grant a qualified title only; and it is not disputed that the claim of the plaintiff in error is limited to the holding of the demanded premises in trust for the public, and for the purposes of a public square. Such possession is in subordination to the title in fee. The instrument under which it is claimed does not furnish color

of title beyond the estate which it purports to convey; for, to constitute adverse possession, entry must be made and the possession held with defined claim of title, and the title acquired cannot rise above the claim. *Pepper v. O'Dowd*, 39 Wis. 538. The claim here was that of an easement only,—not a corporeal interest, but an incorporeal right. This claim consists with, and is not adverse to, the claim of the owner that the right of soil remains in him, and that, when the use or enjoyment claimed is relinquished or abandoned, the property, with all its incidents and appurtenances, will revert to the owner. *Gardiner v. Tisdale*, 2 Wis. 153. Such a claim cannot, therefore, in a broad sense, be adverse to the title in fee. The question, however, still remains, whether the claim is not adverse to the owner of the fee, so far as respects the claim of right asserted. The claim of title must be exclusive of any other right; but does not this language mean that the claim must be in exclusion of any other right to that which is claimed, and not in exclusion of the right or title which is recognized by the claim? If one enter into possession of premises, claiming under an instrument which purports to convey a life estate, and hold possession thereunder for the prescribed period, may he not claim the benefit of the statute, as against any other claim to that life estate and possession thereunder? Such possession held in subordination to the title of one, it is ruled, may still be hostile and adverse to the title of all others. *Hayes v. Martin*, 45 Cal. 563; *McManus v. O'Sullivan*, 48 Cal. 15; *Francoeur v. Newhouse*, 43 Fed. 236; *Railroad Co. v. Kranich*, 52 Fed. 911; *Furlong v. Garrett*, 44 Wis. 111, 122. These decisions could not be upheld under the construction contended for by counsel, that the claim must usurp the entire dominion, and exclude every other title and every other right, because the claim and possession in the cases referred to were not in exclusion of every other right, nor hostile to the title of one. If then, as we think, the correct interpretation of the statute is that the claim must be in exclusion of any other right to that which is claimed, why may not one claim adversely with respect to qualified ownership against the owner of the fee title, who seeks possession in denial of the qualified ownership asserted? May not a tenant for years under an instrument purporting to be a lease executed by a stranger to the title hold adversely, as against the owner of the title seeking possession during the term specified in the instrument? Such claim is not hostile to the title in fee, but disputes the right of the owner of the fee title to the possession of the land during the period specified in the instrument; and a plaintiff in ejectment must not only have a valid, subsisting interest in the premises claimed, but must be entitled to their present possession.

Originally a prescriptive right could only be acquired by its enjoyment adversely during a period beyond the memory of man. The various statutes of repose with respect to lands, both in England and in this country, have been enacted chiefly for the purpose of regulating the period within which the prescriptive right must be exercised to allow the presumption of a grant, and they greatly abridge the period which formerly obtained within which a grant would be pre-

sumed. The history of these statutes of repose and of limitation, and of their effect, is thus accurately and well stated by Mr. Justice Orton in *Scheuber v. Held*, 47 Wis. 340, 349, 2 N. W. 779, 780:

"First. Prescription at common law was strictly applicable only to incorporeal hereditaments, while, as to the land itself, the period of adverse possession and enjoyment was fixed by the statute of limitations. Second. The analogy between prescription and limitation was so close and perfect that the period of prescription has now come to depend upon and follow that of limitation, very generally, in this country. Third. Prescription for the requisite period presupposed a deed having been given anterior to the time of prescription, and established a presumption of a grant as a *presumptio juris et de jure*, while limitation raised no such presumption, but operated merely as an extinguishment of the remedy. The former conferred and established a right and title, while the latter only barred a recovery. This was the former distinction, but which has long since been lost by the decisions in this and other states; and now adverse enjoyment for the period of limitation extinguishes, not only the remedy but the title, of the former owner, in lands as well as hereditaments. It is said by Chief Justice Dixon in *Knox v. Cleveland*, 13 Wis. 246, 'that the right or title of a party to property which is adversely held and claimed by another is barred and cut off by his neglect to prosecute within the period prescribed by the statute of limitations, and that such neglect operated to divest and transfer it to the adverse claimant'; and the same principle is recognized in *Sprecker v. Wakeley*, 11 Wis. 432, *Hill v. Kricke*, Id. 442, *Brown v. Parker*, 28 Wis. 21, and in many other cases in this court. Fourth. The analogies between prescription and limitation, in this state, at least, not only establish the period of prescription, and cause them to operate alike in conferring title, but make them so near alike in qualities, principle, purpose, effect, and consequence, as to completely blend them together; and they are used interchangeably, as being substantially the same. In *Smith v. Russ*, 17 Wis. 227,—a case like the present, for flowing lands by means of a milldam,—what is pleaded in the answer as 'prescription,' as in this case, is called and treated as the 'statute of limitations' in the opinion; and in *Haag v. Delorme*, 30 Wis. 591,—a case of like flowage,—Mr. Justice Lyon says in his opinion: 'The nature, qualities, and duration of the user and enjoyment of an easement which will constitute a valid right thereto by prescription are precisely the same as are required by the statute of limitations to enable the occupant of lands to defeat the title of the true owner;' and then holds that 'the occupancy of the lands for such purpose must be continued, uninterrupted, and adverse for the length of time prescribed by the statute.' This clearly implies that the statute of limitations applicable to real actions affecting the title of the lands is equally applicable to an action like the present, and the language of the statute itself may well bear such an interpretation. The former statute in these respects is the same in the revision; and section 4206 provides that 'civil actions can only be commenced within the periods prescribed in this chapter,' clearly implying and comprehending all civil actions, including this action as well. Section 4208 provides that 'no defense or counterclaim founded upon the title to real property or to rents and services out of the same, shall be effectual,' etc. 'Real property' is defined by the statute 'to include lands, tenements and hereditaments, and all rights thereto and interests therein.' This language is certainly broad enough to include the rights and interests in lands involved in this action, and, as we have seen, this court, in *Haag v. Delorme*, *supra*, and in other cases, has given such a construction to it."

The court further observed:

"We conclude, then, that under the effect of said section 26, c. 138, Rev. St. 1858, the adverse possession and user of the lands in question, by means of the milldam, for more than twenty years, would be protected both by the statute of limitation and by prescription, and confer a title to the lands for such use upon the defendants, as against the state and other parties; and, if such

period had expired before the amendment of 1877, such right and title had become vested in the defendants."

See, also, *Sabine v. Johnson*, 35 Wis. 185, and *Murray v. Scribner*, 70 Wis. 228, 233, 35 N. W. 311.

We quote thus at length from the opinion of Mr. Justice Orton because in the consideration of the question presented we must look to the decisions of the supreme court of the state whose law we are considering, and must conform our judgment to the construction of the statutes held by that court, and because we think the case of *Scheuber v. Held* declares that the construction of the statute contended for by counsel cannot be sustained. The easement to flow the lands of another is not hostile to every other title, in the sense in which counsel would construe the language of the statute. The claim of such an easement recognizes the title in fee in another. It does not seek to divest the title of the owner of the land. It merely imposes a burden upon the land,—the right to flow the land acquired by exercise of the right during the period prescribed by the statute. It is, however, adverse to the owner of the fee, with respect to the claim asserted. It was ruled in *Knox v. Cleveland*, referred to in Mr. Justice Orton's opinion, that the right and title to property held adversely and claimed by another are barred and cut off by failure to prosecute within the prescribed period, and that such neglect operates to divest and transfer the title to the adverse claim. This language was strictly accurate as applied to the case then in hand; but in *Scheuber v. Held* the court was careful to limit the effect of that language in respect to easements acquired by adverse possession, and to say that such adverse user would confer a title to the lands for such use, thus clearly restricting the title acquired by adverse possession and use to the defined claim of title under which such use was asserted. It is true that in *Scheuber v. Held* the claim was not founded upon possession under a written instrument, but was rested upon 20 years' adverse user merely. It is, however, to be observed that whether the possession asserted be that of 10 years under, or of 20 years not under, a written instrument, in either case the entry and the possession must be under claim of title exclusive of any other right. If, therefore, the contention of counsel be correct, neither of these statutes would apply to the case of a claim for an easement. They were, however, as we know historically, enacted in regulation of prescriptive rights, and in modification of the common law. The construction claimed would declare erroneous the decision of the supreme court of the state in the cases referred to; for, if the prescriptive right cannot be acquired under the one, it cannot be acquired under the other, of the statutes of repose, since both require an entry and possession under the claim of title exclusive of any other right. Neither can we perceive any just reason, if, as has been held by the supreme court of the state, a prescriptive right may be acquired under section 4213, why it may not be acquired as well under section 4211. Both statutes are in regulation of the same subject-matter. Both require an entry under claim of title exclusive of any other right. The distinction is that the one contemplates an entry and possession under a written in-

strument purporting to be a conveyance of the right claimed, and the other an entry and possession not under any written instrument. We see no escape from the conclusion, as a logical consequence of the principle asserted in *Scheuber v. Held*, that an easement may be acquired against the owner of the fee by adverse possession for the period prescribed, whether under or without a written instrument, and that the title acquired by such adverse user is not the title in fee, but the title and the right to the use claimed.

The principle asserted finds support in other states. Thus, in *Van Derzee v. Van Derzee*, 30 Barb. 331, 337 (affirmed upon other ground in 36 N. Y. 231), a portion of the property had been held, possessed, and claimed for a long period as under a lease in fee. The court observed:

"It has been held adversely to the landlord,—that is, the interest of the tenant or lessee in fee, as such, has been so claimed and held,—and that makes as perfect a title by adverse possession as if the Van Derzees had claimed the whole title and the entire interest. It has been held as a lease or rent farm, and from the moment that the lease was made, or rent paid and received, the title of the tenant to the farm, as tenant, to the extent of the qualified ownership resulting from the relation of landlord and tenant, was as perfect and as adverse to the landlord's title or claim to the tenant's interest as is the title of the grantee in a deed perfect against, and hostile to, the title of the grantor, from the moment the deed is executed."

In *Wilklow v. Lane*, 37 Barb. 244, decided by Justices Gould, Hogeboom, and Peckham (the latter now of the supreme court of the United States), there was a paper writing, called a "lease," granting the privilege of turning a stream of water from its course, and using the same, executed long after the lessor had conveyed all his interest in the land, and which was absolutely void as against the grantee of the lands and those claiming under him. It was held that he who undertook to grant this right, by making the instrument, asserted a right to the thing granted, which assertion or claim passed by the instrument, and, being accompanied by actual enjoyment, was as effectual as an adverse claim as though it embraced the entire estate in the land. The court observes:

"This, so far as the lease is concerned, is not a claim of the entire title. It contemplates and acknowledges the legal title in another, but, to the extent of the rights under the lease, is as essentially a hostile claim, and as perfect an answer to the right to present possession, which is the foundation of an action of ejectment, as if the claim had been co-extensive with the entire title. To constitute an adverse possession, there need not necessarily be an exclusive claim to the entire title, nor one which necessarily excludes the idea of title in another person, although it must be accompanied in this case by a notorious disclaimer of the plaintiff's title to so much as is embraced in the plaintiff's claim."

Judge Elliott, in his recent valuable treatise on Railroads, asserting the right of acquisition of a right of way by adverse possession, observes:

"We suppose that, when the possession consists in the use of the land as a right of way, an easement and not the fee will be acquired." 2 Elliott, R. R. §§ 401, 402.

See, also, generally, *Railway Co. v. Loring*, 2 U. S. App. 310, 2 C. C. A. 546, and 51 Fed. 932; *Quindaro v. Squier*, 4 U. S. App. 569, 2 C. C. A. 142, and 51 Fed. 152; *Blair v. Railroad Co.*, 24 Fed.

539; *Hargis v. Railroad Co.*, 100 Mo. 210, 223, 13 S. W. 680; *Moore v. City of Waco*, 85 Tex. 206, 211, 20 S. W. 61; *Sherlock v. Railway Co.*, 115 Ind. 22, 17 N. E. 171; *Liddon v. Hodnett*, 22 Fla. 442.

We are not referred to any decision of the supreme court of the state of Wisconsin which, in our judgment, militates against the position taken or against the principles announced in *Scheuber v. Held*. In *Pinkum v. City of Eau Claire*, 81 Wis. 301, 51 N. W. 550, the owners in fee of certain lands executed to the city a perpetual lease, which should become void upon failure by the city to maintain and operate a raceway upon the westerly shores of the Chippewa river, and a public highway along and contiguous to the westerly shore of the canal; the grantors reserving the right to cut trees and timber, quarry stone, and dig earth, and remove the same from the premises described. A bill in equity was filed by the assignee of the lessors for breach of conditions, and for damage occasioned thereby, with the prayer for a mandatory injunction to compel the lessee to comply with the conditions and pay the damages, or, in the alternative, that the lease might be canceled. The case came before the court upon demurrer to the bill, one ground of demurrer being that the suit was not brought within the time limited by law. In other words, the city claimed that its possession under the lease, being for a period of more than 10 years before suit, was adverse, and vested in it title to the possession. The claim was remarkable, and was briefly disposed of upon the ground that the possession was only such as was necessary to the easement conferred by the lease, and could not, therefore, be adverse, or constitute a defense to a charge of violation by the city of its obligations under the instrument by which it obtained and held possession. In *City of Racine v. Crotsenberg*, 61 Wis. 481, 21 N. W. 520, it was held that a city cannot maintain ejectment to recover possession of a public alley or street, and that, because its interest therein is a mere easement, it was not entitled to the possession of the premises, within the meaning of the statute respecting actions of ejectment. The court observed that ejectment lies only to recover things corporeal which may be the subjects of seisin, entry, and possession, and that there can be no seisin of an incorporeal hereditament, and it cannot be the subject of entry and possession. It "lyeth in grant and not in livery." It is an interesting question whether the easement which a municipal corporation acquires in the modern street ought ever to have been classed in the category of incorporeal hereditaments. They are rights issuing out of a thing corporate (whether real or personal), or surrounding or annexed to or exercisable with the same, while a corporeal hereditament includes that which is of a substantial, tangible nature. 1 Washb. Real Prop. (5th Ed.) p. 36. A right in a highway was originally classed, and rightly so, with incorporeal hereditaments, because there was granted a mere right of passing over, and it came about that the streets of a city have been placed in the same category; but the rights which a municipal corporation has in the streets of a city are very different from the rights of the public in a highway of the country. The easement is not confined to a mere passing over. The street may be graded and improved, the grade may be rais-

ed or lowered, the earth excavated. It may be tunneled, and water mains, gas mains, sewers, and telegraph and telephone wires laid therein, and cars propelled by steam, electrical, cable, or horse power may be authorized to be operated in such tunnel, as likewise upon the surface of the road (except, possibly, as to cars operated by steam power); and so, also, great steel structures spanning the roadway of the street may be authorized to be constructed for the operation of an elevated railway. In fact, there is at this day, as declared in *Barney v. Keokuk*, 94 U. S. 324, no substantial difference between streets in which the legal title is in private individuals and those in which it is in the public, as to the rights of the public therein. Notwithstanding, the public right in a street still seems to be classed as an incorporeal hereditament, although it possesses many if not all of the substantial qualities of a corporeal hereditament. The evolution of the law does not, in this instance, seem to have kept pace with the evolution of society. The classification is, however, purely technical, not affecting substantial right; for while ejectment may not be maintained to recover possession of an easement, because of the highly technical ground stated, it is still true that the law will protect possession under an easement in an equitable proceeding. Indeed, there would seem to be little question at this day that a railway company, having the right to the exclusive possession of its right of way, which is an easement, may maintain ejectment to protect the right. We need not further consider the opinion in *City of Racine v. Crotsenberg*; for, conceding its correctness, it by no means leads to the conclusion that a prescriptive right may not be obtained by adverse possession under the statutes of Wisconsin. If the title acquired be not such as will support an action of ejectment, possession for the prescribed period under claim of right creates a title and a right to the claim asserted, which is effectual as a defense against one seeking possession.

The questions discussed have by no means been free from difficulty. We are, however, constrained, after careful investigation, and consideration, to the conclusions stated. It is proper to add that the court below, in its charge upon the question of 20 years' adverse possession, seemed to entertain no doubt that such adverse possession would come within the protection of the statute, although the claim under which entry was made and possession held was not hostile to the title in fee. For the reasons stated, we are of opinion that the instruction asked and refused should have been given, and that the charge to the jury, in the particulars referred to, was erroneous. We do not deem it requisite at this time to consider the other objections raised at the trial. The judgment will be reversed, and the cause remanded, with directions to grant a new trial.

ILLINOIS CENT. R. CO. v. GRIFFIN.¹

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 362.

1. CARRIERS—DANGEROUS PREMISES—INVITATION TO ENTER BAGGAGE ROOM.

Where plaintiff, the owner of several pieces of baggage in a baggage room at a railway station, told the baggage master that a part of it was wanted, and the baggage master, upon going in and leaving the door open, was followed by plaintiff, who while there was injured, the jury was authorized to find that plaintiff entered the room at the invitation and for the benefit of the railroad company.

2. SAME—DEFECTIVE PREMISES.

Where the owner of baggage enters a baggage room at a railway station at the invitation of the baggage master, for the purpose of pointing out the baggage wanted, and is injured by the falling of a defective door in an attempt to open it for the purpose of asking a street-car motorman to wait, the questions of negligence and contributory negligence are for the jury; there being testimony tending to show defendant's knowledge of the defect, and testimony—contradicted by plaintiff—tending to show she was told not to open the door.

3. TRIAL—MOTION FOR PEREMPTORY INSTRUCTION—REMARKS OF COURT.

While the better practice is to send the jury out of the room when a motion for peremptory instruction is to be made, argued, or decided, there can be no reversal because of remarks of the court thereon in the presence of the jury, when there was no exception, and no request that the jury retire.

4. SAME—INTERROGATION OF WITNESSES.

It is in the discretion of the court to permit the plaintiff to be further interrogated as a witness after the motion for a verdict has been decided, and there can be no reversal therefor unless that discretion is abused.

5. PLEADING AND PROOFS—EVIDENCE AS TO PERSONAL INJURIES.

Under a declaration alleging nervous prostration, and sensations of numbness and pain in certain parts of the body, as the result of personal injuries, the sympathetic affection of other parts of the body may be shown.

6. DAMAGES—PHYSICAL EXAMINATION.

A physical examination of one suing for personal injuries, by physicians to be designated by the court, cannot be compelled either before or during the trial.

7. TRIAL—INCONSISTENT CHARGES.

A party cannot complain of inconsistent charges where the inconsistency is between a proper charge and an erroneous instruction given on his request.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

The recovery in this case was for personal injury to the defendant in error, attributed to the negligent omission of the plaintiff in error to keep in safe condition a door to its baggage room at Madison, Wisconsin. There is little dispute about essential facts and circumstances, and, while the assignment of errors contains a large number of specifications, the question of chief importance is whether the court ought to have directed a verdict for the defendant. The passenger station of this company at Madison is between the railroad track, on the south, and Bedford street, on the north. The baggage room is at the east end of the station, and is separated from a waiting room by a partition. Its dimensions are 23 feet east and west by 17 feet north and south. There is on the south side of the room a sliding door, and on the north side a similar door, the jambs into which they lock being within a few inches of the wall of the waiting room. The doors are 7 feet and 7 inches high, 6 feet 3¼ inches wide, 2½ inches thick at the edges, and made for the most part of yellow pine, in two thicknesses, "filled in on one side," and "paneled on both sides." They

¹ Rehearing denied June 17, 1897.

have rollers on the bottom, which run upon a small iron rail on the floor, and on the top each has a guide strip designed to run in a groove above. The locks are set entirely on the inside, and mortised in. There are no projecting handles, but depressions on each side serve as handles. In the depression on the inside of each door is a spring, which, when pressed upon, causes the catch or bolt of the lock to be lifted from the iron fastening in the jamb of the frame, whereupon, if the pressure be continued with sufficient force, the door will be pushed aside. From the outside the doors can be opened only by the use of a key. On the outside of each was painted "Baggage Room," and in front of each was an incline made of plank "thinned off at the lower end, and reaching from the door sills out upon the platform." The door on the south side alone was in customary use; that to the north, it is claimed, being "never used for delivering baggage," and during the five or six years since it was put up not having been "used in any way, save only a dozen or fifteen times." There is no other door or opening into the baggage room, excepting an interior window communicating with the waiting room. Extending entirely around the station building is a wide platform, flush on the south with the railroad track, and on the north with Bedford street. On the east and west, between the platform and Main and Washington streets, respectively, are open areas for the use of omnibuses, hacks, and the like. An electric street-car line, with a terminal at Washington street, runs on Bedford and Main streets to Capitol Park. Lucia B. Griffin, the defendant in error, unmarried, about 30 years old, an elocutionist by profession, and without previous knowledge of the place, arrived at the station at 7:45 o'clock p. m. of July 30, 1894, with three pieces of checked baggage. A hand satchel and bundle she deposited, on arrival, in the ticket office of the company for safe-keeping until the next day, and, without claiming the checked baggage, went into the city for the night. The unclaimed baggage, pursuant to a rule of the company, was placed in the baggage room for safe-keeping. About 1 o'clock p. m. of the next day, Miss Griffin returned to the station by a street car, from which she got off at Washington street. The motorman promised to wait a couple of minutes, and to stop his car for her opposite the baggage room. She was able promptly to get her satchel and bundle, but as much as 10 minutes passed before the baggage master, Katter, who was at the freight depot, arrived. At the door of the baggage room she gave him her checks, telling him, as she testified, that she wanted part of the baggage. He unlocked the door, and, leaving it open behind him, went to the baggage, on the north side of the room. Following him in, she stopped at the desk near the waiting room window; and then, according to her own testimony, while Katter was engaged with the baggage she went to open the door on the north, to see if the car was waiting, to ask the motorman to wait, expecting to find him opposite the door, and the door, when she had pulled it back about five inches, fell upon her. While pulling the door open, she heard Katter "say something about being a big door for me to open,—something like that. I was a small person to open a big door,—something like that. I do not remember the exact words." Katter testified: That he had pulled off one check and laid it aside, when she asked if she could not go through that door,—the one that fell,—to which he answered: "No; you can't open that door. I will take your baggage around this way." That she then "started and took hold of the door with her left hand, and slipped and turned around; and the first time she didn't move the door, and she turned right around and took hold with her both hands, and just moved it about four or five inches, and I see the door coming over on her." After the refusal of the court to direct a verdict for the defendant, the plaintiff, by permission of the court, was recalled, and, in response to the question whether Katter told her not to go out of the door, answered: "I think you asked me before, and I told you that I was never warned at all anything about the door,—not even an intimation that the door was unsafe. There was nothing like a warning in any way." And in response to further questions she testified that Katter did not tell her not to go out of that door; that she did not say anything to him about opening the door. Thereupon she added: "I am very much accustomed to waiting on myself. I never ask anybody to open doors for me. I am not accustomed to have a gentleman go with me to open doors. * * * Never dreamed of there being the least doubt but that I could open it. I have opened these baggage-room doors * * * in other places." Proof was made, and not disputed, that

about a month before the occurrence in question the other door to the baggage room had fallen in the same manner,—the fall being due in part to the wearing of the iron rail, but mainly to the shrinkage of the wood of the door and to the settling of the building,—and that a repetition of the fall was guarded against by means of a wooden cleat fastened upon the grooved strip, and extending below the end of the door on the inside. Concerning the door in question, the answer alleges that, "owing to the shrinkage of the wood and settling of the building, the door, when partly opened, could be pulled out of the groove," but that the shrinkage and settling were "only just sufficient to permit the door when pulled sidewise, and not endwise, to slide from the groove." It is not alleged that the liability of the door to be pulled over was unknown to the plaintiff in error.

B. J. Stevens (James Fentress, of counsel), for plaintiff in error.
John M. Olin and Harry L. Butler (J. C. Mabry, of counsel), for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The primary question, upon which all other questions of importance in this case turn, is whether the railroad company was under any duty to the defendant in error to make the baggage room a safe place. The contention of the plaintiff in error is that while railway waiting rooms, platforms, and the approaches thereto, are places to which the public having business with the railway company are invited, a baggage room is necessarily a private place, where the one who goes without invitation, express or implied, is a trespasser, or at best a mere licensee, to whom no duty is owing, and that in this case, there being no pretense of an express invitation to the plaintiff to enter the room, there was no implied invitation, because she entered solely for her own convenience; the proper place for receiving her baggage being at the door or on the platform outside, and her presence inside being in no sense to the advantage of the company. We do not agree that a baggage room at a railway station, when open for the reception and delivery of baggage, is a private room, as against owners of baggage who are permitted to enter. In its relation to the public, the company is represented by the baggage master or other employé whom it puts in charge of the room; and, if an owner of baggage enters upon the invitation or by permission of the baggage master, it is the invitation or permission of the company; and whether, in a given instance, one who goes in by permission does it only for his own benefit, or for the advantage of both parties, must ordinarily be a question for the jury. If thereby the baggage master is aided in the performance of his duties or labors, the company which he represents is benefited. In this case the baggage master was told before he opened the door that a part of three pieces of baggage was wanted, and it was certainly to his convenience that the part or piece desired should be pointed out without his being required to bring the three pieces to the door or platform; and when he passed in, leaving the door open and giving no admonition to Miss Griffin to stay out, it was, to say the very least, a question for the jury whether she was not invited to

go in. In *Bennett v. Railroad Co.*, 102 U. S. 577, 584, the court quotes with approval the following proposition from Campbell on Negligence:

"The principle appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it."

The evidence in that respect being sufficient to support the verdict, it must be assumed, for the present purpose, that the entrance of the defendant in error into the baggage room was at the invitation and for the benefit of the railroad company, as well as for her own convenience; and, that conceded, the evidence which tended to establish negligence on the part of the defendant, and freedom from fault on the part of the plaintiff, was such as to forbid the withdrawal of the case from the jury.

Other questions merit only a brief statement. The record shows no exception to the remarks of the court in the presence of the jury upon the presentation and consideration of the motion for a peremptory instruction in favor of the defendant; but we are of opinion that, if excepted to, the remarks were not such as to justify a reversal of the judgment. The better practice would be to send the jury out of the room when such motions are to be made, argued, or decided. It does not appear that the plaintiff in error moved or requested that the jury be directed to retire.

It was in the discretion of the court to permit the plaintiff to be further interrogated as a witness after the motion for a verdict had been decided, and it does not appear that there was an abuse of discretion for which the judgment should be reversed.

The testimony which the plaintiff was allowed to give of the manner in which different parts of her body were affected was not outside of the issue, nor otherwise improper. The declaration charges nervous prostration, and sensations of numbness and pain in the back of the neck, in the left side, and in the arm "and other parts of her body"; and even if the averment were less broad it would not follow that her statements touching the condition of her uterus and the nerves of her leg would not have been competent. The sympathy of one part of the body with another is involved in a scientific determination of the effects of injuries; and, on such an inquiry, whatever in the light of science is significant, in the eye of the law is competent.

There was no error in permitting a physician to answer the question:

"Have you seen sufficient of the plaintiff here, since the trial commenced, to be able to state, as a physician, whether there is or is not an abnormal nervous condition present in her case."

If, as suggested, the question contains phrases of doubtful meaning, it was the part of a cross-examination to clear the doubts away.

It is objected to certain hypothetical questions that they were based in part upon asserted physical conditions claimed to have been discovered at an examination of the plaintiff made pending, and late in the progress of, the trial, which conditions were not

charged in the complaint, and therefore were not pertinent to the issue, and in part upon the fact that, two months before the injury in the baggage room, the plaintiff "took part" in a railroad collision, as a result of which she suffered insomnia, headache, nervousness, and other hard-worded disorders and irregularities, like those charged in the complaint; and it is contended that if these were other and different from the conditions which the witness discovered at the physical examination, so, also, the conditions described in the complaint were different, and the allegations and proofs do not correspond. These objections are not tenable. When the proof shows causes, outside of those alleged, for the symptoms of suffering, it is proper and necessary that the jury shall be informed, if possible, to what cause the suffering is justly attributable, and to that end it is necessary that the hypothetical questions cover the entire field of inquiry.

The court did not err in refusing to authorize and compel a physical examination of the plaintiff by physicians to be designated by the court. *Railway Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000. The reasoning of that case forbids a compulsory examination during the trial equally with one in advance of the trial.

Error cannot be assigned upon questions put to a witness, when it does not appear what answers were elicited. Unless the answer is objectionable, it does not matter, ordinarily, what was the question. The exception should therefore go to the answer, and not to the question alone.

The alleged inconsistencies between instructions given at the request of the plaintiff in error and the charge of the court to the jury do not go to material questions, and if they did there would be no available error, if the court's charge was right. If the court, of its own motion, gives inconsistent charges, there may be an assignment of error upon the one which is wrong, or perhaps on the fact of inconsistency; but, where the inconsistency is between a proper charge and an erroneous instruction given upon request, the requesting party may not complain. The charge here complained of is in harmony with the views which we have expressed upon the motion for a verdict, while the special instructions refused are inconsistent with those views. A further statement of them is therefore unnecessary. The judgment below is affirmed.

In re BRYANT.

(Circuit Court, S. D. New York. March 29, 1897.)

1. EXTRADITION—HABEAS CORPUS—REVIEW OF COMMISSIONER'S DECISION.

One committed by a commissioner to await the action of the secretary of state cannot be released on habeas corpus if the commissioner had before him legal evidence on which to base his judgment, and it appears that he decided that defendant had committed one of the offenses charged, and that such offense was covered by the extradition treaty.

2. SAME—EVIDENCE.

Circumstantial evidence as to the manner of drawing checks and posting books by an employé held sufficient to justify the commissioner in com-

mitting him on a charge of forgery to await the action of the secretary of state.

The accused, who was held for extradition for the offenses of forgery, larceny, and embezzlement by United States Commissioner Shields, sued out a habeas corpus and certiorari.

Counsel for the relator contended:

First. That as to the three checks of Morison & Marshall, for 500 pounds, 500 pounds, and 720 pounds, respectively, which relator was charged with forging, there was no testimony before the commissioner tending to show his criminality. Second. That, as to the false entries which it is charged relator made in the books of Morison & Marshall, such conduct on his part, even if proven, would not constitute an offense for which he could be extradited, for the reason that, when the treaty of 1842 was executed, the making of false entries was not forgery. Third. That, as to the additional sum of 280 pounds which the relator was charged with embezzling, there was no proof of criminality presented to the commissioner. Fourth. That as to the facts relating to the three checks, if it be held that they were sufficient to warrant commitment on the charge of forgery of the name of Morison & Marshall, and obtaining money upon such forgery from the bank, then they cannot be held as warranting a commitment for larceny or embezzlement from Morison & Marshall. If, on the contrary, it be held that such facts were sufficient to warrant a commitment for embezzlement from Morison & Marshall, then they certainly could not warrant a finding that the accused obtained the same money from the bank upon forged checks. Fifth. That, inasmuch as the treaty provides that a surrendered prisoner shall be tried only for the particular offense for which he may be surrendered, the demanding government and the commissioner should have elected, and, if the latter officer deemed the evidence sufficient to commit upon the one charge, he should not have committed upon the other.

Charles Fox, for the British government.
Lorenzo Semple, for Bryant.

LACOMBE, Circuit Judge (after stating the facts). The questions properly coming up for decision on this hearing are not as comprehensive as was supposed when the case was argued. If, upon examination of the record, it should appear that there was legal evidence of facts before the commissioner on which to exercise his judgment as to the criminality of the accused; that the commissioner reached the conclusion that the accused had committed any one of the several offenses with which he was charged; and that offense be one covered by the extradition treaty,—sufficient warrant for his detention is shown, and he should not be discharged from custody, but should be held in jail until the secretary of state shall act upon the question of his surrender to the demanding government, or until the expiration of the time provided for in section 5273, Rev. St. U. S. In *re Stupp*, 11 Blatchf. 124, Fed. Cas. No. 13,562. Without unnecessarily burdening this memorandum with citation, it will be sufficient to refer to *Ornelas v. Ruiz*, 161 U. S. 502, 16 Sup. Ct. 689, for an exhaustive statement of the procedure in extradition cases, and the extremely limited functions to be discharged by the court upon habeas corpus and certiorari to review commitment.

That forgery at common law, viz. the falsely making or altering a document to the prejudice of another, is one of the offenses covered by the treaty of extradition, is not disputed. The evidence before the commissioner disclosed the following facts: Bryant was employed

as bookkeeper and assistant cashier with the firm of Morison & Marshall, in the city of London, from January to October, 1896, at a salary of £104 per annum. He had under his control the check books and the checks returned from bank after payment. He was not authorized to sign the firm's name to any checks. The firm kept an account with the London office of the Commercial Bank of Scotland. On June 23, 1896, a check for £500, purporting to be drawn on the Commercial Bank, and to be signed by Morison & Marshall, and numbered 698, was presented for payment by the Provincial Bank of England, paid, and debited to Morison & Marshall. On August 14, 1896, a like check for £500, numbered 54,264, was presented by the Provincial Bank, paid, and debited. And on September 10, 1896, a third like check, £720, numbered 54,373, was presented by the Provincial Bank, paid, and debited. Bryant kept an account with the Provincial Bank, in which he deposited on June 22, 1896, a check for £500, on August 13, 1896, a check for £500, and on September 9, 1896, a check for £720. The proceeds of these three checks were duly credited to Bryant's account and the greater part thereof subsequently drawn out by him. The three checks which were paid by the Commercial Bank were abstracted from two check books, which were not in use at the time, and were accessible to Bryant. No particulars appear on the counterfoil of the book from which they were taken. Nor are there any particulars of such checks entered on the counterfoils of any check books in use, nor are these checks now to be found among those received back from the bank in the ordinary way. Morison & Marshall had a sum exceeding £5,000 carried to the credit of a suspense account in their ledgers. Bryant had no authority to interfere with this account. He, however, brought £2,000 from such suspense account to the credit of a fictitious account which he opened in the ledger, in the name of T. H. North. Against this sum of £2,000 he debited the following amounts, viz.: £780 and £1,220. The £780 was posted in the ledger from the cash book, and consisted of £280 and the £500 represented by check No. 698. The £1,220 was in respect of the checks No. 54,364, for £500, and No. 54,373, for £720. These amounts Bryant did not carry out in the cash column of the cash book, but, in order that the balances of the ledger, cash book, and bankers' pass book should agree, added the sum of £1,220 to the total, at the bottom of the page, notwithstanding that amount was not in the column, nor was there any entry in the cash book relating to the £1,220 which could be posted to North's fictitious account.

This court most certainly cannot say in view of this proof, circumstantial though it be, that there was no legal evidence upon which the commissioner could properly exercise his judgment as to the guilt or innocence of the accused; and when, reaching the conclusion that the checks were false, he deems the evidence sufficient to sustain the charge of forgery, under the provisions of the treaty, and commits the accused to await the action of the secretary of state, this court most certainly should not enlarge him upon habeas corpus. What action may be taken as to the form of his surrender is a matter for the disposition of the executive.

UNITED STATES v. NEBRASKA DISTILLING CO.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 329.

1. INTERNAL REVENUE—ILLEGAL ASSESSMENT—LIMITATION.

The inhibition of Rev. St. § 3224, against suits "for the purpose of restraining the assessment or collection of a tax," and the provisions of sections 3226, 3227, that a suit to recover an illegal tax shall not be brought "until after appeal to the commissioner of internal revenue, and must be brought within two years next after the cause of action accrued," do not apply to a proceeding in which the government is the moving party; and, therefore, upon an application by the United States for an order upon a receiver to pay an assessment, the receiver may show that the assessment was erroneous or illegal, without regard to the lapse of time, or to whether there has been an appeal to the commissioner of internal revenue.

2. SAME—DEFICIENCY ASSESSMENT AGAINST DISTILLERY.

A deficiency assessment against a distillery is erroneous where the deficiency of production for which the assessment was made was caused by a defective still, and was not the result of "culpable neglect, default, or mismanagement of the owners"; and the failure to apply to the collector to have the distillery sealed up until the fault could be rectified, as provided by Rev. St. § 3310, was not in this instance a want of diligence.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

John C. Black, U. S. Dist. Atty.

Levy Mayer, I. K. Boyesen, John J. Herrick, Charles L. Allen, and Horace H. Martin, for appellee.

Before WOODS and JENKINS, Circuit Judges, and SEAMAN, District Judge.

WOODS, Circuit Judge. This appeal is from an order of the circuit court dismissing the intervening petition of the United States filed in the consolidated cause of John M. Olmstead and others against the Distilling & Cattle-Feeding Company, a corporation of Illinois, of which, by appointment of the circuit court, John McNulta was and is receiver. Included with the properties of which the receiver had been put in charge was the distillery of the Nebraska Distilling Company, located at Nebraska City, which had theretofore been transferred to the Distilling & Cattle-Feeding Company. Before the transfer, on November 21, 1891, a deficiency assessment against the distillery had been made by the commissioner of internal revenue, amounting, after reductions which need not be explained here, to the sum of \$2,161.71, alleged to be unpaid. The petition, after alleging the facts, prayed an order upon the receiver to pay the assessment, or, in the event that such order could not be made, that permission be granted by the court for the immediate levy of a distraint warrant upon the distillery and premises, to the end that the same be sold, in pursuance of the statutes in such cases provided, to satisfy the claim. The receiver answered to the effect that the deficiency for which the tax was assessed was caused by the use of a new still, which was imperfect and defective in its working. The amount

and date of the assessment were agreed upon, and it was stipulated that certain affidavits which are set out in the record should be read on the hearing with the same force as if in the form of depositions. The final entry shows that after hearing the evidence and the arguments of counsel the court ordered that the petition be dismissed, and thereupon the United States interposed a motion to dismiss without prejudice, which motion the court denied, and thereupon ordered that the petition be dismissed for want of equity.

Error is specified in various forms, but the essential question is whether it was within the rightful power or jurisdiction of the circuit court to inquire into the validity or justness of the assessment which the court was asked to order paid or to permit to be enforced directly against the property in the custody of the court, against which the assessment had been made. The statutory provisions which have been cited as bearing on the question are sections 3224, 3226, 3227, 3264, 3309, 3310 of the Revised Statutes, and section 6, c. 125, 1 Supp. Rev. St. U. S. The inhibition of section 3224 against suits "for the purpose of restraining the assessment or collection of a tax," and the provisions of sections 3226 and 3227, that a suit to recover an illegal tax shall not be brought until after appeal to the commissioner of internal revenue, and must be brought within two years next after the cause of action accrued, are not applicable, it is clear, because this was not a suit either to recover or to restrain the collection of a tax. The case comes within the decision in *Clinkenbeard v. U. S.*, 21 Wall. 65, that the prohibition against bringing a suit until after an appeal to the commissioner does not apply when suit is brought by the government, and the person taxed is defendant instead of plaintiff. The limitation of time prescribed in section 3227, it is equally clear, does not affect the right to set up matter of defense in a proceeding in which the government is the moving party. Besides, the limitation is against suits "for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected," and notwithstanding the alternative expression "assessed or collected," it is evident there can be no "recovery" of an uncollected or unpaid tax, and in this case, consequently, a cause of action to recover the tax had not accrued when the intervening petition was filed; and, once the government chose to come into court for relief, it was competent for the receiver, representing the interests involved, to show that the assessment was erroneous or illegal, and should not be enforced. In section 3207 of the Revised Statutes it is provided that the commissioner of internal revenue may direct the bringing of a bill in chancery "to enforce the lien of the United States for tax upon any real estate," and that at the hearing the court shall adjudicate all matters involved "and finally determine the merits of all claims to and liens upon the real estate in question"; and, while this was not a proceeding under that section, it was strongly analogous, and we have no doubt that the court, upon the petition presented, had authority to determine the merits, and was not

limited to the inquiry whether an assessment had been made, and remained unpaid, as alleged. It follows that there was no error in the refusal of the court to allow the petition to be dismissed without prejudice. The merits having been put in issue, and the finding of the court announced, it was proper that there should be a conclusive decree. Whether, if the petition had been simply for leave to the government officers to enforce the collection of the tax by seizure and sale of the distillery, the court could properly have inquired into the merits of the assessments, is a question which does not arise, and is not determined.

In respect to the facts there is no dispute. It is clear that the deficiency of production, for which the assessment was made, was caused by a defective still, and "was not, in any sense, the result of culpable neglect, default, or mismanagement of the owners, proprietors, or managers having charge." The district attorney has urged that under section 3310 of the Revised Statutes "there should have been an application to the collector to have the distillery sealed up until the fault in the machinery could have been rectified," but we are convinced that there was no want of diligence in that respect, nor "any fraudulent purpose on the part of the distiller." See *U. S. v. Rindskopf*, 105 U. S. 418; *Felton v. U. S.*, 96 U. S. 699.

Reference is made in the brief of the district attorney to an order of the court of January 28, 1895, which, it is said, was erroneous, and should have been set aside upon the filing of the intervening petition, because it restrained the collection of this tax. But no such order is shown in the record before us. The intervening petition makes no mention of it, and it does not appear that the court was asked to set it aside. The decree below is affirmed.

BOSTON & R. ELECTRIC ST. RY. CO. v. BEMIS CAR-BOX CO.

(Circuit Court of Appeals, First Circuit. April 21, 1897.)

No. 201.

1. PATENTS.

Where an invention does not relate to matters of mere convenience, simplicity of form, or cheapening of cost, but involves a new and useful function, though in a limited field of operation, the patentee will be entitled to sufficient aid from the doctrine of equivalents to meet mere departures in form of such a character as to suggest that they are studied evasions of the claim.

2. SAME—CAR AXLE BOX.

The Bemis patent, No. 239,702, for a car axle box, construed, and held valid and infringed as to the first claim. 75 Fed. 403, affirmed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity to enjoin the alleged infringement of letters patent No. 239,702, issued April 5, 1881, to Sumner A. Bemis, for a car axle box, and No. 330,372, also to said Bemis, November 17, 1885, for a car wheel and axle box. The circuit court entered a decree for

complainant under the first patent, but found that respondent did not infringe the second one. 75 Fed. 403. From this decree the defendant has appealed.

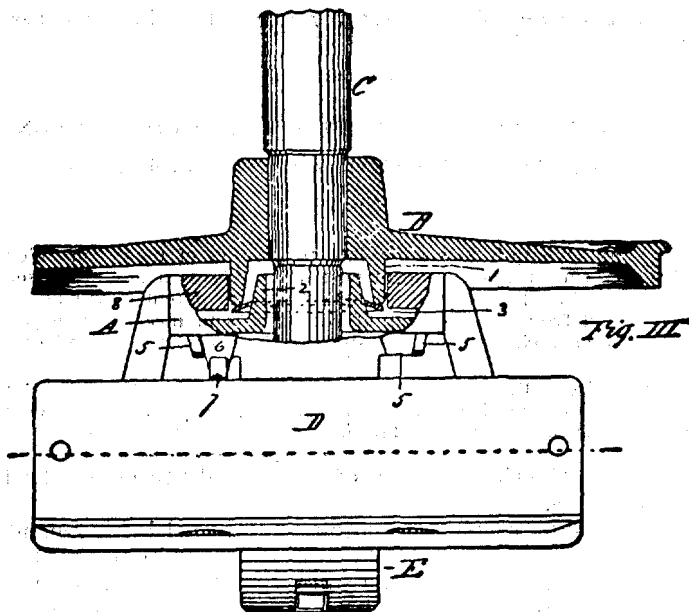
Francis Rawle, for appellant.

Frederick P. Fish and W. K. Richardson, for appellee.

Before PUTNAM, Circuit Judge, and WEBB and ALDRICH, District Judges.

PUTNAM, Circuit Judge. The controversy in this case is over claim 1 of a patent issued to Sumner A. Bemis, on April 5, 1881, and the claim was sustained and held infringed by the court below. The appeal is from the usual interlocutory decree for an injunction and an account, entered on a hearing of the cause on bill, answer, and proofs. The complainant below (now the appellee) assures us that its device has proved in practice completely effective; but we do not find the evidence of this in the record, nor do we find any proofs showing to what extent it has been used, or the patent publicly acquiesced in. Therefore the patent is without the support which might come from a condition of facts favorable to it in these respects (*Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 958, 970); and we are left to determine the case from what appears in the records of patent offices, domestic and foreign, from the testimony of experts, and from what we can ascertain to be matters of common knowledge and experience.

The appellee's device is shown by the following drawing, forming a part of the application for its patent:



The inventor to whom appellee's patent issued described his invention as an "Improved Car Axle Box"; and all he said in his specification relevant to claim 1 was as follows:

"The object of my invention is to provide a cheap and convenient manner of securing the springs in place between the housing and the pedestal, to ease the side movement of the car, and also an effective way or means of excluding the dust and dirt from the axle bearings; and I accomplish these objects by the means illustrated in the accompanying drawings. * * * In the drawings, C represents a car axle; B, the car wheel; E, the axle box; and A, the housing at the inner end of the box, on the inner part of which housing is made a tubular sleeve, 2, tapered on its periphery, as shown clearly in Fig. III. That part of the housing nearest the car wheel is filled with wood blocking or other suitable material, 8, with a circular space between the blocking, 8, and the sleeve, 2, to receive the sleeve or flange, 1, cast on the outer face of the wheel. A washer, 3, is placed on the sleeve, 2, the hole through the washer being a little smaller than the largest part of said sleeve, 2; and when the axle bearing is in its proper position in the axle box, the end of the sleeve or flange, 1, on the wheel, impinges against the washer, and tends to crowd the latter further upon the sleeve, 2; and when in this position, as there is always contact between the end of the flange on the wheel and the side of the washer, and also contact between the inner rim of the washer and the outer surface of the sleeve, 2, on the housing, of course the dust cannot get past the washer into the axle box."

Claim 1, in issue here, is as follows:

"The combination, in a car axle box, of the car wheel provided with a flange projecting out from the side of the wheel and around the axle, a tapered sleeve on the box or its housing projecting into the said flange on the wheel, and surrounding the axle, and a washer placed upon said tapered sleeve on the box, and there confined by contact with the end of the flange on the wheel, substantially as described."

For the purpose of attacking the novelty of this device, and also for the further purpose of limiting its range, the respondent below (now the appellant) introduced many prior patents, both domestic and British. We are unable, however, to perceive that any of them contained all the elements found in the appellee's device, or were intended to perform precisely the same function. The elements found in the claim are (1) the projecting flange; (2) the tapered sleeve; (3) the washer; (4) the location of the washer so as to be "confined by contact"; and (5) some elasticity in the washer, implied from common knowledge, and from the words "confined by contact," as well as from the words in the specification "always contact between the end of the flange on the wheel and the side of the washer." A combination of all these is not found in any prior device proved in the record, and the novelty of the appellee's device is established to our satisfaction.

As bearing on the question whether the device involved patentable invention, the appellee's expert testified as follows:

"I understand that the purpose of the tapered sleeve on the axle box is to provide a part which will hold a flexible washer thereon, which washer in the patent is indicated by 3, and that the purpose of the flange which projects out from the side of the wheel is to provide a suitable part which rotates coincidingly with the wheel and the axle, to have such a bearing against the outer side of said flexible washer as will prevent dust from entering into the box between the edge of said flange and the adjoining side of the washer. The flexible nature of the washer permits a certain end motion of the axle, or its journal, within the box, or of a similar motion of the box and its journal brass on the journal, such as is common in car constructions, and still keeping the outer side of the washer and the flange on the wheel so in contact that, even

under such motions, the contact of the edge of the flange with the washer is maintained."

The function thus described is plainly within the purview of the patent, and is clearly useful. It cannot be supposed that appeals to the common knowledge of the state of the art in 1881, with reference to a device of this character, could yield any substantial results beyond what is shown by the proofs; and, usefulness and novelty being established, it is plain that the appellant cannot find enough in this record to overcome, under the circumstances, the presumption arising from the patent itself in favor of the proposition that they are of a character which involves patentable invention.

But the appellant maintains that, in view of the state of the art and the phraseology of the claim, the patent is narrow, and that, therefore, its own manufactures do not infringe it. Its expert says:

"In the defendant's structure there is a car wheel, but there is no flange or projection cast thereon, and projecting out therefrom. Neither has the defendant's box a tapered sleeve on the box or housing projecting into the said flange of the wheel, and surrounding the axle, in the same sense or for the same purpose as this tapered sleeve is shown and described in the Bemis patent. In the defendant's structure, as shown by both exhibits, the washer rests against an abutment formed in the box, and its inner diameter is larger than the portion of the projecting flange of the box, which is at the extreme end rounding, as shown in the model. There can be no crowding up of the washer upon this sleeve, but the washer, when placed in position, is at once received and held by the abutment in its final position, the washer not having the capacity of being pushed further and further up, and upon a tapering sleeve."

It is true that the appellant's manufactures have no flange cast on a wheel, but they have one projecting from a collar shrunk on the axle in proximity to the wheel, and answering all the functions of the appellee's flange. Also, it does not have the tapered sleeve, but its abutment unquestionably answers all its functions, unless one. As to this the appellant maintains as follows:

"This tapered sleeve is not a chance method of construction, but is described as having a distinctive function to perform. When the parts are assembled, it takes the washer at a point on the taper about midway between the ends of the sleeve, the washer opening being described in the patent as being 'a little smaller than the largest part of' the tapered sleeve, and holds it there with a tight joint to prevent the entry of dust; and, when the wear of the inner edge of the sleeve enlarges its inner circumference, the flange on the wheel presses—or, in the language of the patent, 'crowds'—the washer further along the tapered sleeve, thus continuing to maintain a tight joint."

If this proposition was true, and yet, if this alleged function was incidental, and was not, according to the fair construction of the patent, one of the essential functions the invention was intended to promote, then the facts would present only questions analogous to those of "double use," and could not limit the claim. On the other hand, an alleged infringing combination, which has no adaptation for accomplishing the essential functions which the combination patented was, on the face of the patent, intended to accomplish, cannot ordinarily be held to truly infringe. We explained these propositions in *Long v. Manufacturing Co.*, 21 C. C. A. 533, 75 Fed. 835, 838, 839. We do not find that this function set up by the appellant is described in the patent, or contemplated by it; nor do we perceive that its existence in practice is established by the proofs, or attempted to be sup-

ported otherwise than by the suggestions of the expert witness, which we cannot regard when the fact, if it was in truth a fact, could be so easily shown by direct evidence. The word "crowd," found in the specification, and so much relied on by the appellant, is at the most only descriptive, and is sufficiently apt to indicate crowding against the taper of the sleeve merely to make a close joint, exactly as the appellant crowds the washer against its "abutment" for the same purpose.

If it be conceded, however, that the appellant does not use the "tapered sleeve," nor the flange projecting out from the side of the wheel, in precisely the forms described in the appellee's patent, the case becomes a question of equivalents. We have discussed this general question so fully in *Long v. Manufacturing Co.*, *ubi supra*, in *Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, *ubi supra* (an extreme case one way), and in *Ball & Socket Fastener Co. v. Ball Glove Fastening Co.*, 7 C. C. A. 498, 58 Fed. 818 (an extreme case the other way), that we do not deem it necessary to go over it here. The patent at bar lies between the two cases last cited; and it clearly is not shut out from the expression of the supreme court, cited by us in *Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, at page 962, 61 Fed., and page 198, 10 C. C. A., that "the range of equivalents depends upon the extent and the nature of the invention." This invention did not relate to a matter of mere simplicity of form, or of mere convenience, or to cheapening the cost. It involved a new and useful function, although, perhaps, in view of what the record shows of the art, in a limited field of operation. It is therefore entitled to some aid from the doctrine of equivalents; and we cannot conceive of any case where it could be so entitled unless it is in the present one, where the departures are only in matters of form, and of such character as to suggest that they are studied evasions of those described in the claim in issue.

As we have reached the same result as the learned judge who sat in the circuit court, and by substantially the same process of reasoning, we might well have excused ourselves if we had merely adopted his opinion as ours; but, as the case presents some new phases which have not been exhibited by any appeal we have heretofore disposed of, it seems useful to state our views at length. The decree of the circuit court is affirmed, and the costs of appeal are adjudged to the appellee.

SESSLER et al. v. BORCHARDT.

(Circuit Court of Appeals, Second Circuit. March 19, 1897.)

PATENTS—INFRINGEMENT—SLIPPER SOLES.

The Sessler patent, No. 525,746, for an insole for slippers, made of leather, paper, and wool, and used as an outsole for knit slippers by turning the thickness of leather over the thickness of paper, and uniting it to the braid to which the knit slipper is to be attached, is not, in view of prior devices, infringed by the slipper of the Borchardt patent, No. 539,337, which has a cord running under stitches in the turned-over edge of the leather, for attachment to the knit upper by stitches under it. 78 Fed. 482, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit in equity by Arnold Sessler and Arnold Sessler & Co. against Samuel Borchardt for infringement of the Sessler patent, No. 525,746, for an "improvement in insoles for slippers," etc. The alleged infringing slipper was made according to letters patent No. 539,337, issued May 14, 1895, to the defendant. The circuit court dismissed the bill (78 Fed. 483), and the complainants have appealed.

The opinion of the circuit court (WHEELER, District Judge) was as follows:

This suit is brought upon patent No. 525,746, dated September 11, 1894, and granted to Arnold Sessler, for an 'insole for slippers, used as an outsole for knit slippers, and made of leather, paper, and wool, "by turning the thickness of leather at its edge over the thickness of paper, and uniting to the turned-over portion of the leather the braid to which the knitted portion of the slipper is to be attached; the paper portion of the insole serving, as in the prior insoles, to carry the lamb's wool." The claims in question are for: "(1) The combination, in an insole, of a thickness of leather, a thickness of another material, as paper, and a tape; said thickness of leather being turned over the thickness of paper, and the tape being attached to said inturned portion of leather,—substantially as set forth. * * * (3) The combination, with a slipper upper, of an insole provided with a thickness of leather having a turned-over edge, a tape attached to said overturned edge, said knitted upper being attached to the tape, substantially as set forth." The alleged infringement has a cord running under stitches on the turned-over edge of the leather, for attachment to the knit upper by stitches under it. The defenses are prior patents and structures. The tape answers the purpose here of the welt in a hand-sewed shoe, which is first sewed to the upper, and then to the flat, thick outsole of the shoe, instead of to the turned-over edge of the flexible outsole of the slipper, as the tape is. A prior patent shows such a turned-over, flexible outsole, with an upper sewed to it, in a bathing slipper; and prior scuffs show such a one with a straw welt sewed to it, and a straw upper sewed to that. So a turned-over sole was not new. Neither was connecting such a sole by a welt to the upper new, and the tape is the same as a welt. In the scuffs seems to be the precise combination of the third claim. These soles are, however, sold without the uppers; and these scuffs are said, as exhibited whole, in argument, not to show these separate soles of the first claim. But the construction of the soles and welt is as well shown with the uppers attached as without them. If this would not be an anticipation, the defendant's sole would not seem to be an infringement. Bill dismissed.

Daniel H. Driscoll and James A. Hudson, for appellants.

J. J. Kennedy and M. B. Philipp, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Decree of circuit court affirmed, with costs, on decision of circuit judge.

ELGIN CO-OPERATIVE BUTTER-TUB CO. v. CREAMERY PACKAGE
MANUF'G CO.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 318.

1. PATENTS—CONSTRUCTION.

Patents, like other writings, are to be construed by the terms in which they are expressed, except as limited by the prior art, and an attempt to restrict them to the scope of the inventor's understanding of the device is unwarranted.

2. SAME—INVENTION—MACHINE FOR TRUSSING TUBS.

Claim 2 of the Corcoran patent, No. 294,764, for a "machine for trussing tubs," covering a combination of recessed standards, with truss hoops, removable bottom, and driving weight, if upheld at all, must be restricted to the particular construction described. The right to drive staves through trussing hoops resting in recesses is covered by the prior art, and the insertion of a removable bottom requires no invention. *Held*, therefore, that the claim is not infringed by machines made in accordance with the Ulrich patent, No. 356,217, or the Glader & Smith patent, No. 477,195.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This appeal is from a final decree, entered on January 31, 1896, awarding damages for infringement of letters patent in pursuance of an interlocutory decree of July 31, 1890, whereby the patent was declared to be valid and to have been infringed. The following statement of the case, taken from the opinion of the circuit court at the first hearing (43 Fed. 892), is sufficient for the present purpose: "This is a bill in equity seeking an injunction and accounting by reason of the alleged infringement of patent No. 294,764, granted March 11, 1884, to Matthew Corcoran, for a 'machine for trussing tubs.' The patentee describes his invention in the specification as follows: 'My invention has reference to improvements in machinery for trussing or setting up tubs, having more special reference to the manufacture of butter tubs, which latter are now in great demand as a means for packing, preserving, and transporting butter. Such improvement consists mainly in novel mechanism for supporting the truss-hoops horizontally, at proper distances above each other to receive the staves, and the employment of a drop weight to force the staves into such truss-hoops while the latter are supported in certain relative positions.' The device covered by the patent consists of three standards placed at equal distances apart in the periphery of a circle, and in the inner faces of which recesses are formed for the truss hoops to rest upon. These recesses recede from each other so that the upper ones hold the larger sized truss-hoops, as the tub is dressed small end downwards. These recesses are so arranged as to hold the truss-hoops in place, and below these recesses, marked '1' in the drawings, is another recess, marked '2' in the drawings, for holding a removable bottom to the machine. There is also a drop bottom; that is, a bottom which is hung upon a lever, and so arranged as that, by an action of the foot upon a treadle, it may be pressed upward to hold the ends of the staves while they are being put in place. After the staves are properly arranged, a weight suspended over the machine is dropped upon the upper ends of the staves for the purpose of driving the staves to place. The patentee describes the operation of his machine as follows: 'The operator places his foot on the outer end of the lever, bringing such end down upon the floor, and, by the same motion, forcing the movable bottom up against the under edge of the lower truss-hoop, the truss-hoops having been placed in their several positions in the recesses, 1. The staves are then placed within the truss-hoops around the entire inner circumference of the latter. The upper edge of the lower truss-hoop is provided on its upper edge with an inward bevel, to assist in guiding the lower ends of the staves into proper position. The operator's foot is then withdrawn from the lever, and the bottom thereby drops slightly away from the lower truss-hoop.

The drop weight is then permitted to fall upon the upper ends of the staves, forcing the latter tightly into such truss-hoops.' Infringement is insisted upon only as to the second claim of the patent, which is: '(2) The combination of the standards, A, provided with recesses, 1 and 2, on the inner faces thereof, the truss-hoops, B, fitted to rest in such recesses, 1, the removable bottom, I, fitted to rest in such recess, 2, the weight, G, arranged to be suspended over and dropped upon the upper ends of the staves, C, within such hoops, and the rope, H, substantially as shown, and for the purposes specified.' The defenses insisted upon are (1) want of patentable novelty; (2) that defendants do not infringe."

John G. Elliott, for appellant.

James H. Pierce, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge (after stating the facts as above). The contention of the appellant that the Corcoran patent is invalid, because it claims distinct machines, one a setting-up machine, and the other a trussing machine, is based upon no assignment of error which is adapted to raise the question, and is otherwise untenable. The so-called "setting up" and the "trussing" are no more than successive stages of the same process, and are so treated in the specification of the patent. See *Hogg v. Emerson*, 11 How. 587, 605. The attempt to show by the testimony of Corcoran, the patentee, that the patent embraced something which he did not invent, and to restrict the patent to his understanding of the scope of the invention, was unwarranted and improper. Even if he had been a party to the suit, he could not have been bound by a mistaken judgment which he might have been led to declare of the scope or character of his patent, and, as against the assignee of his title, his testimony in that particular was wholly incompetent. Except as controlled by the prior art, letters patent, like other writings, are to be construed and interpreted by the terms in which they are expressed.

The proposition that the bottom plate, I, which is described in the claim as removable, is in fact not removable, rests on the erroneous assumption that the specification of a patent should be controlled by the drawing. The contrary is nearer true. A drawing is not to be regarded as a working plan, unless it is so stated in the specification; (*Caverly's Adm'r v. Deere & Co.*, 24 U. S. App. 617, 13 C. C. A. 452, and 66 Fed. 305); and any apparent inconsistency with the specification, which a skillful mechanic may overcome without the exercise of inventive power, is of no significance.

The controlling question of the case is whether the second claim of the patent in suit shows invention. The court below was unable to find in the mass of testimony adduced any such combination as that shown in the patent. "There is proof in the record," says the opinion, "of vertical standards to hold the truss-hoops and of bottoms to receive the ends of the staves, but the proof fails to show a combination of recessed standards with truss-hoops and the removable bottom and the driving weight, as claimed in this patent." According to that statement, if it be closely analyzed, the differences between the combination of the claim and the recog-

nized prior art are three, namely: (1) Recesses in the standards; (2) removability of the bottom plate; and (3) the driving weight. The contention of the appellee here is less specific. It is asserted that "nowhere in the prior art did a machine exist in which all the staves were driven home simultaneously through fixed truss-hoops, and leveled against a bottom sustained in definite relation to the hoops." And again it is said: "The radical distinction in the Corcoran advance lies in the fact that he drives the staves while the truss-hoops are stationary, whereas in the prior devices, with one exception, the truss-hoops are forced along while the staves are stationary." The removable bottom, it will be observed, is not essential to either of these propositions. The "one exception" referred to is the Deering patent No. 194,335, which, it is said, is for a "machine to pound on the stave ends," in which the hoops are set one at a time (it being necessary to readjust after each setting the dependent standards which clasp the barrel in the interval while the piston is performing its stroke), and do "not level against the abutment plate in unison with the simultaneous tightening of all the hoops, which is Corcoran's central idea." These propositions of counsel and the view declared by the court alike can be accepted only by assuming or conceding the further contention that the trussing of "butter tubs," as distinct from "barrels," began with Corcoran, and that the earlier patents for barrel-trussing devices are not a part of the prior art to be considered. "The Corcoran construction," it is said, "while simple and efficient as a means of trussing tubs or half-barrels, would have been wholly inefficient for trussing barrels, for the reason that more than half of the barrel would project over the top of the Corcoran standards, and with the flare that the staves have, within said standards, the upper ends of the barrel staves, if seated in the Corcoran truss, would radiate to such an extent as to render impracticable the use of a driving weight, and at the same time the upper halves of the staves, being wholly unsupported, would yield in an outward direction to the blows from such weight, and therefore would prevent the compact seating of the staves within the truss hoops, shown in the Corcoran invention as applied to butter tubs." This may all be conceded, but it does not follow that the transition from barrel trussing to the trussing of half barrels or tubs was at all difficult, or involved the exercise of more than mechanical skill. To illustrate: One of the drawings of the Dann patent, No. 289,393, represents barrel staves projecting more than half their length above the standards, and above the uppermost trussing hoop, and radiating to such an extent as to render impracticable the use of a driving weight; but nothing could be more evident than that, if the upper halves of the staves there shown were cut off, the driving weight could be used, and that the result of the operation, without any change whatever in the form of the device, would be a half-barrel or tub. Other patents in evidence, notably the Wycoff, No. 6,813, and the Bayley, No. 190,730, show machines for trussing barrels which without essential alteration could be used for trussing tubs, and their construction is such that if they do not, part

by part, anticipate the combination of Corcoran, they make it impossible that the machines of the appellant, constructed as they have been in conformity either with the Ulrich patent, No. 356,217, or the Glader & Smith patent, No. 477,195, shall be deemed to infringe that combination. The earlier patents mentioned show recessed standards, some vertical, as in the Deering device, and some horizontal, as in the Wycoff and Bayley machines, through the truss-hoops of which, held in the recesses of the standards, the staves are driven simultaneously against bottom plates sustained in a definite relation to the hoops. That is done, it is true, in the Wycoff and Bayley machines, by pushing forward the standards, and thereby forcing the hoops upon the staves; but the process and effect, it is quite clear, are mechanically the same as if the staves were driven through stationary hoops; and if it were proposed to employ the machines in trussing half-barrels, instead of barrels, the only change of construction and operation required would be to make stationary one of the leveling heads and one set of standards, and to use the other leveling head as a piston head, in lieu of the driving weight, to force the staves simultaneously through the hoops. Indeed, in the Wycoff construction one of the cup dies, or pots, is shown to be stationary, and the staves are forced into it, and through the hoops held in its annular recesses by the pressure or stroke applied at the other end, just as in the Corcoran device. In the Deering machine, as its operation is explained, the staves are driven through the hoop, and not the hoop upon the staves. There is, to be sure, but one recess in the standards, but the standards are adjustable so as to receive into the recess the different sizes of hoops successively as necessary, and to hold them in a fixed position while all the staves are driven simultaneously through each hoop in its order, until the intended result is accomplished. The substitute for the driving weight and rope is a platform moved by a piston, and, instead of a continuous pressure, the specification says that the piston with the platform "may be dropped down and brought up again suddenly with a strong stroke against the lower end of the barrel, thus setting the hoop through the means of percussion."

It need not be said that the Corcoran claim is totally void; but, if upheld, it must be restricted to the particular construction described. The right to drive staves through trussing hoops resting in annular rings or recesses on the inner side of a pot is covered by the prior art, and when it was found, if not anticipated, that the bottom of the pot was liable to be broken or worn in the process of trussing, it required no invention to insert a false or removable bottom, which could be replaced when necessary. In fact, the leveling heads shown in the Bayley patent are or could easily be made removable. The practice of making removable such parts of machinery as are especially exposed to wear or injury is too old to admit of the exclusive appropriation of that feature of construction in any kind of machine. Corcoran's patent discloses no such intention. The bottom, I, in his device, was made removable evidently in order that in Figs. 1 and 2 it might be inserted,

and again withdrawn, after the dropping down of drop bottom, D, and in order that in Fig. 3 the standards might be adjusted to hoops of different sizes. In the machines of the appellant the removable bottoms contribute to no such adjustments, and are used solely for the purpose of economical replacement when broken or unduly worn. The decree below is reversed, with direction to dismiss the bill for want of equity.

THE CITY OF AUGUSTA.

HANDY et al. v. ADAMS.

(Circuit Court of Appeals, First Circuit. April 15, 1897.)

No. 194.

1. APPEALS IN COLLISION CASES—CONFLICTING EVIDENCE—FINDINGS BELOW.

Where the judge below has recorded his impression that certain testimony given by witnesses in his presence was of doubtful value, and on an examination of it by the appellate court there is nothing to suggest that the trial judge overlooked anything appearing on a careful comparison of the whole record, his conclusions will be entitled to great weight.

2. COLLISION—BURDEN OF PROOF—LOOKOUTS.

Where a lookout is shown to have been absent from his post for a large part of the critical time during which the vessels were approaching each other, and was therefore unable to observe a considerable portion of the essential occurrences in controversy, the presumptions arising from this lack of vigilance are of very substantial importance; especially where it appears that the master of the vessel, instead of being in command of the deck, was himself at the wheel. In such case, if the vessel is unable to sustain the burden of showing fault in the other party, such inability must be laid to her own misfortune or negligence. The *Charles L. Jeffrey*, 5 C. C. A. 246, 55 Fed. 685, applied.

3. SAME—ERRORS IN EXTREMIS—LUFFING.

Where a sailing vessel going closehauled finds that another sailing vessel running free is crossing her course so close under her bow that she will probably not go clear, and thereupon luffs, she will not be held in fault, even if this was a mistake, as the rule of error in extremis applies.

4. SAME—EVIDENCE—ADMISSIONS.

While the courts seldom put much reliance on the evidence of officers or seamen as to alleged admissions by officers or seamen of the hostile vessel, yet, when such admissions are in harmony with the reasonable probabilities of the case in other particulars, they may be of value in suggesting a solution as between conflicting proofs.

5. ADMIRALTY APPEALS—COSTS.

While, perhaps, there may be no appeal from ordinary questions of costs within the common jurisdiction of taxing masters, yet there may be such an appeal when the force of a statute or some positive rule of law is involved, though it concerns only costs.

Appeal from the District Court of the United States for the District of Massachusetts.

Eugene P. Carver (Edward E. Blodgett on brief), for appellants.
Edward S. Dodge, for appellee.

Before COLT and PUTNAM, Circuit Judges, and BROWN, District Judge.

PUTNAM, Circuit Judge. The learned District Judge from whom appeal has been taken in this case, and who found the A. Heaton alone in fault, stated the questions at issue as follows:

"This collision between the two schooners, the City of Augusta and the A. Heaton, occurred off Nausett Light on September 13, 1895, about 1 a. m. The wind was northwest by west, blowing a moderate breeze; and the weather was clear and fine. The City of Augusta was coming up the coast, closehauled, on the port tack, and steering about north. The A. Heaton was coming down the coast on an almost directly opposite course to the other vessel, with the wind abaft the beam,—a situation which gave the City of Augusta the right of way. The claim set up in the libel of the A. Heaton, and which is supported by the evidence of the libelants, is that she saw the lights of the City of Augusta almost directly ahead, and, in order to avoid her, starboarded, and kept off a point or so to the southeast, and, shortly afterwards, kept off another point; and, as she claims, she was going clear, when suddenly the City of Augusta ported, and ran across her bow, and that, to avoid this danger, the Heaton then ported and luffed up into the wind, and that then she would have gone clear if it had not been that the City of Augusta also luffed, and in that situation ran into her, striking her on the port side, near the forerigging. The claim on the part of the City of Augusta is quite different. On board her the lights of the A. Heaton were seen directly ahead. It is claimed that the vessel held her course until she was quite near to the City of Augusta, in fact within dangerous proximity to her; and that, observing that the Heaton was keeping off, to give her more room, the City of Augusta luffed a little, and then the Heaton luffed up into the wind, and went right across her bow."

These issues involve only questions of fact, as to which the master of the A. Heaton was so essential a witness in her behalf that her case must clearly fail unless his testimony is substantially accepted. He testified orally before the District Judge, who observed:

"I would state that the testimony of the master of the Heaton did not impress me very favorably. His memory was singularly feeble and faulty, and I doubt very much whether he made a correct statement of what occurred."

The learned judge, having had the opportunity of personally observing this witness, has thus carefully recorded the result on his own mind. Our examination of his testimony, as shown by the record, confirms this result; and a like examination of that of the lookout of that vessel leaves a similar impression. It is true that the evidence of the lookout of the City of Augusta is also very much confused in regard to the events at the critical period immediately preceding the collision. But that of her master is clear and consistent, so far as the facts were within his observation; and those covered the main issue in the case, namely, that the City of Augusta firmly held her course until she luffed the instant before the collision.

The nature of the conflicting proofs is such that it is impossible, in any view of the case, to pronounce the decree below clearly erroneous. Nothing suggests that the district court overlooked anything which appears to us on a careful comparison of the whole record. Without, therefore, undertaking to say whether weight is usually to be given to the findings of fact by the court below in the terms in which the rule is ordinarily stated, or according to the qualified and guarded way of putting it in *The Ariadne*, 13 Wall. 475, 479, we are within the lines of undoubted safety when we say that this is one of the peculiar class of instances where necessarily the conclusions of the learned District Judge have great value. Moreover, the rules

laid down by us in *The Charles L. Jeffrey*, 5 C. C. A. 247, 55 Fed. 685, 686, will be found to have application to this case. We there said:

"The entire watch of the *Joe Carleton* consisted of the captain and steward or cook, the latter testifying that, although he had followed the sea for 18 years, it had been mostly in the latter capacity. According to the testimony of both of these men, the captain relieved the cook at the wheel at or about 10 o'clock, and the cook then went on the lookout. The cook admits that, after he went on the lookout, he took about 10 or 15 minutes in clewing up the topsails and trimming down the staysail. * * * Natural justice and good sense, as well as the settled practice of the admiralty courts, are not ordinarily satisfied with testimony touching contested issues of fact relating to the topics in dispute here, given by mariners who are so slack as these witnesses with reference to the cognate prime requirements of navigation. When one vessel makes a claim against another in the case of a collision, admiralty courts are bound by the same rule which forbids any other court from condemning any one in damages, except in behalf of a party who supports his demand by a preponderance of evidence. If, therefore, as with the *Joe Carleton*, the owners of a vessel, either through the necessities of economy or for other reasons, are not able to show such constant vigilance, especially on the part of the lookout, as is necessary to sustain the burden which rests upon every one who claims another to be in fault, the inability to maintain the claim must be laid to their own misfortune or negligence, and not to the courts or the law. Under the circumstances of this case, and applying the rule of evidence referred to, even if this court was not able to find by a preponderance of evidence that the *Charles L. Jeffrey* was free from fault, there is also lacking the like preponderance in favor of the claim that she was in fault, or that the *Joe Carleton* was fulfilling all the duties which the statute required of her; and therefore, for this reason alone, we would justly be compelled to affirm the decree of the district court, and dismiss the libel of the owners of the *Joe Carleton*, on the ground that the case of the latter was not proven to our satisfaction."

In the case at bar it is conceded that, after the *A. Heaton* sighted the *City of Augusta*, the lookout of the former went to the pump, and remained there three minutes. He maintains that he went forward again seasonably before the collision, but there is some evidence to the contrary. We do not deem it necessary to determine whether or not he did so go forward again. It is plain he was absent from his post, and that there was no other lookout, for a large part of the critical portion of the time during which these vessels were approaching each other, and that he was unable, on account of his admitted absence, to observe a considerable portion of the most essential occurrences about which the parties are at issue. This is not the case of *The Nacoochee*, 137 U. S. 330, 341, 11 Sup. Ct. 122, where the absence of a lookout would be of no consequence, but of *The Genesee Chief*, 12 How. 443, 462, 463, and of *The Oregon*, 158 U. S. 186, 193, 15 Sup. Ct. 804; and the vigilance of the lookout, and the presumptions arising from the want thereof, are of very substantial importance. In addition thereto, contrary to the continued injunctions of the courts otherwise, the master of the *A. Heaton* was not in command of the deck, but was himself at the wheel. Besides him and the lookout, she had one other man on deck amidships; who, however, admits that he heard the first report of the light of the *City of Augusta*, but did not see her till she came under the lee bow of the *A. Heaton*, which was at the moment of the collision. Under these circumstances, the *A. Heaton* must bear the burden, within the rules in *The Charles L. Jeffrey*, *ubi supra*, of the unwillingness of the court to accept proofs

to charge another vessel, coming from one so slack in her discipline as she is clearly shown to have been. We are not, on this point, required to make like inquiries as to the discipline aboard the City of Augusta, nor as to her proofs in all respects, because she is not the moving vessel in this litigation, and no burden rests on her to make out a claim.

We should also observe that, as the A. Heaton was sailing free and the City of Augusta was closehauled, it is a clearly settled rule of the practical administration of the law that the burden rests on the A. Heaton to show that she kept well clear of the course of the other vessel. This has nothing to do with the subordinate rule which would require the City of Augusta, if her luffing was inexcusable, to show that it could not have contributed to the collision, because if the A. Heaton was in fault, as found by the district court, the proofs show that the luffing was undoubtedly in extremis. According to the testimony of the captain of the City of Augusta, having been called forward by the lookout, he saw that the A. Heaton was crossing his course from his port to his starboard, showing her green light, and that she was so close under his bow that he thought she probably would not go clear, and therefore he luffed, to enable her to do so. He had reasonable grounds for believing that his luffing would prevent a collision which was imminent. Under these circumstances, it is impossible for any one to say with certainty that his luffing was a mistake; but, even if it were otherwise, the rule in extremis applies. The instances in which parties have been held strictly for errors in luffing seem to be superseded by later and more moderate statements of the rule. Among the more stringent cases are *The Catharine*, 17 How. 170, and *The Agra* and *The Elizabeth Jenkins*, L. R. 1 P. C. 501, 505. A more reasonable and just statement is that of the supreme court in *The Oregon*, 158 U. S. 186, 204, 15 Sup. Ct. 804, 812, as follows:

"It was a case of action in extremis, and, while it is possible that a bell might have called the attention of the approaching steamer, it is by no means certain that it would have done so; and, whether the lookout acted wisely or not, he evidently acted upon his best judgment; and the judgment of a competent sailor in extremis cannot be impugned."

We stated somewhat more fully the same principle in *The H. F. Dimock*, 23 C. C. A. 123, 127, 77 Fed. 226, 229, as follows:

"We are aware that the master of the *Dimock* appears to have been competent for his position, and to have exercised an honest judgment, and, indeed, to have proceeded even more carefully than other steamers navigating practically in company with him. Where the questions are merely those of prudential rules of navigation and of maritime usages, a vessel should not ordinarily be held in fault simply because the courts, with cool deliberation, after all the facts, determine that what was done was mistaken. In such cases a court should put itself in the position of the master at the time of the circumstances involved, and consider that the rights of the parties, when maritime contingencies are difficult and unusual, must ordinarily be settled according to his determination, provided he has suitable experience and capacity, and exercises a discretion not inconsistent with sound judgment and good seamanship."

The A. Heaton contests the experience and competency of the man at the wheel of the City of Augusta. He was a passenger, and his

inexperience cannot be denied; yet he had a knowledge of maritime terms, and was not entirely without maritime experience. He was an apparently intelligent student at a Maine academy, taking this voyage for a vacation. There is nothing in the case to suggest that he was not both a competent and an impartial witness. He may well be supposed to have been less subject to influences than any officer or seaman attached to either vessel. The fact that he was inexperienced would be of more value if there were any evidence that he in truth steered badly. There is no such evidence except as involved in the issue of the whole case; that is, if the whole case is against the City of Augusta, it must be because it carries the theory that she was badly steered. The evidence of her master and wheelsman is positive that she was kept on her course until she luffed just before the collision. The wheelsman says that he kept a "good full," and also that he held his course steadily by compass. However, this particular question is removed by the fact that the master of the City of Augusta was himself by the wheel so constantly that no point can be made out of the mere inexperience of the wheelsman. Each side charges the opposing vessel with maneuvers which would be very improbable in one properly manned and disciplined; and, on the whole, in view of the facts and considerations to which we have referred, we are unable to reverse the conclusion of the district court.

While the case of the A. Heaton against the City of Augusta thus fails mainly for want of satisfactory proofs on her part to support the burden which rests on her, yet it seems quite apparent that the collision occurred through her own fault. Either she failed to sight the City of Augusta seasonably, as was found by the district court, or she afterwards lacked vigilance in observing her courses, and in bearing away from her by so large a margin as she was bound to do. The libel alleges that she first saw, at a distance of about two miles, the red light of the City of Augusta on her starboard bow. The testimony of her lookout is to the same effect, putting it about half a point on that bow. The testimony of the master of the A. Heaton, at one place, is that he saw the light of the City of Augusta before his lookout saw it, and that it bore about half a point on his starboard bow, but that the light first seen was green. At another place he states that it was red, and again, after having had read to him the portion of the libel to which we have referred, he says, "Both lights." It is quite plain, taking the whole case together, that, when the City of Augusta was first sighted by the A. Heaton, the two vessels were nearly head on, but that the City of Augusta was a little on the starboard bow of the A. Heaton, and, accepting the terms of the libel, showing her red light. This brought them on courses slightly crossing. The A. Heaton claims that her first maneuver was to keep off to her own port a point, and she complains that, immediately after first sighting the City of Augusta, the latter vessel showed both of her lights, and continued to show them, notwithstanding she herself kept off. In view of the testimony of the master of the City of Augusta that she was making about half a point leeway, which is in accordance with the probabilities, the A. Heaton, by keeping off only a single point to her own port, which was also to the leeward, and thus in the

same direction in which the course of the City of Augusta was crossing her course, and in which the City of Augusta was also drifting, could hardly expect other than that she would see both lights of the other vessel. She claims that she afterwards kept off further, but she states that, when she finally shut in the red light of the City of Augusta, the latter vessel was only eight or ten times her length distant from her own starboard bow. It is apparent that if the A. Heaton undertook to keep off in the direction in which the City of Augusta was crossing her course, and thus to the leeward, in which direction the City of Augusta was also making some leeway, instead of going to the windward by porting her helm, and thus bringing red to red, she was bound to go off promptly points enough to give ample margin for passing the other vessel. This she evidently did not do, and thus it was that she came across the bow of the City of Augusta, as stated by the master of the latter vessel, inducing him to luff, and thus, further, in connection with her own maneuver of also luffing in the confusion of the last moment, she brought about the collision. It is true that her master and lookout claim that, before she luffed, the City of Augusta had crossed her bow to the leeward, had shut out her green light, and was showing only her red, thus occasioning the luffing of their own vessel. In view of the comments we have already made on their testimony, we do not feel justified in accepting it as against the evidence of the master of the City of Augusta to the contrary.

The courts seldom put much reliance on the evidence of the officers or seamen of any vessel involved in a collision as to alleged admissions by officers or seamen of the hostile vessel, although such admissions, when made on the spot, and proved by the evidence of disinterested witnesses, which cannot be challenged, may well be regarded as the most natural and truthful expressions of the circumstances of a collision, uttered before there was an opportunity to frame a theory exculpating one vessel or the other. Therefore, such alleged admissions may, in any event, be of value in suggesting a solution as between conflicting proofs, when they are in harmony with the reasonable probabilities of the case in other particulars. Of this character is the evidence of Captain Adams, of the City of Augusta, as to his conversation with Captain Handy, of the A. Heaton, on the deck of the former vessel, immediately after the collision. Captain Adams testified as follows:

"He [meaning Captain Handy] said he thought he would keep off across our bows, and then he was afraid we were keeping off, or would keep off, and then he said he commenced to luff, put his wheel down, and he said he was afraid at the same time that we would luff."

This is in entire harmony with our theory that he did not keep off in season.

In this connection we may aptly cite *The Singapore* and *The Hebe*, L. R. 1 P. C. 378, 384, with reference to the duty of a vessel running free, as follows:

"Her plain duty was to have ported her helm, altered her course, and so got out of the way. She says she did so. * * * Whether she did or not, this is plain: that it was her bounden duty to have gone out of the way, and that, the wind being in the quarter in which we find it proved to have been,

and her course being such as she admits it was, it was plainly within her power, as it was within her obligation, to have got clearly out of the course that was being pursued by the Hebe."

The appellants made the following assignment of error, with others: "That the court erred in taxing more than one hundred miles travel for witnesses from without its jurisdiction." This is intended to raise an objection to an allowance of costs, according to the rule of the circuit court for the district of Massachusetts, as established by Mr. Justice Gray and Judge Colt in *U. S. v. Sanborn*, 28 Fed. 299. This question was raised in the district court, and insisted upon, in such way that it is fairly before us, notwithstanding the many expressions that costs are not matters of appeal. Among the latest are those found in *Du Bois v. Kirk*, 158 U. S. 58, 67, 15 Sup. Ct. 729, 732, and *Bank v. Cannon*, 164 U. S. 319, 323, 17 Sup. Ct. 89. In *Du Bois v. Kirk*, the court said:

"This court has held in several cases that an appeal does not lie from a decree for costs; and if an appeal be taken from a decree upon the merits, and such decree be affirmed with respect to the merits, it will not be reversed upon the question of costs."

Another late expression is in *Bank v. Hunter*, 152 U. S. 512, 515, 14 Sup. Ct. 675, 676, as follows:

"If the sum in dispute on this appeal were sufficient to give us jurisdiction, we could consider the question of costs referred to in the second assignment of error. But, as the appeal in respect to interest must be dismissed for want of jurisdiction, the appeal, in respect to costs, must also be dismissed. No appeal lies from a mere decree for costs."

That case was in equity. The record does not show the amount of costs involved, and the only question appears to have been which party should pay costs,—a question which, under the circumstances, did not necessarily involve a strictly legal right. So far as concerns causes in equity and admiralty, the rule of the supreme court, as generally stated, seems traceable to *Canter v. Insurance Co.*, 3 Pet. 307, 319. That case was in equity, and the matter appealed against was apparently one of counsel fees. At that time there was no statutory regulation about costs; and it had been decided in *The Apollon*, 9 Wheat. 362, 379, that counsel fees might be allowed as costs in admiralty. Consequently, in *Canter v. Insurance Co.*, the only questions were those of a sound discretion, questions not "positively limited by law." It will be seen, therefore, that this case involved no question of fixed law, either as to the right to any costs at all, or as to the right to particular items where the allowance of any costs whatever is in the discretion of the court. This was the condition of the case covered by our opinion in *Gamewell Fire-Alarm Tel. Co. v. Municipal Signal Co.*, 23 C. C. A. 250, 77 Fed. 490. But since the act of February 26, 1853 (10 Stat. 161, c. 80), regulating fees and costs (now section 823 of the Revised Statutes and sequence), the law has taken on a different phase. At present the power to allow costs at all is in many cases fixed by positive law; and in other cases, where there still remains a judicial discretion to allow costs and to determine for or against whom they shall be allowed, as in equity and admiralty, some of the items are, nevertheless, positively fixed or limited. *Canter v. Insurance Co.* has been largely cited in the cases wherein it is said

generally that there is no appeal on a mere question of costs, to and including *Bank v. Hunter*, *ubi supra*. They were all, however, equity or admiralty appeals, except that in *Wood v. Weimar*, 104 U. S. 786, 792, there is a dictum that no writ of error lies from a judgment as to costs alone. But in *O'Reilly v. Morse*, 15 How. 62, 124, 137, where the patentee had not disclaimed certain void portions of one of his claims, and the circuit court allowed him costs, the supreme court affirmed the decree as to its merits, but reversed it as to the costs. And in *Burns v. Rosenstein*, 135 U. S. 449, 456, 10 Sup. Ct. 817, the court affirmed that it has entire control of the costs, as well as of the merits, where it has possession of a case on an appeal from a final decree. *Bank v. Cannon*, *ubi supra*, is apparently to the same effect.

That no appeal lies from a mere matter of costs has been said to be the rule of the house of lords, though a late statement of it very much qualifies it. *Asylum Dist. v. Hill*, 5 App. Cas. 582, 584. And an appeal clearly lies to the court of appeal on a mere matter of costs where a question of principle is involved. *Annual Practice* (1895), 1115. But, whatever may be the rule of the supreme court, the right of appeal to this court, given by the sixth section of the act establishing it, is of the broadest character. The statute is remedial, and we have always held that there is no necessity for limiting it in any respect when neither its language nor the clear rules of construction require it. *Davis Electrical Works v. Edison Electric Light Co.*, 8 C. C. A. 615, 60 Fed. 276, 277; *Marden v. Manufacturing Co.*, 15 C. C. A. 26, 67 Fed. 809, 814. Cases may be conceived where a party may not be greatly inconvenienced by the decision of the merits of a cause against him, and yet be ruined by a false principle of allowance of costs. We therefore hold that while, perhaps, there may be no appeal from the ordinary questions within the common jurisdiction of taxing masters, there may be when the force of a statute or some positive rule of law is involved, although it concerns only costs, and that, therefore, the question raised by the assignment of error which we have quoted is before us for determination.

The practice in this circuit has been for many years as stated in *U. S. v. Sanborn*, *ubi supra*. Nevertheless, the question involved is not one of usage, but of statutory construction, and has never been passed on by this court. Wherever the question has been before other circuit courts of appeals, it has been decided as claimed by the appellants; but this has not been to such an extent as to make such a body of concurring decisions as to compel our acquiescence. We therefore must abide by the long-continued construction of the law given by the federal judges within this circuit, and by the great weight of judicial authority involved therein. The decree of the district court is affirmed, and the costs of appeal are adjudged to the appellee.

GOMBERT et al. v. LYON et al.

(Circuit Court, D. Nebraska. May 3, 1897.)

FEDERAL COURTS—EQUITY JURISDICTION—STATE STATUTE—REMOVED CASES.

A suit brought in a state court, under a state statute, to quiet title against one in possession, is an equitable suit, which cannot, after removal to a federal court, be prosecuted therein, because there is an adequate remedy at law. The federal court will not, however, dismiss the suit, but will remand it to the state court.

Benjamin S. Baker and Cole & Brown, for complainants.

L. C. Burr and Searl & Coleman, for respondents.

MUNGER, District Judge. Complainants brought this action in the state court to quiet title in them against the claim of title on the part of the respondents to certain real estate in the bill described, situate in the state of Nebraska. The complainants in their bill allege they are the owners in fee simple of said real estate. The respondents deny complainants' title; allege title in themselves, and that they are in the possession of said premises. By the pleadings and proof it is clearly shown that respondents are now, and were at the time of the bringing of the action, in the possession of said real estate. Respondents removed the case into this court on the ground that a federal question was involved, and now move to have the case dismissed for the reason that the action is an equitable one, and that this court has no jurisdiction to determine the rights of the parties in an equitable proceeding, as complainants have an adequate remedy at law. The action is one in equity, and is authorized to be brought and maintained in the state court by the provisions of the state statute. Comp. St. Neb. 1895, c. 73, § 57; *Foree v. Stubbs*, 41 Neb. 271, 59 N. W. 798; *Dolen v. Black*, 48 Neb. 688, 67 N. W. 760. It is claimed on the part of complainants that this equitable remedy given by the state statute may be maintained in the federal courts, and they cite in support thereof *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495; *Reynolds v. Bank*, 112 U. S. 405, 5 Sup. Ct. 213; and *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557. We do not think these cases so hold. *Holland v. Challen* was a case involving, it is true, this statute of Nebraska; but in that case there was no one in possession of the premises, and complainant had no adequate remedy at law. In *Reynolds v. Bank* the question as to whether complainant had a complete adequate remedy at law did not arise. In *Arndt v. Griggs* it was held that "a state may provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a nonresident, is brought into court by publication." The judiciary act provides "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." In *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, it was held that a demurrer was properly sustained to a bill that alleged that the plaintiff was the owner in fee of the premises; that, notwithstanding such ownership, defendants were in possession, holding the same adversely under claim of title,—on the ground that plaintiff had a plain,

adequate, and complete remedy at law. To the same effect are the following: *Sanders v. Devereux*, 8 C. C. A. 629, 60 Fed. 311; *Frey v. Willoughby*, 11 C. C. A. 463, 63 Fed. 865. In the case before us it seems clear that plaintiffs, under the pleadings, have an adequate and complete remedy by the action of ejectment, and for that reason this action cannot be maintained in this court. But should the motion to dismiss be sustained? We think not. The case was one properly brought in the state court. That court was given jurisdiction by the state statute to determine the controversy between the parties in this equitable proceeding, and to dismiss the action would be, in effect, to hold that the state court did not have jurisdiction, and thus nullify the state statute. We think the proper proceeding is to remand the case to the state court, and this view we think sustained in *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977. The case will be remanded to the state court at the cost of respondents.

FRINK v. BLACKINTON CO.

(Circuit Court, D. Massachusetts. April 29, 1897.)

No. 618.

1. REMOVAL OF CAUSES — FILING OF RECORD BY PLAINTIFF — MOTION TO REMAND.

Quære, whether, after the removal papers are filed in the state court, and before the time allowed to defendant for filing the record in the federal court, the plaintiff may himself file the record, and move to remand.

2. SAME—TIME OF REMOVAL.

The rule of the superior court of Massachusetts requiring demurrers, answers, pleas in abatement, and motions to dismiss to be filed within the time allowed by law for entering an appearance is a general rule of practice, so as to require that a petition for removal to a federal court shall be filed within the same period; nor is it material that the rule permits the court to enlarge the time on special cause shown. *First Littleton Bridge Corp. v. Connecticut River Lumber Co.*, 71 Fed. 225, affirmed.

George R. Nutter, for plaintiff.

Charles H. Williams, for defendant.

PUTNAM, Circuit Judge. This is a "plea of land," or "real action," brought in the superior court of Massachusetts. The defendant filed the proper petition and bond to remove the cause to this court. They were filed at such a date that pursuant to the act of August 13, 1888, c. 866, § 1 (25 Stat. 433), the bond was necessarily conditioned for entering the copy of the record in this court at the May term, 1897. During the October term, 1896, of this court, the plaintiff asked leave to file a copy of the record, and moved this court to forthwith remand the case. The defendant claims that we have no jurisdiction to entertain this motion prior to the May term.

The weight of authority and the reason of the case seem to be with the plaintiff so far as concerns this proposition. The statute contains no express provision on this topic; and the most that can be said in regard to it is that its requirements looking to the entering of the

copy of the record in the circuit court at a specific term raise an implication that the cause is not pending there until that time. However, it does not expressly prohibit either party from entering such copy at an earlier term; and what it does not prohibit cannot be held to be a legal impossibility. Various expressions of the supreme court make it certain that, after the filing of proper removal papers, a case is no longer pending in the state court for any useful end; and there seems to be no theory nor fiction of law which renders it illogical to maintain that, for practical purposes, it must be regarded as pending in one court, if not in the other. Gross injustice would often be done, and great hardships ensue, if it should be held that there was an interregnum during which no court could make interlocutory orders, no matter how great the necessity; and we are not inclined to the view that such is the law. However, in the absence of any ruling on this question by the supreme court, we prefer not to hazard unnecessarily the chance of laying a serious error in the very foundation of this litigation, and we believe that the expression of our views on the remaining question presented to us will enable the parties to accomplish seasonably practical results with safety.

The only reason for remanding now relied on by the plaintiff is that the removal papers were not seasonably filed in the superior court. A rule of that court provides that "demurrers, answers and pleas in abatement, and motions to dismiss, shall be filed within the time allowed by law for entering an appearance, unless otherwise ordered by the court for good cause shown"; and the time allowed by law, as provided by the acts and resolves of Massachusetts (St. 1885, c. 384, § 7), for entering an appearance, is ten days after the return day of the writ. The removal papers were not filed until after the expiration of the ten days named. This rule, or one of the same character, has prevailed so long in all the superior courts of judicature of Massachusetts that it has become universally known as a general principle of practice. Under a like rule of the supreme court of New-Hampshire, in *First Littleton Bridge Corp. v. Connecticut River Lumber Co.* (September 24, 1895) 71 Fed. 225, we applied the expressions of the supreme court in *Martin's Adm'r v. Railroad Co.*, 151 U. S. 673, 14 Sup. Ct. 533, and held that the rule limited the time for filing removal papers in the manner claimed by the plaintiff in the cause at bar. Judge Simonton, in *Mahoney v. Association* (November 7, 1895) 70 Fed. 513, declined to follow the expressions of the supreme court, on the ground that they were not essential to the decision of the case referred to. Notwithstanding the great weight to be given to whatever comes from that learned judge, we do not consider ourselves at liberty to follow him. The expressions of the supreme court in *Martin's Adm'r v. Railroad Co.* were repeated by it in *Goldey v. Morning News* (March 11, 1895) 156 U. S. 518, 524, 525, 15 Sup. Ct. 559, in such way that we must accept them as stating deliberate conclusions of that court which we are not at liberty to disregard. Moreover, in view of the delays in litigation arising unavoidably from the right of removal, the construction of doubtful provisions should be in favor of requiring the greatest diligence from parties exercising that right. The supreme court, in *Martin's Adm'r v. Railroad Co.*, at page 687, 151

U. S., and page 538, 14 Sup. Ct., gave very substantial reasons in favor of its expressed rule, as follows:

"Construing the provision now in question, having regard to the natural meaning of its language, and to the history of the legislation upon this subject, the only reasonable inference is that congress contemplated that the petition for removal should be filed in the state court as soon as the defendant was required to make any defense whatever in that court, so that, if the case should be removed, the validity of any and all of his defenses should be tried and determined in the circuit court of the United States."

These reasons have been re-enforced by the final determination in *Railway v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, to the substantial effect that all matters in abatement remain open to be pleaded in the circuit court in suits removed. Therefore, both authority and sound reason require us to abide by our former conclusions.

The rule of the supreme court of New Hampshire did not contain the words "unless otherwise ordered," found in that at bar; and, in the case based on that rule, we noted that it was not claimed that the court had the power to enlarge the time. On reflection, we are satisfied that this fact is of no consequence in this class of cases. Nearly every rule and statute fixing periods within which pleadings are to be filed give the courts power to enlarge the time, and such power is also ordinarily implied. Therefore, if this fact should be held of importance, there would, in a very large proportion of cases, be no practical limit to the period within which a petition for removal could be filed. It was apparently not regarded as an essential one in *Railroad Co. v. Daughtry*, 138 U. S. 298, 300, 11 Sup. Ct. 306.

The defendant maintains that the rule in question does not apply to real actions; but its whole claim in this respect rests on the fact that certain matters formerly pleaded only in abatement in that class of suits are now pleadable in bar, and on the other fact that certain matters in abatement may now be set up by answer. The first fact does not, however, reach all matters in abatement or demurrers; and the second is met by a late case relied on by the defendant,—*Silver Co. v. Smith*, 163 Mass. 262, 268, 39 N. E. 1116,—where it is stated that the rule of the supreme judicial court of Massachusetts as to the time of making defenses in abatement still stands. A study of the history of the practice acts of Massachusetts will show clearly that they have no such general operation with reference to matters in abatement as supposed by the defendant.

In conclusion, it is our opinion that, if the motion to remand be renewed at the May term, it will be granted. It is ordered that the plaintiff's motion to remand stand over to the May term, 1897.

UNITED STATES V. AMERICAN LUMBER CO. et al.

(Circuit Court, N. D. California. April 19, 1897.)

No. 12,162.

1. **LIMITATION OF ACTIONS—RUNNING OF STATUTE—COMMENCEMENT OF ACTION.**
Suits in equity in the federal courts are not deemed to be "brought" or "commenced," so as to stop the running of the statute, until the suing out of appropriate process and a bona fide attempt to serve it.
2. **SAME—SERVICE OF PROCESS OUTSIDE THE JURISDICTION.**
The issuance of a subpoena to be served outside the territorial jurisdiction of a federal court, and the service thereof, is a mere nullity for all purposes, and will not stop the running of the statute of limitations in favor of the defendant.
3. **PROCESS—EXTRATERRITORIAL SERVICE.**
To procure the special order of service, or "warning order," authorized by Rev. St. § 738, for service on absent or nonresident defendants in the special class of suits therein mentioned, it is not necessary in all cases to lay a foundation therefor by first issuing subpoenas, or by making an order requiring defendants to appear before a certain date. If the bill itself shows that they are absent or nonresident, and cannot be served within the district, such subpoena or order is useless and nugatory, and the "warning order" may be procured at once and as the first process.
4. **SAME—EXTRATERRITORIAL PROCESS—SUIT TO CANCEL PATENT.**
In a suit by the United States to cancel a land patent, where the bill itself shows that the defendants are absent or nonresidents of the district, the appropriate process, and the only process which will stop the running of the statute of limitations, is the special order of service, sometimes termed the "warning order," provided for by Rev. St. § 738, for extraterritorial service in suits to enforce any equitable lien or claim, etc., against real or personal property situated in the district.

Bill in equity to cancel, set aside, and have decreed null and void certain patents issued by the United States to all the lands set forth and described in the bill. A plea in bar was filed by the defendants setting up the question of the statute of limitations under the act of March 3, 1891 (26 Stat. 1099). The complainant answered the plea in bar, to which answer the defendants excepted for impertinency.

Benj. F. Bergen, Special Asst. U. S. Atty.

Platt & Bayne and Butler, Notman, Joline & Mynderse, for defendant Central Trust Co.

Page, McCutchen & Eells, for defendant American Lumber Co.

MORROW, District Judge. This case comes up on an exception taken by the defendants to the amended answer of the complainant filed by the latter to the defendants' plea in bar to the bill. The bill is filed to cancel, set aside, and have decreed null and void the patents issued by the United States to all the lands set forth and described in the bill. The plea sets up the statute of limitations as contained in an act of March 3, 1891 (26 Stat. 1099), which provides that suits by the United States to annul and vacate any patent to timber land issued by the United States prior to the 3d day of March, 1891, shall only be brought within five years from the passage of said act; and it furthermore sets up that the present suit was not brought within

five years from the passage of the act. The act having been approved on March 3, 1891, the limitation of five years expired on March 3, 1896. The amended answer to the plea sets up that the bill was filed on February 3, 1896, and within five years from the passage of the act of congress of March 3, 1891, referred to. The defendants except to this answer as being impertinent. The bill itself was filed on February 3, 1896, and was therefore filed within the limitation of five years, which, as stated, did not expire until March 3, 1896; but the special order for extraterritorial service necessary to be obtained, under the provisions of section 8 of the act of March 3, 1875, reproduced as section 738 of the Revised Statutes, to serve absent or nonresident defendants, was not applied for until March 5, 1896, which date was then two days after the five-years limitation had expired. The question raised by the plea, and the pleadings relating thereto, is whether the suit was "brought" when the bill was filed or when the special order for extraterritorial service of process was asked for and obtained. In order to understand intelligently the issue of law thus presented, it will be necessary to refer, briefly, to some of the allegations of the bill and the proceedings relating to the issuance of process against the defendants. It is alleged, in the bill, that "the respondent the American Lumber Company is, and was at all the times hereinafter mentioned, a corporation created and organized under the laws of the state of Illinois, and that the respondent the Central Trust Company is, and was at all the times hereinafter mentioned, a corporation created and organized under the laws of the state of New York." The complainant, therefore, knew, when the bill was filed, that the defendants were nonresidents of and absent from this district. Indeed, any controversy on this point is removed by the affidavit of counsel for complainant, made on March 5, 1896, for the purpose of obtaining the special order for extraterritorial service. The defendants being, confessedly, nonresidents, the proper, and, in fact, the only, legal way, provided for by the laws of the United States, in which they could be served with process, and thereby effectually made parties to the suit brought against them in this district, was by obtaining the special order of service, sometimes termed the "warning order," required by section 8 of the act of March 3, 1875 (18 Stat. 472; Rev. St. § 738). The material parts of this section in the act are as follows:

"That when in any suit commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found; * * * or, where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and, in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, * * * and upon proof of the service or publication of said order, * * * it shall be lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of such suit," etc.

As the suit in this case comes within the category of cases where extraterritorial service of process is permitted, and it appeared, from the allegations of the bill, that the defendants were absent from, and nonresidents of, this district, the process which the complainant should have obtained, in the first instance, was the special order of service required by the act, and not the ordinary subpoena in equity. However, before obtaining the special order of service referred to, the complainant caused certain subpoenas to be issued, the force and effect of which may as well be considered at the outset, before taking up the important question as to when suit must be deemed, in law, to have been "brought."

The proceedings, with reference to the issuance of the subpoenas, were substantially as follows: On February 3, 1896, the date of the filing of the bill, counsel for the complainant filed a *præcipe* with the clerk, requesting that official to issue two original subpoenas *ad respondendum*, returnable March 2, 1896, one to be served on the American Lumber Company, in Chicago, and the other on the Central Trust Company, in New York. These subpoenas were duly and regularly issued. None were issued and placed in the hands of the marshal for this district, such step being obviously useless, as it was known that the defendants were absent from, and nonresidents of, this district. The one directed to the Central Trust Company, in New York, was served, as appears from the return thereto, by the United States marshal for the Southern district of New York on February 11, 1896. That directed to the American Lumber Company, in Chicago, was not served, being returned "Not found" by the United States marshal for the Northern district of Illinois. Thereupon the complainant caused an alias subpoena to be issued on February 18, 1896, which was served on February 24, 1896, as shown by the United States marshal for the Northern district of Illinois on his return thereto. This process, however, although it was served on the defendants before the statute of limitations ceased to run, was ineffectual for any purpose, and was absolutely void. In the first place, a subpoena has no effect or validity outside of the territorial jurisdiction of the court from which it emanates. This is in conformity to the cardinal principle of jurisprudence that the process of a court cannot extend beyond the territorial jurisdiction of the court, and that, unless expressly authorized by law, its process cannot be served outside of the territory over which it has jurisdiction. *Picquet v. Swan*, 5 Mason, 35, Fed. Cas. No. 11,134; *Hyslop v. Hoppock*, 5 Ben. 447, Fed. Cas. No. 6,988; *Id.*, 5 Ben. 533, Fed. Cas. No. 6,989; *Parsons v. Howard*, 2 Woods, 1, Fed. Cas. No. 10,777; *Pacific R. R. v. Missouri Pac. Ry. Co.*, 3 Fed. 772; *U. S. v. Crawford*, 47 Fed. 561; *Russell v. Clarke*, 7 Cranch, 69, 99; *Toland v. Sprague*, 12 Pet. 300; *Levy v. Fitzpatrick*, 15 Pet. 167; *Herndon v. Ridgway*, 17 How. 424; *Chaffee v. Hayward*, 20 How. 208; *Galpin v. Page*, 18 Wall. 350; *Ober v. Gallagher*, 93 U. S. 199; *Ex parte Schollenberger*, 96 U. S. 369. See, also, *Romaine v. Insurance Co.*, 28 Fed. 625, and cases there cited.

In *Pacific R. R. v. Missouri Pac. Ry. Co.*, *supra*, it was said:

"There is nothing in any statute of the United States that gives to the process of the circuit court of the United States, in a civil case, any power to

bring a party within the jurisdiction of that court when he is not in and cannot be served within the limits of the territory."

And after referring to the provisions of section 738 of the Revised Statutes (section 8, Act March 3, 1875), which provides for a special order of service upon absent or nonresident defendants in a certain class of cases, the learned judge says further:

"But this section does not authorize the issuance of the process, either of summons or subpoena in chancery, to be served beyond the limits of the jurisdiction of the court."

In the second place, the only proper and legal method provided by the laws of the United States for the service of extraterritorial process, in a certain class of cases, upon absent or nonresident inhabitants, is by obtaining the special order of service, sometimes termed the "warning order," as required by section 8 of the act of March 3, 1875 (section 738, Rev. St.). That it is competent for congress to provide for extraterritorial service, so long as such service does not violate the constitutional guaranty of "due process of law," is well settled. *U. S. v. Crawford*, supra; *U. S. v. Union Pac. R. Co.*, 98 U. S. 601. The special order of service, required to be obtained under the act referred to, is not a subpoena nor a summons. Its nature is thus described by the late Judge Gresham, sitting in the circuit court for the district of Indiana, in *Forsyth v. Pierson*, 9 Fed. 801, 803:

"This act provides that when any defendant in a suit in equity to enforce any equitable lien or claim against real or personal property in the district where the suit is brought is not an inhabitant of nor found within the district, and does not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear and plead, answer or demur, to the complainant's bill on a certain day therein to be designated; and the said order shall be served on such absent defendant wherever found, or, where such personal service is not practicable, shall be published in such manner as the court shall direct. If the absent defendant fails to appear and plead within the time limited, the court is authorized to entertain jurisdiction and proceed to the hearing of the suit. The act is silent on the subject of the evidence that will authorize the making of an order for substituted service. The marshal's return to a subpoena that one or more of the defendants cannot be found within the district would, no doubt, authorize the court to enter such an order. But this is not the only evidence that will authorize the court to enter an order for substituted service. An affidavit such as was produced in this case is sufficient evidence that the defendants named in it are not inhabitants of the district. When it is made to appear at the commencement of the suit, or at any subsequent time, that a defendant is not an inhabitant of the district, and cannot be found within it, and will not, or does not, voluntarily appear to the suit, an order may be entered specifying a day for such defendant to appear and plead, answer or demur. It is not necessary to wait and see if the absent defendant will not voluntarily enter his appearance, or that he may be found and personally served with process in the district. It is urged that equity rule 17 fixes the appearance day for defendants in all equity cases. 'The appearance day of the defendant,' says this rule, 'shall be the rule day after the subpoena is made returnable, provided he has been served with the process 20 days before that day. Otherwise his appearance day shall be the next rule day succeeding the rule day when the process is returnable.' The act says the absent defendant shall be ordered to appear on a day to be designated in the order, not on a rule day. And, furthermore, the order for the appearance of the absent defendant is not a subpoena or process, within the meaning of rule 17 or rule 15, which provides that the service of all process, mesne and final, shall be by the marshal of the district, or by his deputy, or by some other person specially appointed by the court for that purpose. The language of the act is: 'And the said order shall be served on

such absent defendant, if practicable, wherever found; or, when such service is not practicable, shall be published in such manner as the court shall direct.' The order is nowhere referred to as process, and no particular service or proof of service is required."

The essential difference between the special order of service under the act of March 3, 1875, and the ordinary subpoena, will be readily recognized and appreciated. A subpoena is the first process issued in equity, and is issued by the clerk of the court as of course (Rule 12, Gen. Eq. Rules); but it has no effect or validity outside of the territorial limits of the court from which it issues. The special order of service or "warning order," required to be served upon absent or nonresident defendants, under the act of March 3, 1875, does not issue as a matter of course. It must first be obtained from the court, and then only in the cases covered by the act. Therefore the only process, if it may so be termed, of any validity upon these nonresident defendants, was that expressly authorized by the act of March 3, 1875 (section 738, Rev. St.). Under this view, the issuance and service of the subpoenas on the defendants outside of the territorial jurisdiction of the court, although before the statute of limitations had ceased to run, was absolutely null and void, and, in law, was the same as if no process at all had been issued. *Harkness v. Hyde*, 98 U. S. 476; *Dwight v. Merritt*, 4 Fed. 614; *Peaslee v. Haberstro*, 15 Blatchf. 472, Fed. Cas. No. 10,884; *U. S. v. Eddy*, 28 Fed. 226, and cases there cited. A notice must be one authorized by law, or it is no notice, no matter how accurate it may be. *Kuntz v. Sumption*, 117 Ind. 1, 19 N. E. 474; *Allen v. Strickland* (N. C.) 6 S. E. 780. Nor was it necessary, in view of the allegations of the bill as to the nonresidence of the defendants, first to obtain the issuance of the subpoenas in order to lay a foundation for the special order of service. This was discussed generally in the case of *Forsyth v. Pierson*, supra. And in the case of *Batt v. Procter*, 45 Fed. 515, it was held that the issuance of a subpoena and return "Not found" were not prerequisites to the making of the application and granting of the order under the act. In that case, the general fact of nonresidence distinctly appeared from the averments of the bill, as it does in the case at bar. It is true that Judge Dillon, in *Bronson v. Keokuk*, 2 Dill. 498, Fed. Cas. No. 1,928, intimated very strongly that the proper practice, under the act of March 3, 1875 (section 738, Rev. St.) would be "for the bill to aver the citizenship and residence of the respective defendants; to let the subpoena issue against all; and if the marshal return some of them not found, and they do not voluntarily appear, the court, on a showing of these and the necessary facts, as before stated, by affidavit, will make the order to appear and plead, and direct the mode of serving the same." But it does not appear, from the report of that case, that the bill alleged affirmatively that the defendants were nonresidents of the district in which the suit was brought, as is distinctly averred in the bill in the present suit. I consider this as an important distinguishing feature between the two cases, and one which will go far towards settling and regulating the practice to be pursued in obtaining extraterritorial service upon absent or nonresident defendants in the class of cases covered by the act of March 3, 1875. In my opinion,

the better, more expeditious, and more satisfactory method of procedure, where the bill alleges the general fact of nonresidence, as in the case at bar, is for the complainant to apply for the special order of service at the outset and as the first process, thereby dispensing with the ordinary subpoena issued as of course. What can be the possible utility, efficacy, or necessity of causing subpoenas to issue to be served upon nonresident defendants in another district, such service being absolutely null and void, or how such attempted and void service can afford a preliminary right to the issuance of the special order for extraterritorial service, is difficult to imagine. Where the absence or nonresidence of the defendants is known to the complainant and alleged in his bill, the issuance and service of subpoenas would seem to be absolutely useless for any purpose. Where, however, the bill does not disclose the general fact of absence or nonresidence, then the better practice, as suggested by Judge Dillon in *Bronson v. Keokuk*, supra, would seem to be to cause the subpoena to issue as of course, so that the court and the party complainant may be advised, from the return thereto, whether or not the defendant has been found within, or is absent from, the district. But, even where the bill fails to disclose that the defendant is absent or a noninhabitant, still it seems to me that if the complainant should make the necessary affidavit for the special order required under the act of March 3, 1875, this should dispense with the issuance of the ordinary subpoena. However this may be as a question of practice, the complainant did not file his affidavit for the special order of service until March 5, 1896, which was then two days after the period of five years in which to bring suit had expired. The affidavit prayed that an order be granted by the court, directing the defendants to appear before the court on April 6, 1896, to plead, answer, or demur to the bill. The order was granted on March 5, 1896, and copies of said order were duly served upon each of the defendants in their respective districts. The defendant the Central Trust Company appeared specially on April 6, 1896, and moved to quash the service of the special order of service issued on March 5, 1896. Meanwhile, on June 22, 1896, counsel for the complainant waived, in open court, any benefit to be derived from the service of the subpoena, as before stated, on the Central Trust Company. Thereafter, on June 26, 1896, the court granted the motion to quash the service based on the order made on March 5, 1896. On June 25, 1896, the day previous to the decision of the court quashing the special order of service just referred to, another affidavit for a special order of service was filed by the counsel for the complainant, which was granted, the defendants being required to appear on August 3, 1896. Certified copies of this order were duly served upon the defendants within their respective districts, and on July 29, 1896, they appeared specially, moving, on July 30, 1896, to quash said service. This motion was denied on December 14, 1896. Thereupon the defendants appeared generally, and filed the plea in bar, setting up the statute of limitations, now under consideration. The act which provides the limitation of five years reads: "That suits by the United States to vacate and annul any patent heretofore issued shall only be

brought within five years from the passage of this act." Section 8, Act March 3, 1891 (26 Stat. 1099).

The ultimate question, therefore, to be determined, is, as previously stated, when was the suit "brought"? It is contended, on behalf of the defendants, that it was not "brought," in the contemplation of law, until the special order for extraterritorial service on the nonresident defendants, as required by section 8 of the act of March 3, 1875 (Rev. St. § 738), had been obtained on March 5, 1896, and, as this was two days after the period of five years had run, that the complainant is barred. It is contended, on the other hand, in behalf of the complainant, that the suit was "brought" when the bill was filed, and, as this was before the five years had run out, that it is not barred. While the act uses the word "brought," still it has been held, by the United States supreme court in the case of *Goldenberg v. Murphy*, 108 U. S. 162, 2 Sup. Ct. 388, that there is no real difference in meaning between the words "commenced" and "brought." Mr. Chief Justice Waite, in delivering the opinion of the court, said:

"A suit is 'brought' when, in law, it is 'commenced,' and we see no significance in the fact that in the legislation of congress on the subject of limitations the word 'commenced' is sometimes used, and at other times the word 'brought.' In this connection the two words evidently mean the same thing, and are used interchangeably."

The court, however, declined to discuss the question as to when a suit is deemed, in law, to be "brought" or "commenced," as it considered that that question, so far as the case before it was concerned, had been determined and was concluded by the laws of the state of New York, where the action had been brought, which provide when a suit is deemed "commenced" or "brought." While, commonly speaking, an action is said to be "commenced" or "brought" when the complaint is filed, still the general rule in the United States, except where it has been otherwise provided by statute, is that the action is deemed, in law, to be brought, so far as the defendant is concerned, from the time the summons or other process is issued and delivered, or put in course of delivery, to the officer, with a bona fide intent to have the same served. *Ross v. Luther*, 4 Cow. 158, 15 Am. Dec. 341, and cases cited in a note to the same case. This was the rule in New York until it was changed by statute. In California it is expressly provided otherwise, for section 350 of the Code of Civil Procedure declares that "an action is commenced * * * when the complaint is filed." But the procedure in equity in the United States circuit courts is not controlled by state statutes; it is entirely separate and independent of the equity rules and procedure existing in the state tribunals. As was well said by Mr. Chief Justice Taney in *Bein v. Heath*, 12 How. 168, 178:

"The proceeding in a circuit court of the United States in equity is regulated by the laws of congress and the rules of this court made under the authority of an act of congress; and the ninetieth rule declares that, when not otherwise directed, the practice of the high court of chancery in England shall be followed. The eighty-ninth rule authorizes the circuit court, both judges concurring, to modify the process and practice in their respective districts."

See, also, *Gaines v. City of New Orleans*, 27 Fed. 411; *Poultney v. City of La Fayette*, 12 Pet. 472, 474.

But, where this general rule has not been changed by statutory enactment, the action, while it may be deemed "commenced" or "brought," so far as the plaintiff is concerned, when the complaint is filed, is not considered "commenced" or "brought," so far as the defendant is concerned, so as to stop the running of a statute of limitations, until legal steps have been taken to make him a party by suing out the appropriate process and making a bona fide effort to serve the same. In other words, the mere filing of a complaint will not prevent the operation of a statute of limitations unless process be taken out and a bona fide attempt be made to serve it. In *Wood, Lim. Act.* (2d Ed.) p. 740, it is said:

"The question as to when an action is commenced, within the meaning of the statute, is one which has been variously decided. In some of the states, the statute itself settles this question, but where the statute is silent upon this point it may be said that an action is commenced when the writ is issued; that is, when it is filled out and completed with an intention of having it served. In any event, the issue of a process, and giving it to an officer for that purpose, clearly amounts to a commencement of an action. * * * The general rule adopted was, and is, except where otherwise provided by statute, that the statute is suspended from the time of the suing out of the writ and its bona fide delivery to a proper officer for service."

Some of the authorities in accord with this statement of the law are: *Whitaker v. Turnbull*, 18 N. J. Law, 172; *Updike v. TenBroeck*, 32 N. J. Law, 105; *Clark v. Redman*, 1 Blackf. 379; *Hancock v. Ritchie*, 11 Ind. 48; *Evans v. Galloway*, 20 Ind. 479; *Hail v. Spencer*, 1 R. I. 17; *Gardner v. Webber*, 17 Pick. 407; *Day v. Lamb*, 7 Vt. 426; *Chapman v. Goodrich*, 55 Vt. 354; *Society v. Whitcomb*, 2 N. H. 227; *Hardy v. Corlis*, 21 N. H. 356; *Mason v. Cheney*, 47 N. H. 24; *Cheetham v. Lewis*, 3 Johns. 42; *Fowler v. Sharp*, 15 Johns. 323; *Noel v. Noel* (Va.) 25 S. E. 242; *U. S. v. Eddy*, 28 Fed. 226; *Dwight v. Merritt*, 4 Fed. 614.

The same rule obtains in equity. The suit is deemed commenced from the time of the issuance of the subpoena and its service or a bona fide attempt to serve it. In *Benn. Lis Pendens*, § 51a, it is there stated:

"It may be said generally that, at the present day, the filing of a bill, the taking out of the subpoena thereafter, and making a bona fide attempt to serve it, is, in equity, the commencement of a suit, as against the defendant himself. Where the question is not regulated by statute, this may be said to be the law in all of the states. This has been the rule in England, also, since the statute of 4 Anne, c. 16, § 22, requiring the filing of the bill before the issuance of the subpoena. Before that act was passed it was not necessary to file the bill before the issuance and service of the subpoena to appear and answer, it being sufficient if the bill were afterwards filed; the suit, as against the defendant himself, being then considered as commenced from the teste of the subpoena, as in suits at law commenced by original writs."

See, also, to the same effect, the statements of the following text writers: *Busw. Lim.* § 365; *Ang. Lim.* § 330. In *Hayden v. Bucklin*, 9 Paige, 512, Chancellor Walworth, in considering the question when a suit in equity is to be deemed commenced, said:

"Previous to the statute of Anne (4 Anne, c. 16, § 22) it was not necessary to file the complainant's bill before the issuing and service of the subpoena to appear and answer, but it was sufficient if the bill was filed afterwards; and the suit, as against the defendant himself, was then considered as commenced from the teste of subpoena, as in the case of suits at law commenced by original writs. Such appears to have been the decision of Lord Nottingham in the case of *Pigott v. Nower*, in 1677, which is copied by Mr. Swanston from his lordship's manuscript notes. 3 Swanst. 536. And at the present day the filing of a bill and taking out a subpoena thereon, and making a bona fide attempt to serve it without delay, may be considered as the commencement of the suit for the purpose of preventing the operation of the statute of limitations, if the suit is afterwards prosecuted with due and reasonable diligence."

In *Fitch v. Smith* and *Terry v. Smith*, both reported together in 10 Paige, 9, Chancellor Walworth again considered the question, and thus states the facts and his conclusions thereon:

"The complainants in both of these cases sent their bills to the clerk's office at the same time, neither being aware of the fact that the other was about to commence a suit against the same defendant for a similar purpose. But, owing to a mistake, the deputy clerk who acted as the appellant's agent filed the bill immediately, and without applying to the vice chancellor for an injunction thereon, in consequence of which mistake that bill got on to the files of the court two hours before the respondent's bill. And if the filing of the bill, before taking out and serving a subpoena or making a bona fide attempt to serve it, was the commencement of a suit in this court, the appellant would have obtained a preference in payment out of the property of the defendant, in consequence of this mistake of the deputy clerk. The filing of the bill, however, is not the commencement of the suit, although by statute the bill must now be filed before any process for the appearance of the defendant can be issued. 2 Rev. St. pp. 179, 180, §§ 70, 76. It is true, in common parlance we use the expression 'filing of the bill' to denote the commencement of a suit in chancery, instead of referring to the issuing and service of the subpoena, or the making of a bona fide attempt to serve it, after the bill has been filed, which is the actual commencement of the suit in this court." Citing *Webb v. Pell*, 1 Paige, 564; 1 Daniell, Ch. Prac. 554.

In *Pindell v. Maydwell*, 7 B. Mon. 314, the facts, as stated in the opinion of the court, are these: Samuel Beach, having filed an answer which he prayed might be considered a cross bill against his co-defendant, Maydwell, in a suit in chancery, in which Beach and Maydwell were both defendants, but having failed to sue out process thereon, the plaintiff in error, Pindell, some considerable time afterwards, exhibited in his own name, as assignee in bankruptcy, a bill purporting to be an amendment to the cross bill of Beach, and caused a subpoena to be issued thereon and served on Maydwell. Thereupon Maydwell filed his answer, relying, among other matters of defense, upon the statute of limitations. The court, in discussing this proposition, said:

"Whether he can avail himself of the statute or not depends upon the time the suit shall be considered as having been commenced. The suing out process has always been held the commencement of an action or suit (*Lyle v. Bradford*, 7 T. B. Mon. 111). * * * In bringing a suit in chancery, the first step taken by the complainant is to file his petition or bill, and hence writers on this subject frequently speak in general terms of this act as the commencement of the suit. But, so far as it relates to the defendant, the suing out process against him is the commencement of the suit, preferring the bill being only preparatory to this being done. The propriety of the adoption of this principle is illustrated very forcibly by the proceedings in the present case. No process had been issued on Beach's cross bill for upward of three years. Maydwell was not bound to notice it, and no suit was actually pend-

ing against him on the cross bill until process issued thereon in the name of the plaintiff in error on his bill purporting to be an amendment thereon. * * * Where a party files a bill in chancery and neglects to take out process, the statute still continues to run against him, and he cannot avoid its effect by showing that he lodged his bill in the clerk's office, or even filed it in open court, before the time had expired. It is obvious that, although it might remain in that condition for any length of time, there would be no suit pending against the defendant; and if when process issues, at any subsequent period, no matter how distant, it should be considered as relating back to the time when the bill was filed, such a doctrine would have the effect of encouraging negligence, on the one hand, and of defeating, on the other, the object of the statute, which was intended to obviate any injustice that might arise from the absence of testimony supposed to have been lost or forgotten through the operation of time."

And the statute of limitations was held to apply, although the bill had been filed before its expiration.

In *Fairbanks v. Farwell*, 141 Ill. 354, 358, 30 N. E. 1056, 1060, it was said:

"It may well be doubted whether the mere filing of a bill in chancery, of itself, without the issuing or service of process, is sufficient to arrest the running of the statute. The modern rule seems to be that the filing of a bill and taking out of a subpoena, and making a bona fide attempt to serve it, is the commencement of a suit in equity, as against the defendant, so as to prevent the operation of the statute."

It was held that, as there was no showing that the suit was commenced as indicated, it would not operate to arrest the running of the statute. But it is unnecessary further to multiply quotations from authorities. The rule itself, in the absence of statutory enactment to the contrary, seems to be well settled, and commends itself to the court as a wise and salutary one. The reason therefor is based upon the fact that the mere filing of a bill, unaccompanied by service or attempted service of process, could be used to stop the running of a statute of limitations for, perhaps, a very considerable period of time, during which the defendant might not be apprised of the fact that a suit was pending against him. This, it can very readily be appreciated, would often lead to gross injustice upon defendants, whose witnesses might die or move to parts unknown. And, if this be true with respect to defendants within the district, how much more so is it with reference to defendants who are absent from, and nonresidents of, the district in which suit is brought. See, in this connection, the dissenting opinion of Mr. Justice Mulkey in *Schroeder v. Insurance Co.*, 104 Ill. 71. None of the authorities cited by counsel for complainant militate very seriously, in my judgment, against the rule stated. At any rate, I prefer to adopt and follow the rule laid down by the authorities I have previously referred to as being the correct doctrine. In the federal courts the case of *Bisbee v. Evans*, 17 Fed. 474, appears to be precisely in point, although the cases of *Dwight v. Merritt*, 4 Fed. 614, and *U. S. v. Eddy*, 28 Fed. 226, also support, upon principle, the contention of the defendants that the suit is barred. The decision in *Bisbee v. Evans* was rendered in the circuit court for the district of Kentucky. The question involved was similar to that raised in the case at bar, in that

it related to a consideration as to when a suit could be deemed commenced, under section 8 of the act of March 3, 1875 (section 738, Rev. St.), against a noninhabitant defendant, so as to stop the running of the statute of limitations. The facts, in the case cited, were, briefly, that a bill was filed on May 11, 1881, by which it was sought to enforce a vendor's lien on a lot for the purchase money, evidenced by a note due February 4, 1867. The defendant Evans filed a plea setting up the Kentucky statute of 15 years in bar of the action. To this plea a demurrer was filed. The bill alleged, as does the bill in the case at bar, that Evans was not an inhabitant of the district, and could not be found in it; and, furthermore, prayed for an order of court requiring him to appear and plead to complainant's bill. The bill was not sworn to, but I regard this as quite immaterial to the question involved in the case at bar. The important fact was that the necessary affidavit for the order contemplated by section 8 of the act of March 3, 1875, was not filed until April 12, 1883, when the "warning order" was entered. Barr, District Judge, in considering the question, said:

"The plea of defendant is upon the theory that this suit was not commenced, as to Evans, until at least this warning order was made by the court. The complainant insists that under the provisions of the eighth section of the judiciary act, approved March 3, 1875, the suit is commenced at the time of the filing of the bill in the office, and that the warning order cannot, by the terms of this section, be made until the suit has already commenced."

Precisely the same contention is made by counsel for complainant in the case at bar. The learned judge, after reciting the material parts of section 8 of the act of March 3, 1875, proceeded:

"In construing this section we must look to the scope and object of the enactment. It is true, the suit is 'commenced' upon the filing of the bill, for the purpose of taking the necessary steps to bring the defendant, who is a noninhabitant, before the court. This is true in a suit against an inhabitant, and the court may make orders necessary or proper to bring the defendant before the court as soon as the bill is filed. But does it follow that congress declared in this section a suit 'commenced' against a noninhabitant of the district upon the mere filing of the bill, so as to stop the running of the statute of limitations? If we are to look alone to the language of the section, is it not rather when, and only when, 'it shall be lawful for the court to entertain jurisdiction' that the suit is 'commenced' against the noninhabitant defendant? It seems to me that congress did not intend, and has not determined, when a suit is commenced against a defendant so as to stop the running of the statute of limitations, and that this court must determine the question in the absence of a statute. Whenever a complainant has in good faith obtained process, or, it may be, whenever he has done all that is necessary for him to do to obtain process to bring a defendant before the court, then his suit is commenced as to that defendant, and then the running of the statute ceases, and not before. In this case it was the duty of the complainant to obtain process under the provisions of this section, or, at least, to have filed an affidavit and moved for the proper order, and, as he did not do this until after the expiration of the 15 years, the demurrer to the pleas should be overruled." Citing *Pindell v. Maydwell*, 7 B. Mon. 314; *Lyle v. Bradford*, 7 T. B. Mon. 111; *Hayden v. Bucklin*, 9 Paige, 513; *Fitch v. Smith*, 10 Paige, 9; *Webb v. Pell*, 1 Paige, 564; *Ross v. Luther*, 4 Cow. 158; s. c. 15 Am. Dec. 341, and note.

Counsel for complainant, however, seeks to avoid the force of this decision by contending that efforts were made, before the statute had ceased to run, to obtain process, and that, as the re-

sult of these efforts, the subpoenas previously referred to were issued and served in time, and that, therefore, the complainant comes within the exception recognized by Judge Barr when he says that "whenever he [the complainant] has done all that is necessary for him to do to obtain process to bring a defendant before the court, then his suit is commenced as to that defendant, and then the running of the statute ceases, and not before." But the difficulty with this contention is that the subpoenas, though issued and served before the statute had ceased to run, were void and of no effect for the reasons heretofore explained, and they were not necessary as a condition precedent, under the allegations of nonresidence in the bill, to obtain the special order for extraterritorial service required under the act of March 3, 1875. In the second place, the affidavit for this special order was not made, nor the order granted, until March 5, 1896, or two days after the statute had ceased to run. In order that a complainant may avail himself of the exception stated by Judge Barr, he must not only have done all that is necessary for him to do to obtain any process, but it must be the appropriate process,—that which, under the nature and circumstances of the case, is authorized by law and recognized by the court as legal and effectual service,—and, furthermore, this must be done before the statute has ceased to run, and not at a time subsequent, no matter how soon thereafter. This counsel for complainant failed to do. The affidavit for, and special order of, extraterritorial service, as required by section 8 of the act of March 3, 1875 (section 738, Rev. St.), were not made until two days after the period of limitation provided by the act of March 3, 1891, had taken effect. There is no question in the case but that counsel for complainant were acting bona fide. But this feature of the case cannot operate to extend the statute of limitations. As was aptly said by Chief Justice Marshall in *McIver v. Ragan*, 2 Wheat. 25: "Courts cannot insert in the statute of limitations an exception which the statute does not contain." While the delay was, undoubtedly, inadvertent and unfortunate, still I fail to see how I can relieve the complainant from the bar of the statute. As was said by the late Judge Sawyer, in the case of *Kielley v. Mining Co.*, 3 Sawy. 505, Fed. Cas. No. 7,761, "the rules of law are rigid, and we are bound by them." The exception of the defendants to the complainant's answer to the plea in bar will therefore be allowed, the plea in bar will be sustained, and the bill dismissed; and it is so ordered.

WATKINS v. LITTLE.

(Circuit Court of Appeals, Fifth Circuit. February 23, 1897.)

No. 387.

MORTGAGE OF HOMESTEAD—TEXAS STATUTE—ESTOPPEL.

In Texas, a wife who, in an application for a loan, joins her husband in representations that the lands proposed to be mortgaged, and which are contiguous to, but not a part of, the tract on which they reside, are no part of their homestead, is estopped thereby, where they have been acted on in good faith, as against a title acquired under the mortgage, when, at the time, they owned 200 acres in addition to the mortgaged lands, including the tract on which they actually resided, and parcels contiguous thereto, and also an outlying disconnected timber tract used in connection with the others for fuel and timber supplies.

In Error to the Circuit Court of the United States for the Northern District of Texas.

This was an action of trespass to try title, brought by J. B. Watkins against Maria F. Little. Upon the verdict of a jury, judgment was rendered partly in favor of plaintiff and otherwise for defendant, and plaintiff brings this writ of error.

The land in controversy is described in the petition of the plaintiff, to wit: "Situated in the county of Dallas, state of Texas, 160 acres out of the William Gatlin one-third league survey, patented to the heirs of said Gatlin, January 5, 1874, patent No. 432; 120 acres of land. Also 45 acres of said survey. Also 6 acres out of the Thomas Freeman survey, patented to said Freeman, February 26, 1842, by patent No. 136, Vol. 2, located about 12 miles south, 35 degrees east, from the city of Dallas." Petition charged that the value of said land was \$5,500; that the reasonable rental value thereof was \$500 per year. Plaintiff's petition was indorsed that it was brought to try title as well as for damages. The defendant answered by general demurrer, and by plea of not guilty, and stated that on the 1st day of February, 1887, and many years prior thereto, she, being the wife of William Little, and they being citizens of the state of Texas, had lived upon the land described in plaintiff's petition as their homestead; that on the above date William Little borrowed from plaintiff, J. B. Watkins, the sum of \$3,000, and he and the defendant, his wife, executed their promissory note of that date for said sum of money, payable five years after date, with interest at the rate of 6 per cent. per annum, payable semiannually, and they also executed and delivered to the said J. B. Watkins, as trustee, their deed of trust of that date, by which they conveyed to the said Watkins the land described in plaintiff's petition to secure the payment of said promissory note; that at the time of borrowing said money the said lands were actually resided upon and occupied as a rural homestead by the said William Little and the defendant, who continued to occupy and use said lands as a homestead until the death of said William Little, which occurred on the 10th day of September, 1888; since the death of her husband, the defendant has continued to occupy said lands as her homestead, and they still constitute her homestead; that after the death of said William Little the said J. B. Watkins procured Ben. Cabell, the sheriff of Dallas county, to sell said lands owned by virtue of the above-mentioned deed of trust, at which sale said J. B. Watkins became the purchaser of said lands for the sum of \$1,500, and received from said substitute trustee a deed therefor. The plaintiff replied to this answer by supplemental petition, which contained a general demurrer, and a general denial, and a special plea, in substance, as follows, to wit: That, at the time of the execution of the deed of trust referred to in said answer, defendant and her husband, the said William Little, owned not only the lands described in said mortgage, but about 200 acres of other lands lying adjacent hereto, and embraced in the surveys and patents of William Freeman, William Gatlin, and the Dixon league; and that by a written statement and verbally the defendant and her husband, the said

William Little, designated their homestead as being and situated upon one of the several tracts composing their homestead, which was not included in said deed of trust, upon which tract the dwelling house in which the said William Little and the defendant resided was situated. That, in order to procure the loan of \$3,000 referred to in defendant's answer, the defendant and her husband, the said William Little, did, by an obligation in writing of date February 2, 1887, appoint the J. B. Watkins Land & Mortgage Company their agent to procure for them a loan for a term of five years, interest payable semiannually, to be secured by bond and first trust deed upon lands therein described, which are the same lands sued upon and described in plaintiff's original petition; to which said written application, as a part of it, was appended an affidavit made by the defendant and her husband, in which they stated, among other things, in substance: "That no portion of the above-described property is our homestead, or the homestead of any other person or persons; that our homestead, upon which we reside, and to which our title is perfect, consists of about two hundred acres, the same being embraced in the surveys and patents of William Freeman, William Gatlin, and the Dixon league." That the said mortgage company, acting by and through its proper officers, believed that said statement made by the defendant and her husband was true, and, so believing, and knowing nothing to the contrary, the said mortgage company made the said loan to the said William Little for the benefit of Eliza Harris, who was then, and still is, a nonresident of the state of Texas, and who knew nothing of defendant's homestead claim to the land sued for. That, as an evidence of said loan, the said William Little and defendant executed and delivered to said mortgage company their real-estate mortgage coupon bond, with coupons attached as specified in said bond, all payable to the said Eliza Harris, and made the said deed of trust to secure said bond, which deed of trust contained a provision that, in case of the death of said J. B. Watkins, or his refusal to act, or other legal incapacity, then the acting sheriff of the county of Dallas and the state of Texas should be the successor of the trust. That said deed of trust recited that no portion of the lands therein described was the homestead of the said William Little and defendant. That default was made in the payment of said bond, and said land was sold in pursuance of its terms, and was purchased at said sale by the plaintiff, who relied, in making said purchase, upon the statement made in the aforesaid application, and who became the purchaser of said land because he believed said statements to be true; and the bond, mortgage, and the application for the loan were attached as exhibits to plaintiff's supplemental petition. The defendant replied to plaintiff's supplemental petition by general demurrer and general denial and special allegation: That at the time of the execution of the papers aforesaid she did not know that the deed of trust involved the land now in dispute, but was led to suppose, and did suppose, that said deed of trust was upon other lands; that she did not then know that an attempt was being made to create a lien upon her homestead; that, if she had known that fact, she would not have executed said instruments; that at the time of the execution of said deed of trust and other instruments she was actually residing upon, and in peaceful possession of, said lands as her homestead. The case was tried by a jury, who returned into court a verdict in the following words and figures, to wit:

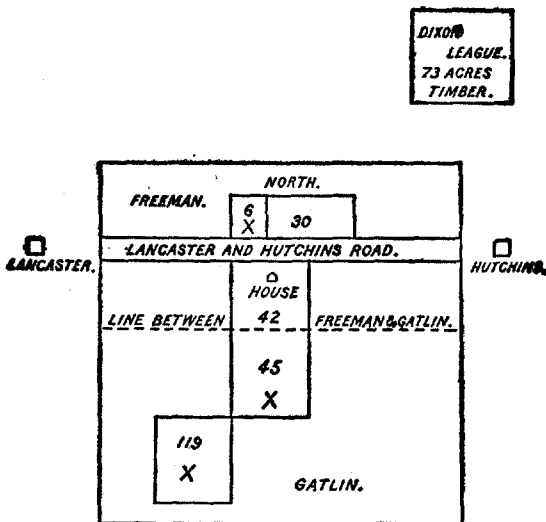
"We, the jury, find for the defendant 30 acres of land north of Hutchins and Lancaster road, being part of Freeman survey, and on south side remainder of Freeman survey, including residence of said defendant and enough of the Gatlin survey which is under mortgage to make homestead of 200 acres. We also find for plaintiff the remainder of said Gatlin land on extreme south of the land in controversy, and 6 acres known as 'John Little Place' north of aforesaid road.

W. O. Henderson, Foreman."

Upon this verdict a judgment was entered partly in favor of the plaintiff and otherwise for the defendant.

On the trial, evidence was introduced tending to prove the following facts, to wit: The plaintiff introduced in evidence the bond and mortgage or deed of trust referred to and described in the pleadings of the parties, and also the deed made by the trustee in pursuance of said deed of trust to the plaintiff,

J. B. Watkins, for the land in controversy, as alleged in said pleadings; also that at the date of the execution of the said deed of trust the defendant was the wife of William Little, and that they owned, in a compact body, lying in Dallas county, in the state of Texas, 239 acres of land, subdivided into four tracts, of which two were situated on the Freeman survey, one containing 42 acres and the other 36 acres; and the other two on the Gatlin survey, one of which contained 45 acres and the other one 119 acres,—a substantially accurate plat of which is here given, to wit:



Each of said four tracts was originally prairie land, and the whole of each was in cultivation by William Little when said mortgage was executed by the defendant and William Little, her husband. When the mortgage was executed, the residence of the said Little and his wife was in the 42-acre tract next to and south of the Lancaster and Hutchins road, as represented on the plat. All of said land was then cultivated as part of his homestead by the said Little. The 170 acres included in the mortgage is designated on the plat by the cross marks, it being composed of the 119-acre tract and the most southern 45-acre tract and the most western 6 acres of the 36-acre tract. The said Little also owned on the Dixon survey a tract of 75 acres, which was situated about four miles distant from his residence, and was entirely separated from the land above described by land belonging to other people. The said 75-acre tract was timbered bottom land, subject to overflow, and much less valuable than the other land. It was not inclosed, but Little got from it his firewood and timber used upon and about his residence and cultivated land, there being no timber upon the other land. William Little died more than four years before the land in controversy was sold by the trustee, leaving his wife, the defendant, surviving him; and his estate was never administered. Both William Little and his wife, M. F. Little, the defendant, as a preliminary step to the loaning of the money and the execution of the mortgage, made a written application to the J. B. Watkins Land & Mortgage Company for the loan, which was signed and duly sworn to by each of them, in which they described by metes and bounds the 170 acres of land that this suit is brought to recover, and which they subsequently included in their mortgage to secure the loan from the said J. B. Watkins Land & Mortgage Company as the agent of Eliza Harris, and, among other things stated in said application, they swore "that no portion of the above-described property [meaning the land in controversy] is our homestead, or the homestead of any other person or persons; that our homestead [meaning the said William Lit-

tle and defendant], upon which we reside, and to which our title is perfect, consists of about two hundred acres, the same being embraced in the surveys and patents of Wm. Freehan, Wm. Gatlin, and the Dixon league"; that the said representations were made before the loan was made to the said applicants, and for the purpose of procuring it; that the said J. B. Watkins Land & Mortgage Company believed that said statements were true, and was induced by such belief to make the said loan upon the security given by the mortgage of said land, as the agent of the said Eliza Harris, who was a non-resident, and who had no knowledge or information regarding said land, or defendant's homestead claim, or said transaction.

The court charged the jury as follows:

"(3) In the case on trial the homestead of William Little and his wife, Maria F. Little, consisted of two hundred acres of the land actually occupied and used by them as a homestead, and said homestead, to the extent of said 200 acres, could not be mortgaged by the trust deed under which plaintiff claims if said Little and wife were living on it at the date of said trust deed, and openly using and cultivating it as their homestead. If, however, you find that the land north of the Hutchins and Lancaster road and that south of said road amounted to about 236 acres, and that it was all in use by the defendant and her husband on February 22, 1887, when the trust deed was executed (they, defendant and her husband, living on it, cultivating and using it as their homestead), then they had the right and power to mortgage to plaintiff the excess over two hundred acres of their homestead land; and if you find from the evidence that the 30 acres or thereabouts on the north side of the road was embraced in the lands dedicated and claimed by defendant and her husband as a homestead in the affidavit attached to plaintiff's petition, then you may include said 30 acres in the 200 acres you find for defendant, if, under foregoing instructions, you allow defendant 200 acres as a homestead.

"(4) If you find 200 acres of land as a homestead for defendant, and that 30 acres or thereabouts, referred to in paragraph No. 3, above, was a part thereof, then you will commence on the south side of the road, and designate, including the home dwelling, enough of land to make, together with the said 30 acres on the north side of said road, 200 acres.

"(5) You will find for plaintiff the 6 acres on the north side, known as the 'John Little Place.'"

The plaintiff requested the court to give the jury the following three special charges, but the court refused to give either of them, to wit: "You are instructed to find a verdict for the plaintiff in this cause for the land in controversy in this suit." "You are instructed to find whether defendant and William Little owned lands other than those in controversy in this suit, in the same vicinity, at the time they made the deed of trust to Elizabeth Harris, and used them in connection with said lands in controversy, as a homestead; and if you find that they did so own other lands, and that such other lands were designated by them, at the time of making such mortgage or deed of trust, as a homestead; and if you find that defendant and said William Little, in order to procure the loan of money mentioned in said deed of trust, did represent to the J. B. Watkins Land & Mortgage Company that said lands in controversy were not their homestead, and that said loan of three thousand dollars was in good faith made upon said lands in controversy without any knowledge that defendant and William Little actually claimed the same as their homestead; and if you further find that defendant and William Little did not actually reside on the tracts of land mortgaged; and if you further find that defendant and William Little so owned as much as two hundred acres of land besides the lands in controversy, including the tract upon which they resided,—then you are instructed that defendant is now estopped from setting up homestead claim to the land in controversy, and in that event you will find for the plaintiff the land in controversy. You are instructed that the homestead may consist of the tract of land on which the parties may actually reside, and other tracts of land not connected with it, including timber lands used as a source of timber and firewood for the home or farm, and that fencing and cultivating are not necessary to make and constitute such contiguous or timber lands part of the homestead."

The learned counsel for the plaintiff in error, in their brief attacking the instructions given by the trial court to the jury, say: "In giving these charges, it was intended by the court to instruct the jury that the owners of a homestead in Texas, upon which they actually reside at the time, cannot estop or bind themselves by fraudulent acts or representations. In other words, the charge intended to recognize the doctrine that in Texas the time-honored principle of the common law that a man shall not profit by his own fraud is not in force with regard to the homestead. It is not contended that the rule is not applicable here, just as it is elsewhere, with regard to every right, and all species of property, except the homestead. With regard to the homestead right alone, the charge implies that the constitution of Texas permits an owner who actually resides on a homestead to find, if he can, a victim upon whom he may use any and all artifices that his ingenuity can suggest to deceive such victim, and thereby, with the sanction and aid of the state and federal judiciaries, take from him his property. The proposition is a startling one, and it will be found an unwelcome one to our people. It cannot be disguised that expressions may be found in at least one opinion by an eminent judge of the supreme court of Texas suggesting such an interpretation of our constitution. *Loan Co. v. Blalock*, 76 Tex. 86, 13 S. W. 12. But it is contrary to the rule declared in other cases, and, even if the case is correctly interpreted, it cannot stand. No court should feel constrained to follow that opinion, or any case resting on it, if one can be found. In this case the trial court seemed to be of the impression that our law is that in every transaction with the owner of a homestead who resides on it, the opposite party is conclusively held to know that fact. The argument seems to be that nothing will excuse a person going to deal with the owner of a homestead from going upon the land to see whether or not he resides on it. The general rule is that misrepresentations do not estop when the falsehood is open and apparent. In other words, falsehood avoids a transaction when it is intended to deceive, and actually does deceive; but it does not avoid a transaction when it does not deceive. We do not understand that any diligence is required upon the part of the deceived person to protect himself. The principle is that parties dealing with each other have the right to rely upon the truthfulness of material statements unless their falsehood is apparent, and therefore investigation or further inquiry not a duty. Like possession of land is notice of the rights of the occupant, so actual occupation of a homestead is notice. Both are sufficient notice, in the absence of other things. But this principle is to be applied only when it stands alone, and not when it comes in contact with other equally well settled and equally important rules of law. Like presumptions, it is a rule to be applied in the absence of evidence, and not against evidence. A stranger dealing with the owner of a piece of land may be very well charged with the knowledge that, if he lives on it, it may be his homestead; but he may still believe his deliberate representation that he does not live on it at all. But, in such a case as this, actually visiting and inspecting the land would not protect a stranger. He may know that the tract contains largely more than 200 acres; he may know that 200 acres, including the residence and some part of the tract or tracts, is protected as a homestead; but actual inspection cannot, though he exercises the utmost diligence, enable him to know out of what particular part of the larger tract or tracts the exempted 200 acres shall be carved. He only knows that the laws of Texas permit the owner, in the first place, to carve out of the larger tract and designate the exempt 200 acres, so that the remainder of his land may be dealt with as unexempt. The owner may practice a fraud in such cases by pointing out land not his own as the land set aside for his homestead, or he may practice a fraud by pointing out less than 200 acres as constituting the 200 acres exempt, when, in fact, he knows the land so pointed out includes a much smaller acreage. How shall a stranger protect himself from such deception? Shall he, at his peril, take with him maps and field notes and copies of deeds, and call in a skilled surveyor to verify lines and measurements? We do not believe it. Our laws exempt a homestead from execution and mortgages, but they are not intended to exempt it from liability for the fraudulent devices of its owners or occupants. Though a homestead in fact, it may cease to be *that* for the purposes of a given case by the deceitful and fraudulent prac-

tices and arts of its owners. We cannot believe that it is the purpose of our laws to transform our homesteads from shields to protect an honest people into an offensive weapon with which to deceive and plunder those who are unsuspecting. This would be a different case if the money lender had in fact known that he was taking a mortgage upon a homestead, and had been striving to counteract our laws merely by means of untruthful statements made by the owner. In such a case the lender would not have been deceived, and the principle of estoppel on account of misrepresentations would have had no application. There are some expressions in the opinion in the case of 76 Tex. 86, 13 S. W. 12, indicating that it was a case of that kind; but in the case now before the court there is not an intimation or a suspicion of contrivance upon the part of the lender, nor anything to justify the belief that he did not trust the statement that the mortgaged property was no part of the homestead of the borrowers. Under such circumstances, does the law demand or honesty permit that defendant in error, after having taken the lender's money, shall also keep the land?"

W. W. Leake, for plaintiff in error.

W. B. Gano, for defendant in error.

Before PARDEE, Circuit Judge, and SPEER and PARLANGE, District Judges.

PARDEE, Circuit Judge, after stating the case, delivered the opinion of the court.

William Little and Maria F. Little, his wife, in 1887 owned several parcels of different surveys or tracts of land, containing in all 315 acres, the several parcels lying contiguous to each other, with the exception of one timbered tract about four miles distant. They actually resided upon one of the parcels containing 42 acres, but were cultivating the remainder, except the timbered tract, which was used for timber and fuel supply. Considering the uses of the various parcels, they had a right, in connection with the 42-acre parcel, on which they actually resided, to select any of the other tracts (to an acreage not exceeding 200) as a homestead, the same to be exempt from forced seizure and sale, except as permitted by the constitution of the state. After selecting and designating the homestead, they had a right to deal with the other parcels and portions of their lands not selected as one ordinarily deals with his own. Under these circumstances, and in view of these rights, they applied to the Watkins Land & Mortgage Company for a loan of money, offering as security to mortgage a part of the lands in question, and by sworn representations that their homestead, upon which they resided, consisted of about 200 acres, and formed no part of the property proposed to be mortgaged, distinctly asserting that the lands which they proposed to mortgage constituted no part or parcel of their homestead, obtained a loan of a large sum of money, and secured the same by a mortgage upon the lands so as aforesaid sworn not to constitute a part of the homestead upon which they resided, and which lands so mortgaged did not necessarily constitute a part of the homestead unless they so at the time willed. The present contention is that the sworn representations upon which the loan was made in good faith must be disregarded, and that now the wife, Maria F. Little, her husband being dead, be held entitled to have set apart to her as a homestead a large part of the land so as aforesaid mortgaged, because, at the time of

the mortgage, the Littles, husband and wife, actually resided upon those lands. As a matter of fact, at the time of the mortgage, the Littles no more resided upon the lands mortgaged than they did upon every other part or portion of the 315 acres owned by them, except, of course, the 42-acre parcel upon which they did actually reside. The homestead question eliminated, the above representations made by Little and wife would estop them from claiming, in law or in equity, any interest in the mortgaged lands prior in right to the title acquired under the mortgage; and this is too well settled to need any citation of text-books or adjudged cases. In *Ivory v. Kennedy*, 13 U. S. App. 279, 6 C. C. A. 365, and 57 Fed. 340, which was a case where Kennedy and wife and Walker and wife had obtained a loan of money on sworn representations that Walter Kennedy and Sarah M. Kennedy, his wife, and John F. Walker and Serena K. Walker, his wife, all lived together as one family on the tract of land known as the "Old Kennedy Homestead," and that they used and occupied the said 200 acres as their homestead, and that they did not in any wise use or claim any other land as a homestead; and yet thereafter Serena K. Walker, as the wife of John F. Walker, claimed other 200 acres as a homestead, the question was with reference to the form of decree in connection with a vendor's lien and claimed homestead rights, and this court said, in discussing that matter:

"Under the circumstances of this case, we are of the opinion that we should follow the precedent set by the supreme court of Texas in a like case. We are the more inclined to this because it is all that the complainant asks, and because, under the facts, the demand of the defendants for an additional homestead, in view of their representations and affidavit to induce the complainant to part with his money, is inequitable, and tends to operate a fraud upon the complainant; and, while we recognize the public policy of the state of Texas, as declared in its constitution, in favor of the exemption of homesteads from forced sales generally, we do not think that the present is a case calling upon us to invent new precedents, or to stretch the general rules of equity, in order to give the defendants a homestead for which, by the record, they have not paid, and which, under the law, may be, and ought to be, sold to satisfy a just debt."

In *Investment Co. v. Ganzer*, 23 U. S. App. 608, 11 C. C. A. 371, and 63 Fed. 647, where a homestead was claimed as against alleged colorable vendor's lien notes, this court held that, notwithstanding the homestead was involved, the husband and wife were bound by the representations made by them as against bona fide holders of the lien notes.

In *Investment Co. v. Burford*, 17 C. C. A. 602, 71 Fed. 74, which was a much-considered case, and in many respects similar to the one under consideration, this court unanimously held:

"Under these circumstances, and under the plain provisions of the law, Burford had a right to designate and set apart, out of the tracts of land owned by himself and his wife, the homestead, not exceeding 200 acres, to which the family was entitled under the constitution of the state; and when he did so designate and set apart the homestead openly and aboveboard, with the consent of his wife, and without infringing on the rights of others, he had the full right to deal with the balance of the land as free and clear of all homestead rights, and other parties had the right to deal with him in regard to such land as free and clear of the homestead right. This being the case, when we find by the undisputed evidence that, in accordance with the forms prescribed by law, Burford designated the 304 acres of the Inman sur-

vey, upon which there was a dwelling house (messuage and curtilage) formerly occupied by him and his family as a homestead, as the homestead of the family, and on the faith thereof made a deed of trust of the other surveys owned by him to secure a loan from the Texas Loan Agency, and afterwards a loan from the complainant, we are bound to hold that Burford is now estopped by lawful covenant from claiming, as against the complainant, a homestead other than that so as aforesaid designated, to say nothing of an estoppel in equity by and through the recitals in the trust deed and under the affidavit made by him, and now set forth in the record."

We do not find the views heretofore expressed by this court in conflict with the general trend and purport of the many decisions of the superior courts of the state of Texas in relation to homesteads and homestead rights, although individual cases may be found declaring an extreme view. Such cases, however, are no more to be reconciled with the general run of decisions of the supreme court of Texas than they are with the decisions of this court.

The charge given by the court in the present case is in conflict with the views heretofore expressed by this court and with the law of the case. The second charge which was requested by the plaintiff below and refused by the court, to wit:

"You are instructed to find whether defendant and William Little owned lands other than those in controversy in this suit, in the same vicinity, at the time they made the deed of trust to Elizabeth Harris, and used them, in connection with said lands in controversy, as a homestead; and if you find that they did so own other lands, and that such other lands were designated by them, at the time of making such mortgage or deed of trust, as a homestead; and if you find that defendant and said William Little, in order to procure the loan of money mentioned in said deed of trust, did represent to the J. B. Watkins Land & Mortgage Company that said lands in controversy were not their homestead, and that said loan of three thousand dollars was in good faith made upon said lands in controversy, without any knowledge that defendant and William Little actually claimed the same as their homestead; and if you further find that defendant and William Little did not actually reside on the tracts of land mortgaged; and if you further find that defendant and William Little so owned as much as two hundred acres of land besides the lands in controversy, including the tract upon which they resided,—then you are instructed that defendant is now estopped from setting up homestead claim to the land in controversy, and in that event you will find for the plaintiff the land in controversy. You are instructed that the homestead may consist of the tract of land on which the parties may actually reside and other tracts of land not connected with it, including timber lands used as a source of timber and firewood for the home or farm, and that fencing and cultivating are not necessary to make and constitute such contiguous or timber lands part of the homestead."

—Appears to be in accord with *Ivory v. Kennedy, Investment Co. v. Ganzer*, and *Investment Co. v. Burford*, supra, and the law of the case.

The judgment of the circuit court is reversed, and the case is remanded, with instructions to grant a new trial, and thereafter proceed in accordance with law, and the views expressed in this opinion.

SPEER, District Judge (concurring). I cannot wholly agree with the views of the majority of the court, although I concur to a certain extent in the judgment of reversal. The action of the circuit court of the Northern district of Texas, from which the appeal is taken in this case, seems to be in accordance with the decisions of the highest

court of appeal of that state. However these may vary from the views with regard to similar controversies which may be entertained elsewhere, they must be regarded as controlling a question of title to land in that state. The action is trespass to try title, and is pending at law. The plaintiff must recover on the strength of his legal title, and in accordance with the decision of the highest appellate court of Texas he has no title to the main body of the land, for the reason that it is the rural homestead of the defendant. This fact is found by the jury, and there is nothing in the way of evidence set out in the record, except in the particulars hereinafter mentioned, which would justify the court in disregarding or setting aside that finding. The finding is itself supported by the decision of the Texas court of appeals in *Pellat v. Decker*, 72 Tex. 581, 10 S. W. 697. The court observes in that case:

"Pellat and wife actually and continuously used the property as their home from 1872 until this action was brought; and this, as to such property, is the conclusive designation of homestead, against which no declaration to the contrary can be allowed any weight. The law provides a method, when the rural homestead is of a larger tract, whereby the homestead may be designated, and the excess subject to execution identified."

It is true that the defendant, Maria Little, and her husband, William Little, then in life, made an affidavit that no portion of the property in controversy was their homestead, or the homestead of any other person or persons. This affidavit is the same instrument which purports to appoint J. B. Watkins their agent to secure the loan upon which the plaintiff's supposed title is based. Now, it is plain from a careful perusal of that instrument that the plaintiff, Watkins, was not the agent of Maria Little and her husband, but was the agent of the lender. In illustration of this, the same instrument makes the applicant swear that "the answers to the following questions given by affiants are full and correct: What is your indebtedness? How much live stock and other property in addition to real estate have you,—horses, mules, cattle, hogs, poultry, machinery, implements, etc.?" It makes the applicants for the loan swear to the character of the land, and in the paper there are several blanks, which indicate that it is merely a printed form, prepared for carrying on the business of the J. B. Watkins Land & Mortgage Company, of Laurens, Kan. These questions are manifestly put in the interest of the lender. Similar expedients have been resorted to by other companies engaged in lending money, and in order to avoid the laws of the state against usury. See *Security Co. v. Gay*, 33 Fed. 636. The principle decided in that case was affirmed by the supreme court of the United States in *Trust Co. v. Fowler*, 141 U. S. 384-415, 12 Sup. Ct. 1-9. It cannot be doubted, therefore, that the plaintiff, as the agent of the lender, had knowledge of the existence of his homestead. In point of fact it did not exist, and the only remaining question is, does this affidavit, however unconscionable it may be, estop the party making it from the assertion of homestead rights? In the case of *Loan Co. v. Blacklock*, 76 Tex. 86, 13 S. W. 12, the borrower made a sworn application for a loan, in which he stated that the land was not his homestead; that he owned another tract, therein described, which he and his family occupied as a homestead. The court said:

"The constitution forbidding the fixing on the homestead of liens other than such as are thereby expressly permitted, no estoppel can arise in favor of a lender who is attempting to secure a lien on the homestead in actual use and possession of the family, based on declarations of the husband and wife, made orally or in writing, contrary to the fact. To hold otherwise would practically abrogate the constitution. If property be homesteaded in fact and law, lenders must understand that liens cannot be fixed upon it, and that declarations of husband and wife to the contrary, if made, must not be relied upon. They must further understand that no designation of homestead contrary to the fact will enable parties to evade the law, and incumber homesteads with liens forbidden by the constitution."

It cannot be said that the plaintiff was a bona fide purchaser without notice. The facts were sufficient to put him on inquiry, and he is, therefore, chargeable with notice of all he could have ascertained if inquiry had been made. Nor did he, at the sale by the substituted trustee, succeed to the rights of a bona fide purchaser without notice, which might have protected him, even though he had actual notice himself. He was, as we have stated, the agent of the lender; and, since he had notice of the homestead, the principal also had notice, and was not herself entitled to be treated as a bona fide purchaser. The case, therefore, is in all respects different from that of *Hazzard v. Fitzhugh* (decided at the present term) 24 C. C. A. 232, 78 Fed. 554. There the plaintiff was the bona fide purchaser of a security similar to that on which the plaintiff here relies. She, however, bought a title which came through a third person, and, however colorable the transaction might have been between those who were parties to the device to defeat the Texas law, so far as she was concerned, she was entitled to be treated as an innocent purchaser. Here, however, the plaintiff knew, or might have known, the fact of the homestead. But it is insisted that he was misled by the fraud and turpitude of the defendants, and because of that fraud he ought to recover. What seems to be a sufficient reply to this is the fact that we are in a court of law, and, if the facts set up in this answer are true, and the fraud is so great as would avoid the estate created in behalf of the defendants by the constitution of the state of Texas, it is an equitable cause of action, and cannot be maintained at law in an action of trespass to try title. In that respect also the case differs from that of *Hazzard v. Fitzhugh*, supra, where the proceedings were pending and disposed of in a court of equity. In one respect only do I think the judgment should be reversed. The defendant and her husband owned 315 acres of land, made up of five tracts. Of these, four of the tracts, aggregating 242 acres, were contiguous, and one tract of 73 acres was some four miles distant from the others. The four tracts were originally prairie lands, and were in cultivation by defendant's husband, and upon one of them was situate the family mansion. From the 73-acre tract the family got their accustomed supply of firewood, and their supplies of timber used about the cultivated land. The defendant and her husband mortgaged 170 acres out of the four tracts, and in the written application for the loan made a sworn statement that the 170 acres was not homestead property, and that the other portions of the lands not mortgaged (some 145 acres, including the 73-acre tract) constituted the homestead. The actual homestead in use may be described as in the brief of defendant's attorney: "A mansion house with ad-

joining land." Bouv. Law Dict. and Worcester. "The place of residence; the place where he lives." *Philleo v. Smalley*, 23 Tex. 502. This definition might be applied, however, to a tract of 1,000 acres as well as to one of 200 acres. The exempted homestead, however, under Texas law, is defined by the constitution as follows: "The homestead shall consist of not more than two hundred acres of land which may be in one or more parcels with the improvements thereon." As stated by the supreme court of Texas in *Brooks v. Chatham*, 57 Tex. 32:

"The constitution expressly provides that the rural homestead may consist of one or more parcels, and the fact that they may be distant several miles the one from the other is immaterial; and in many cases, to enable the head of the family to maintain a prairie farm, it may be necessary to have woodland, which can only be obtained at a distance even as great as was the distance between the two tracts of land in this cause claimed to be the homestead of the appellants; but when the lands are separated there must be such use as will amount to a designation of homestead of the subsequently acquired parcel as fully as the same would be required in the original homestead. The constitution does not determine how the homestead shall be designated, but its protection is extended only to that which is homesteaded. Nor have we any statute which provides how the designation of the homestead shall be made, which is to be regretted."

It cannot be doubted, therefore, that prior to the creation of the plaintiff's lien in this case the entire 315 acres was, so far as use could make it so, the actual homestead of the defendant and her husband, but that the constitution gave its protection to an undefined 200-acre tract only out of the whole tract. When the homestead consists of more than 200 acres, the excess is subject to designation, and its designation may be compelled by the creditor, if not voluntarily by the owner (*Rev. St. 1879, arts. 2346-2364*), and these statutes are cumulative only (*Id. art. 2366*). The mortgagee in the case at bar was put on notice by the application for the loan that the lands proposed to be mortgaged lay in the same surveys and same neighborhood as that stated to constitute the homestead upon which was the mansion house, and the tracts actually touch each other. And yet it contented itself with the loose statement that "our homestead, upon which we reside, and to which our title is perfect, consists of about two hundred acres; the same being in the surveys and patents of Wm. Freeman, Wm. Gatlin, and the Dixon league." It is very clear, therefore, that under the Texas law the 145 acres not mortgaged must be increased to the extent of 55 acres out of the tract mortgaged to make the requisite exemption under the Texas constitution. I think it equally clear under the Texas law that where the actual homestead in use consisted, as in this case, of 315 acres, the defendant and her husband could, prior to creating a lien on the excess over 200 acres, voluntarily designate which part of the 315 acres would be their exempted homestead. The attorney for the defendant does not deny her right to make such designation within certain limits after credit given, but does dispute her right to make such designation prior to credit given, and as a basis of credit. There is quite a difference, however, between restricting the limits of a homestead below the 200-acre tract exempted by law and defining the particular full 200 acres exemption out of a still larger body of lands. It was certainly never intended to cut off the right of landowners to raise money on

the excess over 200 acres. The case of *Railway Co. v. Winter*, 44 Tex. 612, cited by defendant's attorney to the point that where the tract consists of more than 200 acres the homestead exemption allowed to the head of the family must be taken out of that portion of the tract contiguous to that upon which the improvements are situate, and that he will not be permitted to pick over the different tracts to make up the 200 acres exempted, seems to be addressed to the idea that, as the creditor's right accrued before a designation of the particular exempted tract out of a large body of lands, an equitable adjustment of the rights of the parties, standing somewhat in the relations of tenants in common, would require that the head of the family should take his 200 acres contiguous to the improvements, which are made his by the law. But this principle certainly cannot be invoked to enable the debtor to undo a designation of a homestead made by him upon the faith of which he obtains money, and extend it to his other lands, not so designated. As the head of the family and the wife designated at the time of the loan certain tracts as the homestead, they are estopped from denying that the land thus designated constitutes a part of the homestead. And to the extent that these parts designated as homestead fall short of the 200-acre exemption allowed by the constitution, the defendant is entitled to go upon the part mortgaged to complete the 200-acre exemption; but no further.

This view of the case makes the 73-acre tract necessarily a part of the homestead, and, in effect, sustains the sixth assignment of error, leaving the other action of the circuit court undisturbed.

THOMPSON et al. v. N. T. BUSHNELL CO.

(Circuit Court, D. Connecticut. April 28, 1897.)

No. 884.

1. RES JUDICATA—EXTENT OF ESTOPPEL.

Unless it appears from the record or consistent extrinsic evidence that the particular matter sought to be concluded was necessarily tried and determined, so that the judgment could not have been rendered without deciding it, there is no estoppel.

2. SAME—DECREE IN PATENT SUIT.

Where a decree sustains one claim of a patent, but there is nothing, either in the decree or the opinion, showing whether another claim is or is not valid, the defendant in a second suit is not estopped from contesting its validity.

This was a suit in equity by Harry G. Thompson and others against the N. T. Bushnell Company for alleged infringement of a patent. The cause was heard on defendant's motion for leave to amend its answer.

John K. Beach, for complainants.

Phillipp, Munson & Phelps, for defendant.

TOWNSEND, District Judge. Motion to amend answer. The complainants herein, by the usual bill, ask for an injunction and accounting by reason of the alleged infringement of their patent, No.

328,019, granted October 13, 1885, to Thaddeus Fowler. The defendant moves to amend its answer by adding thereto the names of certain persons alleged to have previously known and used said improvement, in order to lay the foundation for introducing newly-discovered evidence that the patentee was not the first or original inventor thereof. Complainants object to said amendment on the ground that the question of validity is *res adjudicata*. In a former litigation upon the merits between the complainants and certain vendees of G. W. Griffin & Co., the court entered a formal decree dismissing the bill. *Thompson v. Jennings*, 66 Fed. 57. Complainants thereupon filed a disclaimer, and brought this suit against another vendee of said Griffin & Co. It appears from the pleadings and the opinion of the court that the questions of validity of the two claims of said patent and of infringement were in issue, and that the court found that the first claim of the patent was valid. Complainants contend that the opinion of the court is evidence of what matters were actually adjudicated therein, and that such general decree of dismissal cannot be claimed to qualify the adjudication of the issues actually litigated and determined. It is unnecessary to deny this contention, or to affirm the contention of defendant as to the effect in this action of said disclaimer, or of the language of the court in construing the first claim of said patent. In order that said former judgment should operate as an estoppel, it is essential that there should be certainty to every intent. Unless it appears from the record or consistent extrinsic evidence that the particular matter sought to be concluded was necessarily tried or determined, so that the judgment could not have been rendered without deciding it, there is no estoppel. *Russell v. Place*, 94 U. S. 606, 610. Here, whatever may be claimed from the opinion of the court as to the first claim or infringement thereof, neither the opinion nor the decree shows whether the second claim of the patent is or is not valid. Therefore, within the rule laid down in *Packet Co. v. Sickles*, 5 Wall. 580, the defendant is not estopped to make the amendment as prayed for. The motion is granted.

KING v. ELKHORN & S. R. LAND TRUST et al.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1897.)

INJUNCTION—AGREEMENT OF PARTIES.

In a suit to enjoin the cutting of timber by a defendant pending ejectment, the parties filed in court an agreement that defendant might continue to cut timber, but should deposit all the royalties therefrom in bank, to remain until rendition of judgment in the ejectment suit; and that, "upon either party securing a judgment" in the trial court, he should be permitted to withdraw "all the accumulated royalties," on giving bond to the losing party satisfactory to the court, pending any appeal, etc. In the ejectment suit plaintiff recovered only a portion of the lands sued for. *Held*, that plaintiff was only entitled to withdraw an amount of royalties apportionable to the lands recovered.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

Daniel Trigg (M. F. Stiles and Sipe & Harris on the brief), for appellant.

S. C. Graham, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge. This case comes up on appeal from the circuit court of the United States for the Western district of Virginia, at Abingdon. On the 7th April, 1894, the appellant filed his bill of complaint against the appellees in the circuit court of the United States for the Western district of Virginia. The bill, after stating the jurisdictional facts, alleged: That the complainant therein was the owner in fee, entitled to the possession of, and in actual possession of, "all that portion lying in the said county of Buchanan of the tract of five hundred thousand acres of land which was granted by the commonwealth of Virginia to Robert Morris by patent of June 23, 1795." Then follows a full and minute description by metes and bounds of the land in the patent. That the land is wild land, covered by a heavy growth of marketable timber, constituting its chief value, which complainant was about to utilize. That the defendants, without right and without leave of complainant, have come on the land, and are cutting and removing trees and timber of great value therefrom. Then follow other statements showing the facility with which all this could be done. The bill prayed an injunction. Upon the filing of the bill a rule to show cause why an injunction be not granted was issued, and a restraining order was entered. The defendant the Elkhorn & Sandy River Land Trust demurred, and sustained the demurrer with an answer. The entire claim of complainant was put in issue, and his title denied, the defendant asserting title in itself. W. M. Ritter, who was also a defendant, filed his answer, admitting that he was cutting timber on this land, and averring that he did this under the authority of a lease from his co-defendant, the lawful owner. A copy of this lease is in the record. Replication was filed on 21st May, 1894. On 23d May, 1895, an agreement was entered into between the complainant and the Elkhorn & Sandy River Land Trust and W. M. Ritter, and on the 24th February a copy of that agreement, signed by all the parties by their attorneys, was filed in court as a part of the cause, leave having been given for that purpose by the judge, on notice to the parties thereto. This agreement provides: (1) That Ritter should go on and cut and manufacture all timber mentioned in his contract (above referred to) on the tract of land known as the "Greenbrier Tract," in Buchanan county, part of a 2,093-acre survey. (2) That he deposit all royalties or sums due for said timber as they become due in the National Exchange Bank at Lynchburg, Va., subject to the order of the United States circuit court for the Western district of Virginia, there to remain on deposit until the trial of the action of ejectment pending between the complainant and the defendants, or until the royalties shall be withdrawn by the parties to this agreement. (3) The third makes provision for the speedy trial of

the action of ejectment. (4) "That upon either party securing a judgment in the trial court upon said action of ejectment, the prevailing party, upon giving a sufficient bond, payable to the losing party, with security satisfactory to the court, shall be permitted to withdraw all the accumulated royalties from said bank, and shall collect from said W. M. Ritter all subsequent royalties as they become due, pending any appeal that may be taken by the losing party to a higher court, and until the final determination of said action." The construction of these words is the crucial question in this case.

The next step in the case, as shown by the record, is a notice signed by the attorney of the complainant, to the defendants, that he will move on the 1st day of December, 1895, at 10 a. m., before Hon. John Paul, one of the judges of the court, at Harrisonburg, for an order directing the National Exchange Bank of Lynchburg to pay to complainant all moneys deposited by Ritter with said bank under the stipulation. The motion came on to be heard on 5th December, and the order of the court thereon was duly made and filed. It recites the appearance of the parties before the court, the notice served on the defendants, the production by the complainant, in support of his motion, "of a judgment of this court on the law side thereof" in a cause of H. C. King, plaintiff, against the Elkhorn & Sandy River Land Trust et al., defendants, in ejectment, entered on 4th December, 1895, giving the words of the judgment, with a full description of the land found in detail by metes and bounds; and then adds:

"Whereupon the court, considering the said agreement and the said judgment, doth adjudge, order, and decree that the said H. C. King is not entitled to recover the whole of the said fund and the future amounts that may become due from the said W. M. Ritter for timber hereafter cut upon the land in controversy in this cause, but only so much of the said fund so deposited, and which may hereafter accrue from future cutting, as may have accrued or may hereafter accrue from the land which was recovered in the said judgment; and that the defendant the Elkhorn & Sandy River Land Trust is entitled to recover so much of said fund as accrued, or may hereafter accrue, from the residue of the 2,093-acre tract named in said judgment. And thereupon the court doth direct that an account be taken and reported by Samuel M. Graham, who is hereby appointed a special commissioner for the purpose, showing the amount and the value of the timber cut by the said Ritter upon either side of the line of the said land named in the said judgment."

Then we find the report of the commissioner, showing that of the timber cut by Ritter some of it was on the land recovered by complainant in the ejectment suit, and some on the land of defendants, and that of the royalties paid by Ritter \$1,717.02 belonged to complainant, and \$1,839.19 properly belonged to the defendant the Elkhorn & Sandy River Land Trust. This report was confirmed on 6th May, 1896, and the bank, acting as depository, was ordered to distribute the fund in accordance with it. At the request of complainant this order was suspended for 60 days from 9th May, 1896, to give him time to appeal therefrom, and to give a supersedeas bond. It was then suspended for a further period of 30 days from 9th July, 1896, for the same purpose. Soon thereafter complainant moved before Judge Paul for leave

to file a bill of review, and this motion was refused 23d July, 1896. Leave was granted to the complainant to appeal to this court, and the cause comes here on several errors assigned.

As the bill of review seeks to correct errors on the face of the decrees of the 5th of December, 1895, and the 6th of May, 1896, and as a bill of review will lie only for errors of law apparent on the record (*Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 811), we will examine the errors assigned to these decrees. The first three assignments of error relate to the decree of 6th May, 1896. They proceed expressly upon the ground that the funds in the hands of the bank were not under the control of the court, were not subject to the orders of the court, and therefore not disposable of by the decree mentioned. The parties mentioned in the record were duly before the court. The complainant wanted an injunction. The defendants wished to go on with the cutting of the timber. The issue between them was undecided. Both were in peril. If the complainant failed, his liability on his injunction bond was a serious one. Delay injured the defendant, and cutting timber exposed it to loss in case the decision went against it. They could each have applied to the court for some sort of relief. They preferred to confer with each other before doing so, and, having conferred and agreed, they put their agreement in writing, and filed it as a part of the cause. Thenceforward it came within the purview of the court. More than this, all the royalty payable by Ritter for the timber both sides had agreed he should cut was deposited in the National Exchange Bank of Lynchburg, subject to the order of the United States circuit court for the Western district of Virginia. The money, even in the event of perfect success, could not be drawn out by the prevailing party except with security satisfactory to the court. Here we see all the parties to this case make their compact between themselves a part of the proceedings of a cause in court, and in that compact provide that it be held subject to the order of the court, not to be drawn out without its supervision and active co-operation. It is difficult to understand how the appellant could say that the funds in the hands of the bank were not under the control of the court, or not subject to the order of the court. His own action in giving the notice of 2d December, 1895, and in making his motion of 5th December, 1895, contradicts his assignments of error. The difficulty in the mind of the appellant shown in these and all the other assignments of error seems to be this: He complains of the proceeding by which the court reached its conclusion. But this proceeding was instituted by himself. He gave notice of his motion, applied to the court for the fund, and produced the evidence upon which he made his application. This evidence was, by the agreement, a part of the record in the suit in ejectment. The agreement had spoken of and had provided for a speedy hearing of the action at law, and had provided that the accumulating fund, subject to the order of the court, should be paid to the prevailing party in the action of ejectment upon his securing his judgment. In order to ascertain who was the prevailing party, it became necessary to know what was at issue in

the action of ejectment, what the plaintiff claimed, and what he obtained. If he succeeded in obtaining all that he claimed, then to him belonged all the fruits of victory. But if he succeeded in obtaining only a part of what he claimed, then surely he could not be entitled to the same result as if he had established his whole claim. The presiding judge saw this. Perhaps he himself, on the law side of his own court, knew exactly what, and how much, the complainant did succeed in recovering by his suit. But he did not use this knowledge on the equity side of his court. He referred it to his commissioner, to ascertain and fix the right of the complainant as found for him by a jury. He did not disregard or annul the fourth clause of the agreement between the parties. He considered it, and put his construction upon it, and acted upon this construction. The appellant stands on the words of his agreement, and insists that, having secured a judgment, he was entitled to all the money on all the royalties on all the timber on all the land he claimed. By the same narrow and technical construction, if, after claiming and suing for 3,010 acres of land, the jury had found that he had a good title to 10 acres, he could demand the value of the timber on the 3,000 acres. The appellant, of his own accord, came into equity, and he must do equity. We see no error in the decree of the court below, and it is affirmed.

PHENIX INS. CO. v. SCHULTZ.¹

(Circuit Court of Appeals, Fourth Circuit. May 5, 1897.)

No. 203.

1. RECEIVERS—POWER TO SUE.

A receiver of a corporation, appointed by a state court, with power to collect its assets and to sue therefor, can sue in a federal court to enforce specific performance of an alleged contract of insurance on corporate property. 77 Fed. 375, affirmed.

2. MAILING OF LETTERS—PRESUMPTIONS.

When a party alleges that he duly mailed a letter, the court must presume that the requirements of the law as to stamping, etc., were complied with.

3. INSURANCE—COMPLETION OF CONTRACT.

After extended correspondence between certain insurance agents and the brokers representing a corporation desiring insurance, the agents telegraphed the brokers, "With specific form, can write \$10,000 at 90 cents, if it will help you." On the same day the brokers accepted this offer by mail, saying that they inclose forms, which they "trust will be specific enough and satisfy the companies." Before receipt of this letter and inclosures, the property was destroyed by fire. *Held*, that the mailing of the letter left it unsettled whether the forms inclosed were sufficiently specific to satisfy the agents, and hence there was no meeting of minds, so as to form a binding contract. 77 Fed. 375, reversed. Brawley, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

¹ Rehearing denied May 14, 1897.

T. J. Kirkpatrick and John M. Slaton, for appellant.

Waller R. Staples and B. B. Munford (H. A. Latane and William Beasley, on brief), for appellee.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

GOFF, Circuit Judge. This is an appeal from a decree entered in the chancery cause of J. C. Schultz, receiver of the Franklin Brass Company, against the Phenix Insurance Company of Brooklyn. The suit was instituted in the circuit court of Botetourt county, Va., on the 9th day of September, 1895, and removed, by appropriate proceedings, to the circuit court of the United States for the Western district of Virginia, by which court the decree complained of was entered on the 26th of September, 1896. The bill alleges: That the Franklin Brass Company was, in the year 1891, the owner of certain real and personal property, which is fully described, situated at Buchanan, Botetourt county, Va. That, being desirous of insuring said property, the company authorized J. B. Moore & Co., insurance brokers, doing business in Richmond, Va., to procure insurance for the term of one year against loss or damage by fire on such property, as follows: \$33,000 on machinery, machines, etc., including patterns; \$18,000 on buildings; and \$5,000 on stock, material, and supplies. That J. B. Moore & Co., in July, 1891, applied to P. J. Otey & Co., insurance agents, doing business at Lynchburg, Va., for such insurance, who, after examination of the matter and inspection of the property, accepted the risks for the amount of \$40,000, and delivered policies for the same to the insured. That, when these policies were reported to the insurance companies by their said agents, several of them objected to the form of the policies, of which J. B. Moore & Co., representing the Franklin Brass Co., were promptly advised. That P. J. Otey & Co. then requested that the policies should be returned, in order that the form might be changed, and that new policies containing the required specific form might be issued. That the Franklin Brass Company authorized their said brokers to make the proposed changes, and to procure the insurance in accordance therewith. That J. B. Moore & Co., on September 1, 1891, representing the Franklin Brass Company, wrote P. J. Otey & Co., representing the insurance companies, returning the old and giving instructions as to the new policies desired; and that this communication was replied to on the 2d of September, 1891, in which correspondence the form of the policies and the sums that could be placed in different companies, as also the rate of insurance, were referred to and discussed, but no agreement was reached. That on September 3, 1891, P. J. Otey & Co. sent the following telegram from Lynchburg to J. B. Moore & Co., at Richmond, having reference to said insurance, viz.: "With specific form, will write ten thousand at ninety cents, if it will help you." That J. B. Moore & Co., in a letter to P. J. Otey & Co., concerning the insurance, dated the 3d September, 1891, referring to such telegram, used this language, viz.: "We also have your telegram that you can place 10,000 at 90c., and trust you will do so, as we would like to get it as low as possible. The amount on the patterns, that

is to be $\frac{1}{10}$ of the entire insurance, is to be deducted from the amount wanted on machinery. As in our hurry we sent you the total amounts wanted on the different items, we haven't any way of figuring it out ourselves. In sending the policies, we would be glad if you would return the original mem. sent you. We will be glad to receive policies from you as early as convenient. Send us policies for the full amount of the original order sent you." That on the 4th September, 1891, at about 1 o'clock p. m., a fire occurred, by which all of said property was destroyed, the loss upon each item being greatly in excess of the aggregate insurance thereon. That, prior to said fire, P. J. Otey & Co. had indicated their willingness to insure said property, a full description of which, as also a division of the amounts of insurance on the several kinds of property, then being in their possession, with insurance placed amounting to \$10,000, at 90 cents on the \$100, if the assured, through its agents, would prepare a specific form, which it was alleged was duly prepared and deposited in the post office at Richmond, addressed to P. J. Otey & Co., on the 3d of September, 1891. That this form so mailed was satisfactory to said P. J. Otey & Co., as representatives of the insurance companies, and was accepted by them without objection. That, soon after the fire, said J. B. Moore & Co., as agents of the Franklin Brass Company, applied to P. J. Otey & Co. for the policy which they had agreed to furnish, and for the name of the company they had issued it for, tendering at the same time the premium therefor, and that they refused to deliver said policy, and declined to give the name of such company. That the plaintiff had been theretofore, by a decree of the circuit court of Botetourt county, in a cause therein pending, duly appointed receiver of said Franklin Brass Company, and fully authorized to take all necessary steps to collect its assets and discharge its liabilities. It was also set forth in the bill that the plaintiff had been but lately before informed that it was the Phenix Insurance Company of Brooklyn for which said P. J. Otey & Co. so acted in the telegram of September 3, 1891, and that at that time they were the duly-authorized agents of said company, having in their possession policies of insurance signed and executed by its officers, which they were authorized to fill and deliver. The plaintiff therefore charged that in consideration of a premium of \$90, which the Franklin Brass Company, through its agents, agreed to pay, which was acquiesced in by P. J. Otey & Co., the said defendant did, on the 3d day of September, 1891, agree to insure for one year therefrom the Franklin Brass Company against loss and damage by fire to its said property in the sum of \$10,000, in the proportions on said property theretofore agreed upon, and also that the defendant did then and there agree to write out and deliver a policy for the same. The prayer of the bill was that the defendant be required specifically to perform the said agreement to insure the property and deliver the policy; that it be ordered to pay to the plaintiff the sum of \$10,000, the amount insured, less the premium of \$90, with interest on the residue; and for further general relief.

To this bill the defendant filed a demurrer, which, after argument and consideration, the court overruled, for reasons set forth in an

opinion filed and made a part of the record, which so fully and clearly state the questions involved that this court, in disposing of the assignment of error relating to the demurrer, adopts the same, and quotes it in full, as follows:

"First ground of demurrer: That the receiver cannot sue on the contract sought to be enforced in this suit. The decree of the circuit court of Botetourt county, appointing the plaintiff in this suit receiver of the Franklin Brass Company, expressly confers upon him the power to take any necessary step to get in the assets of the company, and for that purpose to bring such suits as may be necessary. This decree is the charter of his powers and authority, and imposes on him the duty of collecting and reducing into possession the assets of the company of which he is made receiver. And as he has succeeded to, and is invested with, all the rights, powers, and authority of the corporation of which he is made receiver, he, in the opinion of the court, is the proper person to bring this suit. The corporation itself, being in the hands of a receiver, could not maintain this suit. The individual stockholders could not do it, and there is no one else but the receiver who could do it.

"Second ground of demurrer: That the bill, while alleging that the letter containing the form of policy was duly mailed by J. B. Moore & Co., at Richmond, to P. J. Otey & Co., at Lynchburg, fails to allege that the said letter was duly stamped. The court thinks that the allegation that the letter containing the said form of policy was duly mailed carries with it the presumption that it was duly stamped, which was a requirement of law and the prerequisite to mailing. When a party alleges that he duly mailed a letter, the court must presume that he complied with the requirements of law, and stamped the letter. If it were material to allege the particulars as to the manner and mode of mailing the letter in question in this suit, such particularity is rendered unnecessary by the allegation in the bill that the said letter was duly received by P. J. Otey & Co.

"Third ground of demurrer: The third ground of demurrer advanced in the argument by counsel for the defendant is that the plaintiff does not file with his bill the contract which he prays to have specifically performed. The bill alleges that the plaintiff, through his agents, J. B. Moore & Co., a few days after the fire which destroyed the property, applied to P. J. Otey & Co., the agents of the defendant, for the policy which they agreed to furnish, and for the name of the company for which they were acting, and at the same time tendered them the premium therefor, but that P. J. Otey & Co. refused to deliver the policy or to give them the name of the company for which they were acting. From this it appears that the only evidence of the agreement to insure which the plaintiff could file is the correspondence between J. B. Moore & Co. and P. J. Otey & Co., which correspondence constitutes the agreement to insure, relied on by the plaintiff in this suit. The defendant demands that the plaintiff shall file with his bill, as part thereof, in order to maintain this suit, the contract of insurance, which is the policy itself. If he were able to do this, there would be no necessity of this suit, the object of which is to compel the defendant to carry out its agreement to insure by executing the policy of insurance contracted for.

"The demurrer is overruled."

The defendant filed its answer, not admitting any of the allegations of the bill relating to the negotiations charged to have taken place between J. B. Moore & Co., representing the Franklin Brass Company, and P. J. Otey & Co., as agents for the insurance companies, and demanding full and proper proof of the same. It denied that any such contract as was set forth in the bill was ever made, and claimed that the negotiations referred to therein were not consummated, and that they never grew into a binding contract between the parties, and insisted that it was well understood between the parties that the correspondence and negotiations mentioned should not be considered as a contract un-

til the entire matter, in form and substance, had been submitted to and approved by the insurance company. Defendant also denied that the plaintiff had lately theretofore become informed that it was the Phenix Insurance Company of Brooklyn for which P. J. Otey & Co. acted and spoke in the telegram of September 3, 1891, and it alleged in its answer that the Franklin Brass Company was fully advised on that subject in September, 1892, and that the delay in bringing the suit was without excuse. To this answer the plaintiff filed the usual replication, and the proofs were duly taken. The testimony of quite a number of witnesses was taken, and all the correspondence, both letters and telegrams, between the insurance agents, relating to the transactions concerning the insurance in controversy, was produced, as were also copies of the policies of insurance first issued, and of the amended "forms," as subsequently prepared for the then proposed insurance. Before the case came on to be heard, the plaintiff filed exceptions to the defendant's answer, which the court overruled, but, as this action of the court is not now before us for review, the same will not be further referred to, and is mentioned only as a proper statement of the history of the case. The defendant then moved the court for permission to file an amended answer, offering in support of the same the affidavit of one of its counsel; but the court, on consideration of the matters involved, overruled that motion, and this action is assigned as error by the appellant, but it will not be necessary to again refer to it, as the conclusion we reach disposes of the case on other grounds also raised by the appellant. The case was then heard on the bill, answer, replication, and testimony, and the court entered a decree directing that the defendant pay to the complainant the sum of \$10,000, with interest thereon from the 4th day of September, 1891, until paid, with the costs of this suit, less the sum of \$90, as of the 3d day of September, 1891. From this decree the appeal we are now to dispose of was allowed.

The contract as relied upon by the plaintiff is claimed to have been made—to have been in fact the result of the letters and telegrams passing—between J. B. Moore & Co., representing the Franklin Brass Company, and P. J. Otey & Co., agents for the defendant; and the object of the suit is to enforce by the decree of the court the contract of insurance so entered into, or, in other words, for the specific performance of the same. The circumstances under which the insurance was originally effected, the reasons why the companies first issuing policies were dissatisfied and recalled them, have already been in substance fully set forth, about which there is no contention. The second effort then was to obtain policies free from the objectionable forms and the blanket provisions of those that had been condemned by the insurance companies. Much of the correspondence between the parties had no direct bearing on the real question at issue, and it was only offered for the purpose of placing fully before the court all the facts bearing upon the insurance of the property,—those relating to the canceled policies as well as those desired,—and as tending

to explain the language used in some of the letters and telegrams, as also in the forms of policies proposed. The main contention between the agents appears to have been as to the "form," which, the testimony shows, has no reference to the printed conditions on the policies, but only to the written part, which sets forth the property insured, its location, and the divisions of insurance on each item. It is also shown that a "specific form" of policy is one that covers a separate amount on each building, and a separate amount on the contents of each building, and that a blanket form of policy covers more than one building under one item of the policy, or a building and its contents, or the contents of more than one building. The first policies were objected to because the form was not specific, because it was in fact blanket in character. Keeping all this in view will enable us to properly understand the language used in the letters and the telegrams, from which it is said that the contract results.

After considerable correspondence between the agents of the parties hereto, in which all of the matters relating to the proposed insurance, and especially the forms of the policies, had been disclosed, P. J. Otey & Co., on the 3d day of September, 1891, sent to J. B. Moore & Co. this message by wire, viz.: "With specific form, can write ten thousand at ninety cents, if it will help you." The reply to this was by letter of the same date, deposited in the mail at Richmond, and directed to P. J. Otey & Co., at Lynchburg. In this letter, J. B. Moore & Co., after referring to other matters connected with the application for insurance, used this language, viz.: "We also have your telegram that you can place 10,000 at 90c., and trust that you will do so, as we would like to get it as low as possible." This, the plaintiff below claims, is the offer to insure, made by the defendant, through its agents, which was accepted by the plaintiff's agent on the same day. Does the evidence support this contention of plaintiff that a contract of insurance was consummated by the writing and mailing of the letter of September 3, 1891? It is insisted that when J. B. Moore & Co. deposited their letter in the post office at Richmond, on the 3d of September, eo instanti the contract was consummated, and could not afterwards be changed or repudiated by either P. J. Otey & Co. or by the company they represented. Where a contract is sought to be established by letters or telegrams, it must appear from the direct terms of the same that both sides have agreed to one and the same set of propositions. If any new matter is introduced into the answer, or anything is left by the offer to further determination, no contract has been entered into. If the reply does not in every particular comply with the offer, it will not make a contract. 1 Chit. Cont. (11th Am. Ed.) 15; 1 Pars. Cont. (6th Ed.) 476; Edichal Bullion Co. v. Columbia Gold Min. Co., 87 Va. 651, 13 S. E. 100; Minneapolis & St. L. Ry. Co. v. Columbus Rolling-Mill Co., 119 U. S. 149, 7 Sup. Ct. 168; Springs Co. v. Harrison (Va.) 25 S. E. 888; Goulding v. Hammond, 4 C. C. A. 533, 54 Fed. 639. If, by the telegram of September 3d, P. J. Otey & Co. did not reserve the right to determine whether or not the "specific form" was

such as had been required by the previous correspondence, then the claims of the appellee that the contract was closed when the letter of J. B. Moore & Co. of that date was deposited in the Richmond post office must be conceded. In such cases the authorities almost uniformly hold that the acceptance dates from the posting of the letter or the sending of the telegram. *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Duncan v. Topham*, 8 C. B. 225; *Tayloe v. Insurance Co.*, 9 How. 390; *Trevor v. Wood*, 36 N. Y. 307; *Sanders v. Fruit Co.*, 144 N. Y. 209, 39 N. E. 75; *Hunt v. Higman (Iowa)* 30 N. W. 769; *Yonge v. Society*, 30 Fed. 902.

In the light of the correspondence and the special objections that had theretofore been raised as to the "form" in the policies, we are unable to hold that it was the intention of the agents of the defendant, in sending the telegram mentioned, for the first time in the history of the negotiations concerning the insurance, to transfer absolutely to the judgment of the agents of the party asking for insurance both the character and the sufficiency of the one matter that had caused, down to that time, the refusal of the defendant to perfect the insurance requested. We find nothing in the record to justify this contention. The letter of J. B. Moore & Co., by which it was insisted that the contract was consummated, does not sustain the position taken by appellee. While it inclosed the "form," the writers were not confident that it would satisfy the companies, but they trusted that it would be specific enough. They evidently recognized that P. J. Otey & Co. had the right to pass upon the question of the specific character of the forms they were inclosing them, and they knew that, if said agents of the defendant did not approve of the same, the insurance would not be perfected. We gather from the evidence that such was the understanding of all the parties concerned, and, independent of that, we think the offer contained in the telegram was one that reserved to the sender thereof the right to take further action after a reply had been received. That the forms inclosed in the letter of September 3d were not "specific," in the sense that that word is used by insurance men, is conclusively shown by the testimony, and is apparent from the correspondence had between the parties; and that such forms were not of the character indicated by the letters of J. B. Moore & Co., especially their letter of September 1st, is so evident as not to admit of question. The claim that such forms were in accordance with the understanding of the parties, and of the kind called for in the telegram of the 3d September, is negatived by the letter of the agents of the Franklin Brass Company, dated September 1st, as well as by other portions of the correspondence, and is based only on a violent presumption. It would be most inequitable to hold that J. B. Moore & Co., by inclosing such forms, could bind the defendant to a contract that was proffered by its agent contingent upon the furnishing of a specific form by the party desiring insurance. Holding, as we do, that P. J. Otey & Co. reserved the right to pass upon the sufficiency of the specific form called for in the telegrams, it follows that the posting of the letter at Richmond did not operate

to consummate the contract. If the telegram had read, "Form is specific and satisfactory; will write ten thousand at ninety cents," then, we think, the letter would have closed the contract, unless there was the further understanding between the parties that the matter was to be submitted to the final decision of the defendant company, at its home office. On that point we do not find it necessary to pass, in view of the conclusion we have reached that there was no contract of insurance to submit to the defendant; for, as P. J. Otey & Co. reserved the right to pass upon the form of the policy, and as they did not receive the letter containing it until after the property had been destroyed, they refused to further consider the same. The fire occurred during the afternoon of the 4th, and the letter was received by them on the evening of that day. Had the offer made in the telegram been such that the contract could have been consummated by mailing a letter at Richmond, then it would have been immaterial when the letter was received, or whether it was ever received; nor would it have been material when the fire occurred, if within the time covered by the policy. That the minds of the contracting parties had not reached an agreement when the fire took place is shown, not only by the communications passing between them immediately thereafter, but also by the deposition taken and filed in this cause. Therefore no contract of insurance existed as between the Franklin Brass Company and the defendant at the time the property was burned, as the parties had not agreed upon all the essential terms necessary to complete the same. At that time an important element of the contract, about which there had been much controversy, was still open and undetermined.

We do not consider and dispose of other questions raised by the assignments of error, and discussed by counsel, finding it unnecessary, as, in any event, for the reasons already set forth, the decree appealed from must be set aside. It is therefore ordered that said decree be reversed, and that this case be remanded, with instructions to dismiss the bill.

Reversed.

BRAWLEY, District Judge. I dissent. I am of opinion that the negotiations and correspondence led up to an agreement as to the amount, terms, and form of the policy; that Otey & Co., the agents of the insurance company, by their telegram of September 3d, agreed to write a policy for \$10,000 at 90 cents, if the "specific form," which had been the subject of voluminous correspondence, was satisfactory. When Moore & Co., in compliance with this telegram, mailed the "specific form," they were bound in a binding contract, if the form complied with the requirements, which the correspondence had set forth in detail. That Otey & Co. would be equally bound if the "specific form" inclosed met all their demands is equally clear; that is, if it met the assent of their minds in the shape in which it was, requiring no further or other modification,—if it was such a "specific form" as their minds conceived at the time their telegram was sent. That it did so is proved

by the fact that, immediately upon its receipt, they began to write a policy in accordance with it. There can be no doubt that but for the fire the policy would have been delivered. If that is so, then we have here that agreement of minds upon all essential points necessary to consummate a contract, and that agreement was reached before the fire occurred.

GIBBONS v. ANDERSON et al.

(Circuit Court, W. D. Michigan. April 21, 1897.)

1. NATIONAL BANKS — DUTY AND LIABILITY OF DIRECTORS — MALFEASANCE OF OFFICERS.

The duty of the board of directors is not discharged by merely selecting officers of good reputation for ability and integrity, and then leaving the affairs of the bank in their hands, without any other supervision or examination than mere inquiry of such officers, and relying upon their statements until some cause for suspicion attracts their attention. The board is bound to maintain a supervision of the bank's affairs, to have a general knowledge of the character of the business and the manner in which it is conducted, and to know at least on what security its large lines of credit are given.

2. SAME—INSOLVENCY—SUIT BY RECEIVER AGAINST DIRECTORS.

A receiver of a national bank may sue the directors to hold them responsible for the malfeasance of the managing officer, when it appears that they were so negligent as to make practically no examination of its books or affairs, and to hold meetings only at rare intervals, and then to limit their business almost wholly to the election of directors and the declaration of dividends. In such case their liability for losses should begin at a time when they ceased to discharge the duty of giving proper supervision to the conduct of the bank's affairs. In the circumstances of the present case, they were held liable from the time when, by reason of the failure to earn dividends for more than a year, their attention should have been drawn to the necessity of making a thorough examination.

Hearing on Pleadings and Proofs.

Fletcher & Wanty (A. C. Denison, of counsel), for complainant.

Fitz Gerald & Barry (J. W. Champlin and N. O. Griswold, of counsel), for defendants.

SEVERENS, District Judge. The bill in this case was filed by the complainant, as receiver of the City National Bank of Greenville, to establish the liability of the defendants, Foster and Anderson, who were directors of the bank, for negligence in the performance of their duties as such, which it is alleged has resulted in a heavy loss to the bank and its creditors. The bank was organized April 28, 1884, with a capital stock of \$50,000. It suspended on the 22d day of June, 1893. The complainant was appointed receiver thereof by the comptroller of the currency five days later, and on July 1, 1893, entered upon the discharge of his duties. The total liability of the bank to its creditors at the time of its failure was \$237,733. The nominal value of its assets was about \$326,000, but the total net amount which the receiver has been able to realize from the assets is only about \$40,000. This result is certainly a very startling one, and the enormous loss in the liquida-

tion of the bank's assets calls for an inquiry for its causes. And they are not far to seek. The defendants were members of the board of directors from its organization to the date of its suspension. Le Roy Moore was another director, and, either in the capacity of cashier or president, was its managing officer during the whole of the bank's operations. If during part of the time another person was cashier, he was only nominally such. Moore dominated the bank, and exercised the functions of cashier. Upon investigation it turns out that substantially from the beginning Moore employed the bank for the promotion of his own business enterprises, and, to a steadily increasing amount, has in one way and another diverted its funds to his own use, to the extent that at the date of the suspension of the bank he was indebted to the bank upon paper of which he was the maker in the sum of \$36,263.63, and as indorser in his own name in the sum of \$44,819.59. He was also liable as indorser under the name of Le Roy Moore & Co. in the sum of \$17,419.97. No other person than Le Roy Moore was liable for these indorsements of Le Roy Moore & Co.; the other member having long since been discharged by the renewal of paper and the extension of credit without his knowledge,—that firm having been dissolved in 1887, and the liabilities thereof assumed by Moore. There was also in the bank at the time of its suspension, representing part of its assets, paper upon which the Stanwood Manufacturing Company was maker to the amount of \$8,750, and upon which it was indorser, \$67,748.54, amounting in all to \$76,498.54. This Stanwood Manufacturing Company was a business concern of which Moore was the owner, with a trifling exception. He owned 2,400 of the 2,500 shares of \$10 each, and, so far as appears, only 20 other shares were taken. The books of the company show that \$15,000 only of its capital stock were paid in, and this by Le Roy Moore's individual promissory notes, upon which he never made any payment. The bank had a chattel mortgage on all its property, and the sum of \$3,500 was the sum realized out of the sale of that property under this mortgage. Over \$63,000 of paper held by the bank, upon which the Stanwood Manufacturing Company was indorser, consisted of accommodation notes made by the employes about the factory of the Stanwood Manufacturing Company, and was worthless. This paper was all unloaded upon the bank by Moore in the prosecution of his own enterprises, and operated practically as a credit to himself. For a number of years prior to the suspension of the bank he was a borrower from it, either upon his own name, or under a guise so thin as to be transparent, to an amount grossly in excess of the legal limit. The comptroller in his letter of October 14, 1892, states that at the last examination he was directly indebted to the bank in the sum of \$29,565. In all these ways, direct and indirect, Moore converted the assets of the bank to his own use, and in the end it appears that for all these large sums which Moore had obtained, and which were represented by paper which he had employed for that purpose, amounting to \$172,768.88, only a very little can be realized. Moore made a trust deed of all his property to secure the debts he owed to the

bank, out of which not more than \$12,000 to \$15,000 can be realized. This is the result, not of a single fraud, nor of a group of contemporaneous frauds, practiced by Moore, but, as already stated, it is the consequence of malversation of the funds of the bank from about the beginning of its history. It is needless to go into detail. The books of the bank show that he was going deeper and deeper into the funds of the bank, and, under one cover or another, converted of its assets more than three times the amount of its capital stock. The defendants, who were directors all this time, say that they were ignorant of anything wrong in the affairs of the bank until their eyes were opened to the facts by its failure. Greenville is a small place, of only about 3,000 inhabitants, and the defendants resided there. The volume of the business of the bank was comparatively small,—certainly not so large but that the most cursory examination of the general features of its business by any one having ordinary business intelligence would have disclosed the truth. It is contended by the directors that they did not in fact know how Moore was carrying the substance out of it, and it is the more charitable view to take of their conduct to the extent that supine negligence is more easily excused than active fraud. There is in the record the testimony of witnesses stating that at the time of the failure of the bank these defendants declared that they trusted all to the president, and that they knew but little of the bank's affairs, relying as they did upon their confidence in the management. But what else can be said than that, if they had notice of the facts, they were culpable, or that, if they did not know them, they were grossly negligent and inattentive to their duties? The testimony convinces me that the latter is the fact, and that their negligence and lack of interest was so profound that not even the disclosures and the warning contained in the letter of the comptroller of October 14, 1892, and which, pursuant to his request, was brought to their attention, aroused them from the stupor which beset them; for the situation was in no wise redeemed, and grew steadily worse without the moving of a hand by the directors to save it. From the time of their election the board of directors seems to have slumbered over the affairs of the bank while its managing officer was plundering it of all that it owned, and much that belonged to others. Once in a while there seems to have been some faint consciousness, but nothing which indicates any activity. But they say, and have called witnesses to prove, that acting in accord with the usage and custom of national banks, and having called into the management a person in whom they had entire confidence, which was justified by his reputation, and committed the affairs of the bank to him, they were not bound to have doubt and distrust of his correct dealing until something occurred which should arouse suspicion. And this is their defense. The learned counsel for the defendants puts the question thus:

"Whether a director in a national bank is individually liable for loss to the bank accruing through another director, viz. its president, when such mismanagement was not known to or participated in by the directors sought to be charged."

Or, in another form:

"Whether an individual director in a national bank is liable in his individual capacity for all losses occasioned by the mismanagement of the bank's affairs by a trusted officer through the neglect of the board of directors to meet and examine into the affairs of the bank."

These questions present in the most favorable light for the defendants what is undoubtedly the substance of the inquiry upon the facts which existed in this case, and which is, in short, this: Whether the duty of the board of directors is discharged by the selection of officers of good reputation for ability and integrity, and then leaving the affairs of the bank without any other supervision or examination than mere inquiry of the officer, and relying upon his statements until some cause for suspicion attracts their attention. Section 9 of the national banking act, being section 5147 of the Revised Statutes, provides that:

"Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association."

And by section 5145 it is declared that the affairs of such association shall be managed by not less than five directors. The oath which the director is required to take, that he will diligently and honestly administer the affairs of such association, indicates the scope of his obligation. The management of the bank is cast upon the board of directors. The duty of managing and administering the affairs of the bank by the board of directors has been differently construed in decisions bearing upon this subject, but it is not necessary for me to analyze the cases, or to reconcile their apparent differences. Some of them have gone to a length which in my opinion is extremely dangerous to the public safety, and, if generally applied, would make these banking associations, which were designed to supply the people of the country with financial institutions hedged about with security on which their confidence might securely rest, the objects of doubt and distrust. The rule of decision by which my judgment in the present case must be guided is laid down in the case of *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924. Much of the discussion in that case was devoted to the consideration of the special circumstances upon which rested the charges made against the several directors. Those circumstances have little or no resemblance to those of the present case, and not much aid is afforded by that part of the discussion; for, as the court in that case observed, each case must stand upon its own facts. The directors in that case were held to be excusable. One very important and noticeable difference between that case and this is in the fact that the question there was narrowed down to one of fact, as to whether the defendants were fairly liable for not preventing loss by putting the bank into liquidation within 90 days after they became directors, the previous condition of the bank being admitted to have been good, whereas in the present case the defendants' neglect runs through quite a number of years. But the court laid down certain general rules by which the obligation of directors of national banks is to be tested; that

is to say, they declare what is the minimum of that obligation. Chief Justice Fuller, delivering the opinion of the court, said:

"We hold that directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as figureheads. They are entitled, under the law, to commit the banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of reasonable supervision; nor ought they to be permitted to be shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention."

In my opinion, it does not meet the requirements of this statement of the law that directors may confide the management of the operations of the bank to a trusted officer, and then repose upon their confidence in his right conduct, without making examinations themselves, or relying upon his answers to general questions put to him with regard to the status of the affairs of the bank. To begin with, it is to be assumed in every case that the directors have not selected any other than a man of good reputation for capacity and integrity. Any other idea assumes that they have been guilty at the outset of a glaring fault. Further, it is a well-known fact that a large proportion of the disasters which befall banking institutions come from the malfeasance of just such men, and it would be manifest to everybody that only a satisfactory and quieting reply would be made by the official who has any reason for concealment. Again, what are the duties of management that are committed to the cashier, or the officer standing in his place? They are those which relate to the details of the business, to the conduct of particular transactions. Even in respect of those, his duties are conjoint with those of the board of directors. In large affairs it is his duty to confer with the board. In questions of doubt and difficulty, and where there is time for consultation, it is his duty to seek their advice and direction. It is his duty to look after the details of the office business, and generally to conduct its ordinary operations. It is the right and duty of the board to maintain a supervision of the affairs of the bank; to have a general knowledge of the manner in which its business is conducted, and of the character of that business; and to have at least such a degree of intimacy with its affairs as to know to whom, and upon what security, its large lines of credit are given; and generally to know of, and give direction with regard to, the important and general affairs of the bank, of which the cashier executes the details. They are not expected to watch the routine of every day's business, or observe the particular state of the accounts, unless there is special reason; nor are they to be held responsible for any sudden and unforeseen dereliction of executive officers, or other accidents which there was no reason to apprehend. The duties of the board and of the cashier are correlative. One side are those of an executive nature, which relate mainly to the details. On the other are those of an administrative character, which relate to direction and supervision; and supervision is as necessarily incumbent upon the board as direction, unless the affairs of banks are to be left entirely to the trustworthiness of cashiers. Doubtless there are many matters which stand on middle ground, and where it may be

difficult to fix the responsibility, but I think there is no such difficulty here. The idea which seems to prevail in some quarters, that a director is chosen because he is a man of good standing and character, and on that account will give reputation to the bank, and that his only office is to delegate to some other person the management of its affairs, and rest on that until his suspicion is aroused, which generally does not happen until the mischief is done, cannot be accepted as sound. It is sometimes suggested, in effect, that, if larger responsibilities are devolved upon directors, few men would be willing to risk their character and means by taking such an office; but congress had some substantial purpose when, in addition to the provision for executive officers, it further provided for a board of directors to manage the bank and administer its affairs. The stockholders might elect a cashier, and a president as well. The banks themselves are prone to state, and hold out to the public, who compose their boards of directors. The idea is not to be tolerated that they serve as merely gilded ornaments of the institution, to enhance its attractiveness, or that their reputations should be used as a lure to customers. What the public suppose, and have the right to suppose, is that those men have been selected by reason of their high character for integrity, their sound judgment, and their capacity for conducting the affairs of the bank safely and securely. The public act on this presumption, and trust their property with the bank in the confidence that the directors will discharge a substantial duty. How long would any national bank have the confidence of depositors or other creditors if it were given out that these directors whose names so often stand at the head of its business cards and advertisements, and who are always used as makeweights in its solicitations for business, would only select a cashier, and surrender the management to him? It is safe to say such an institution would be shunned and could not endure. It is inconsistent with the purpose and policy of the banking act that its vital interests should be committed to one man, without oversight and control.

Recurring to the present case, it is clear that unless the board of directors is to be absolved upon the theory that they were justified in committing the affairs of the bank to Moore, and relying upon his good conduct, and his answers to the perfunctory questions which were occasionally put to him, until they were brought to the facts by the collapse of the bank upon the first prick of a financial stringency such as came upon the country in the summer of 1893, they must be held liable. It is with sincere commiseration and regret that the court feels compelled to reach this conclusion, in view of the consequence which must follow to these directors. But there is another side to this matter. The court cannot ignore the rights and interests of the depositors and others who have trustfully confided their money to the bank, and who now find that it was run through a shell into the hands of Moore, while the defendants turned their heads away, and failed to give them the protection which a proper discharge of their duties would have afforded. The records of the board of directors make a sorry showing, when

put in contrast with the financial history of the bank. The entries are few, at long intervals, and are almost wholly limited to the election of directors and the declaration of dividends. They are feebly supplemented by the oral testimony of the defendants, which tends only to show that individual inquiries were occasionally made by them, of a comparatively superficial character. There was no examination of the books; at least, none of any value. If there had been such examination by a fairly intelligent man, such as a director promises he is, the condition of things would have been seen. It is not irreconcilable with what they declared, when the bank failed, with respect to their knowledge of its affairs, and with what I must believe was substantially the truth of the matter. It may be conceded that the members of the board were not responsible for the malfeasance or nonfeasance of their associates, where the fault of the others was not known to them, and they were helpless to prevent the consequences; but in the present case the charge of negligence rests upon the whole board, and there is nothing to show that the defendants took any steps to retrieve the consequences of the joint negligence. If the defendants had been able to show that they themselves had done what they could to induce the board to attend to its duty, a different case would be presented. I do not understand why the comptroller did not more energetically interfere, but I have no duty to criticise his action.

The next question for determination is in respect of the date from which the defendants should be charged. It appears from the record of the board of directors that on January 2, 1886, a dividend of 10 per cent. was declared; on January 11, 1887, a dividend of 9 per cent.; on July 15, 1887, a dividend of 7 per cent.; January 10, 1888, a dividend of 5 per cent.; July 9, 1888, a dividend of 5 per cent.; January 8, 1889, a dividend of $5\frac{1}{2}$ per cent.; January 14, 1890, a dividend of 8 per cent.; December 30, 1890, a dividend of 8 per cent.; and July 1, 1891, a dividend of 7 per cent. No dividend was declared in January, 1892, or in July of that year. It would seem to me that at the last-mentioned date the fact that a year had now gone by without any declaration of dividend, and no sufficient explanation thereof being shown, the attention of the board of directors to the bank's condition was challenged, and that, in the interest of those concerned, an examination into the causes should have been instituted. The test of the prudence and attention which an ordinarily discreet business man would give to his own affairs may properly be applied here. But no examination was made, and, indeed, so far as the records show, there never was but a single examination made by the board of directors, or any committee thereof; and that was on September 1, 1886,—more than six years before the failure of the bank. With serious misgiving that the right of the case would require the court to go further back than this, I have concluded to adopt the date of July 1, 1892, as the period from which the defendants must be held liable. Such examination as they should then have made would have been followed by putting the bank in liquidation, and I think the defendants should be held liable for the losses which the bank subsequently

sustained. An order of reference will be made for the ascertainment of the amount of such losses. Let a decree be entered in conformity with this opinion.

WESTERN NORTH CAROLINA LAND CO. et al. v. SCAIFE.

SCAIFE v. WESTERN NORTH CAROLINA LAND CO. et al.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1897.)

Nos. 197 and 199.

1. ACTION TO DETERMINE ADVERSE CLAIM—INSTRUCTIONS.

In an action to determine an adverse claim to land under the North Carolina statute, an omission of the court to define the nature of adverse possession is not reversible error where the matter was not brought to its attention either by a prayer for instructions or by an exception to the charge for insufficiency in this respect, taken before the jury retired.

2. SAME—EFFECT OF ADVERSE POSSESSION—OMISSION TO CHARGE.

Where adverse possession by actual occupancy of part of a tract is relied on, a charge which fails to definitely state whether the adverse possession was limited to the particular land occupied or extended to the whole tract, and to clearly state the effect of such occupation under the circumstances of the case, constitutes reversible error, where exceptions to the insufficiency of the charge were taken in proper time.

3. APPEAL AND ERROR—ERRORS NOT ASSIGNED.

In an action to determine an adverse claim under the North Carolina statutes, where the court gave a misleading and insufficient instruction as to the effect of adverse possession, *held*, that in view of the far-reaching consequences of the verdict on this issue, and the special circumstances of the trial, the circuit court of appeals would exercise its discretion, under rule 11 (21 C. C. A. cxli., 78 Fed. cxli.), to notice the error, though not properly assigned.

Errors to the Circuit Court of the United States for the Western District of North Carolina.

M. Silver, A. C. Avery, and James H. Merrimon, for Scaife.

Richard C. Dale and F. A. Sondley, for Western North Carolina Land Co.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

BRAWLEY, District Judge. We have decided that a new trial should be granted in these cases for the reasons that will hereinafter appear in the consideration of the fifth exception in No. 199, and this conclusion renders it unnecessary to consider many of the questions discussed in the very learned arguments which have been presented. The suit was brought for the purpose of determining the title to about 70,000 acres of land in Western North Carolina, claimed by plaintiff under a grant from the state of North Carolina to Robert and William Tate, dated May 30, 1795. The defendants claimed title under grants to W. W. Flemming, dated December 28, 1877, and a deed from Flemming to the defendant land company, and the action was brought in pursuance of an act of the general assembly of the state of North Car-

olina, which provides "that an action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims." The complaint sets forth that the plaintiff was the owner in fee simple and entitled to the possession of a tract of land described therein, containing about 70,400 acres, except about 4,056 acres lying within said boundary, and previously granted by the state to other parties, and that the defendants were in wrongful possession of a portion of said lands. The answer of the defendants denied the title of the plaintiff and the wrongful possession, and, for a further defense, claimed "that, if the plaintiff has an apparent title to the land purporting to be described in said complaint, which these defendants deny, still the plaintiff cannot locate any such land, and no such land can be located or found." Prior to this action, a suit of like character had been commenced against the defendant land company, and a separate action of ejectment against one Jack Sheehan, alleged to be in possession of a part of these lands, but by agreement of counsel these suits were consolidated, and the case was heard upon the complaint and answer in which the defendants were joined; and it has been strongly urged that under this agreement of counsel the defendants were estopped from setting up title by adverse possession to any of the lands, except that portion in possession of Sheehan, which was a part of the lands embraced in grant No. 945; and that the claim of possession in Holafield, which was not developed until late in the trial, was a violation of this agreement, and operated as a surprise. We are of opinion that the agreement of counsel did not operate as an estoppel, and that the substituted answer to the consolidated complaint put in issue the title of the plaintiff, and under the general denial it was competent for the defendant to prove adverse possession in itself, or in any one claiming under it. The case was duly tried by a judge and jury under these pleadings upon issues submitted in accordance with the practice in the state of North Carolina. Upon the issues so tried the jury found that the plaintiff had made out his title from the original grantees; that he had established his boundaries to the land claimed in his complaint; and that the defendant Sheehan was in wrongful possession of tract No. 945. To the issue submitted in the words following: "Has there been a continuous adverse possession by the defendant the Western North Carolina Land Company of any part of the land described in the complaint for more than seven years under color of title? If yes, describe the location of the adverse possession,"—the answer of the jury was: "Yes. Holafield's possession on 915." Upon this verdict a judgment was entered in favor of the defendant land company.

The defendants' title was derived from W. W. Flemming by deed dated January 3, 1878, conveying 32,382 acres, by metes and bounds, being "the land as described by seventy-six state grants numbered from 904 to 967, inclusive, and from 971 to 982, inclusive, the grants from the state being dated December 28, 1877." It thus

appears that the verdict of the jury as to the adverse holding of Holafield in effect determined the title to the large body of land in dispute. Holafield lived in McDowell county, upon a tract of 50 acres, which he held under grant for about 27 years prior to the date of the trial. About 100 yards from his house lay a tract of land claimed by one Bird, who said that he had an entry for it. By a verbal agreement with Bird, he cleared a patch of $2\frac{1}{2}$ acres adjoining his land, extended his fence so as to inclose it in his field, and remained in possession and cultivated it for five or six years, when one Flemming, the agent of the defendant land company, came to his house, and an agreement, of which the following is a copy, was entered into:

"Office of Lamp Post.

"Marion, N. C., April 5th, 1883.

"I, S. H. Flemming, agent of the Western North Carolina Land Company, do hereby authorize J. G. Bynum Holafield to cultivate the two pieces of land near his house, containing about $2\frac{1}{2}$ acres, known as the 'Tract Cleared by David Bird,' and in consideration of the authority here given, he, the said Holafield, is to prevent any encroachments on the land of the company, as far as possible, and to report any such to me. This lease is for one year from date.

"Witness my hand and seal this April 5th, 1883.

"S. H. Flemming, Agent.

"Witness:

his
"P. X Burnet."
mark

It does not appear that this agreement was recorded, or that Bird was notified of it. About a year after this lease, Flemming was again at Holafield's house, and authorized him to go on cultivating the land, to use firewood and rail timber, and to clear more land if he wished. By virtue of this authority, continued by Houck, a subsequent agent of the land company, he cleared additional land, making in all about six acres, which he inclosed in the same field. There was no written lease subsequent to that of April 5, 1883. The rent charged Holafield was that he should "look after the land." The six acres thus inclosed by Holafield lay, so it is claimed, within the boundaries of grant No. 915. The testimony shows that the lands were in a wild, mountainous region, but that there were a number of settlements in the near neighborhood of Holafield, and that in the summer of 1889 a gentleman engaged in the lumber business was at Holafield's house, and established his headquarters near him, and cut and hauled away a quantity of timber; but it is not clear from the testimony whether or not this timber was cut on the lands in controversy. One of the witnesses examined at the trial testified that there were 50 or 75 families living within the lines of the plat displayed, but he did not know the nature of their claims.

This brings us to the consideration of the exception, which is as follows:

"Fifth exception: The said judge charged the jury upon the issues in regard to the defendant's possession as follows: 'Now, on that issue of possession, if you believe that Holafield entered into possession of that land, and was in possession of the land that he speaks of, within 915, under a lease from the agent

of the Western North Carolina Land Company, and remained in possession of the land that he speaks of for more than seven years continuously and adversely, I will charge you that that possession goes to the entire extent of the land claimed by him under deed made prior to that possession, and prior to the commencement of this action. And the evidence of that possession is that of Holafield.' Whereupon the counsel for the plaintiff insisted that this part of his honor's charge was erroneous: (1) Because, by the evidence of the said Holafield, his possession of the land was under Bird, and he never surrendered to said Bird, and said Bird never consented to his attornment to the defendant the Western North Carolina Land Company. (2) Because the said adverse possession of the said Holafield could not extend beyond the quantity of land mentioned and described in the paper writing from Flemming, agent of the defendant land company, to him, the limits of his said possession having been confined by said paper writing to 2½ acres. (3) Because, if the said Holafield held adverse possession in favor of the defendant land company, such possession was actual only to the extent of the said 2½ acres, and could not be extended by construction in favor of the defendant land company to any land outside of the actual possession of the said Holafield, so as to expose said land company to the action of the plaintiff, or any one under whom the plaintiff claims. (4) The lands claimed by the defendant land company, although included in one general boundary by the deed from W. W. Flemming to the said land company, are, nevertheless, divided by specific metes and bounds into more than 70 different tracts of land; the possession of the said Holafield being on tract No. 915. Therefore the said adverse possession of the said Holafield could not extend beyond the boundary lines of said No. 915; and as to No. 915 the possession of the said land company could be no more than a constructive possession outside of said Holafield's actual possession, and such constructive possession outside of said Holafield's actual possession, not exposing the said land company to the action of the plaintiff, could not have the effect to mature title in the defendant land company. (5) Because said Holafield's possession was not of that open and notorious character which can be considered sufficient to put the plaintiff, or those under whom he claims, upon notice of the claim of the said Holafield or of the defendant land company. (6) Because said Holafield's possession was not exclusive and was not uninterrupted."

That an imperfect title may ripen into and become in law a perfect title by reason of acquiescence in a prolonged and continuous adverse holding, and the failure of the true owner to assert his claim by entry or action, when an action will lie, is a proposition that is not disputed, and it is equally clear that the adverse possession which overcomes the legal title must be actual, open, and notorious, continuous and uninterrupted, exclusive and unequivocal. It has been strongly pressed in the argument that the omission of the presiding judge to define the nature of "adverse possession" is error. So it would have been had a request embodying the desired definition been presented in the form of a prayer for instructions. While this would have been the better practice, it would have been sufficient if an exception to the charge stating the insufficiency thereof on these grounds had been duly taken, for this would have brought to the attention of the judge, before the jury retired, the nature of the objection, and would have given opportunity to modify, enlarge, or correct his charge in respect to the matter excepted to; and his refusal, after his attention had thus been directed to the point, to instruct the jury fully as to the nature of an adverse possession, would have brought the subject here for review. The case has been argued as if this had been done, but an examination of the exceptions shows that they relate rather to the territorial extent of the adverse

possession than to the character thereof. It nowhere appears that, by exceptions or otherwise, the attention of the presiding judge was directed to this point in such a way as would enable him to see that the plaintiff desired that the jury should be specially charged as to the elements which constituted "adverse possession." It is claimed that the fifth exception does so in substance. We cannot see that it does, and if, with the full light of elaborate oral and printed arguments, it has not been made visible to us, we cannot hold it an error in the presiding judge that he failed to see it. On this point, therefore, the exception cannot be sustained. In other respects we are of opinion that this exception must be sustained. Holafield entered into possession under Bird, who claimed title by virtue of an entry which we understand by the laws of North Carolina is a conditional contract of purchase from the state. It was claimed that Bird's title was not perfected by actual purchase, and the state sold to W. W. Flemming, and by grant No. 915 conveyed title to him. The tract of land embraced in No. 915 having been subsequently conveyed to the defendant land company by deed which embraced many other grants, the agent of this company leased to Holafield "the two pieces of land near his house, containing about 2½ acres, known as the 'Tract Cleared by David Bird.'" The 2½ acres thus described were inclosed by a fence, and afterwards—but at what time the testimony does not disclose—additional land, to the extent of six acres in all, was taken into cultivation and actually occupied by Holafield. It is to such possession that the charge relates which is the subject of this exception, and is in these words:

"I will charge you that that possession goes to the entire extent of the land claimed by him under deed made prior to that possession, and prior to the commencement of this action. And the evidence of that possession is that of Holafield."

We are of opinion that the charge was indefinite and misleading, and that the exceptions sufficiently pointed out the objections. The effect of Holafield's attornment to the land company without surrendering to Bird under whom he entered; the question of the extent of Holafield's adverse possession,—whether it was limited to the quantity of land mentioned and described in the paper writing from Flemming, the agent of the land company, and whether or not the alleged adverse possession of the land company outside the limits of the land actually occupied by Holafield was or not such a merely constructive possession as not to expose the land company to an action, and, therefore, not of a character to mature title; whether the possession of a minute portion of land in a territory embracing over 70,000 acres lying in a wild and mountainous region was of that open and notorious character which denoted an intention to usurp a possession beyond the boundaries actually occupied, and therefore such as required that an owner of reasonable diligence and ordinary vigilance should assert his title by action or otherwise; whether the alleged settlement of other parties within those boundaries is consistent with the claim of exclusive and unequivocal possession, which is nec-

essary in order to ripen an imperfect into a perfect title,—all of these were questions pertinent to the issue, and they were not covered by the charge. The plaintiff was entitled to instructions upon them, and, his exceptions having brought them to the notice of the court, its failure to charge the jury upon them was error.

Considering the far-reaching consequences of the verdict of the jury upon the question of the adverse possession of Holafield; that the testimony relating to such possession was not introduced until late in the trial, after many days had been devoted to other, and what were apparently regarded as more important, issues; that the distance of the locus in quo from the place of trial furnished some excuse, under the circumstances, for the failure to establish with due definiteness the lines and locations of settlements within the disputed boundaries, the knowledge of which is essential to the doing of exact justice between the parties,—we are of the opinion that the case is one which would with propriety justify, and should in justice require, this court to exercise that discretion which its eleventh rule allows in its concluding words, “but the court, at its option, may notice a plain error not assigned.” So, even if we were in doubt whether the exceptions did in due form assign the errors complained of, we would feel ourselves impelled to exercise that option, which is to be rarely and reluctantly invoked, and notice the plain errors and omissions in the charge of the presiding judge. It is but simple justice to the memory of that learned and conscientious judge, who has since passed away, to say that such errors were due to the strain of a long and fatiguing trial, and perhaps to the omissions of counsel, due to the same cause. We are of opinion that a new trial should be granted, and it is so ordered.

NORTHWESTERN MUT. LIFE INS. CO. v. SEAMAN et al.

(Circuit Court, D. Nebraska. May 3, 1897.)

1. OFFICERS OF COURT—APPOINTMENT—RELATION TO JUDGE.

The provision of 24 Stat. 552, that no federal judge shall “hereafter” appoint to any office or duty in the courts a person related to him within the degree of first cousin, does not invalidate such an appointment previously made.

2. CLERK OF COURT—APPOINTMENTS—MASTER—FORM OF ORDER.

An order appointing a clerk of a federal court as master in chancery without assigning a special reason therefor, as required by 20 Stat. 415, is sufficient, however irregular, to clothe him with insignia of the office, so that his acts will be those of a de facto incumbent, and not subject to question in a collateral proceeding.

3. JUDICIAL SALES—VACATING APPOINTMENT.

Under the Nebraska statute, giving judgment debtors the right to have their property appraised, and providing that it shall not be sold for less than two-thirds its appraised value, an appraisal cannot be set aside, as too low, where fraud in the appraisal is not alleged.

Bartlett, Baldrige & Debord, in support of exceptions.
Howard Kennedy, Jr., opposed.

MUNGER, District Judge. This case is on hearing to exceptions filed to the master's report of sale of real estate under a decree of foreclosure, and to set aside the appraisement. The exceptions, though several in number, present but two questions, viz.: (1) The authority of the master to act as such; and (2) the valuation as made by the appraisers.

The facts, briefly stated, are the following: The decree directed that the mortgaged premises should be sold by "a master in chancery of this court." No particular master was named. Under this decree the premises were appraised and sold by E. S. Dundy, Jr. It is shown, in support of the motion to set aside the appraisement and sale, that said E. S. Dundy, Jr., was on the 23d day of November, 1882, appointed clerk of the United States district court for the district of Nebraska, and has held such office from that date continuously to the present time; that, at the time of his appointment as such clerk, his father was judge of said court; that on the 25th day of January, 1886, a petition was presented to the judges of this court, signed by a number of attorneys, praying for the appointment of said E. S. Dundy, Jr., a master in chancery. On the same day an order was made by said judges appointing said Dundy master in chancery, which order was as follows:

"U. S. Circuit Court, District of Nebraska.

"On consideration of the annexed petition, it is ordered that E. S. Dundy, Jr., be appointed master in chancery of this court, and that he take and subscribe the oath of office, and file the same with the clerk of this court within thirty days.

"Leavenworth, Jany. 25, 1886.

David J. Brewer, Circuit Judge.
"Elmer S. Dundy, District Judge."

Said E. S. Dundy, Jr., on the 4th day of February, 1886, took and subscribed to the proper oath of office, which oath, together with the petition and order of appointment, were on said day filed in the office of the clerk of this court; but the same were never recorded in any of the record books of said clerk's office.

From the foregoing state of facts it is urged that said Dundy was by law inhibited from acting as master in chancery, and that the sale in this case, by him as master in chancery, if not void, is at least avoidable. This contention is based on the following provisions of the United States statutes:

"That no person related to any justice or judge of any court of the United States by affinity or consanguinity, within the degree of first cousin, shall hereafter be appointed by such court or judge, to, or employed by such court or judge in any office or duty in any courts of which such justice or judge may be a member." 24 Stat. 552.

"No clerk of the district or circuit courts of the United States, or their deputies, shall be appointed a receiver or a master in any case except where the judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment." 20 Stat. 415.

The section of the statute first above quoted, if applicable to sustain the claim of defendant in this case, must be held retroactive, and to have removed said Dundy not only from the office of master in chancery but that also of clerk, as it will be observed that his appointment to both positions was prior to the enactment of this provision of

the statute. To so hold is not only to overturn a well-settled rule of statutory construction, but also do violence to the language of the statute itself. In *Murray v. Gibson*, 15 How. 421, the court say:

"As a general rule for the interpretation of statutes, it may be laid down that they should never be allowed a retroactive operation where this is not required by express command, or by necessary and unavoidable implication. Without such command or implication they speak and operate on the future only."

In *U. S. v. Heth*, 3 Cranch, 398, the following was stated:

"Words in a statute ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied."

To the same effect are *McEwen v. Den*, 24 How. 242-244; *Harvey v. Tyler*, 2 Wall. 328, 347; *Sohn v. Waterson*, 17 Wall. 596; *Chew Heong v. U. S.*, 112 U. S. 536, 5 Sup. Ct. 255; *Fuller v. U. S.*, 48 Fed 654.

In the case of *People v. Green*, 58 N. Y. 295, it was held that an amendment to the charter of a municipal corporation, which provided that an officer of the city who accepted a seat in the general assembly of the state should be deemed to have vacated his office, was to be construed as prospective, and not to apply to officers who had already become members of the legislature. The decision in this case was based, not on the ground that the legislature did not have the power to thus regulate and change the tenure of officers already elected, but for the reason that the intention to so regulate was not clearly expressed in the act.

The language of the statute in question by its terms is clearly prospective. It says:

"No person related to any justice or judge of any court of the United States * * * shall hereafter be appointed by such court or judge to * * * any office or duty in any court of which such justice or judge may be a member."

The statute does not prohibit one already appointed from continuing to act and perform the duties of his office.

It is further urged that the appointment as master was void because no special reasons therefor were assigned in the order of appointment. It will be noticed that authority to appoint the clerk as master exists when there are special reasons therefor. It is fairly inferable, from the order of appointment, that it was made because asked for by petitioners. Whether that was a sufficient special reason, within the purview of the statute, it is unnecessary at this time to inquire. In *Fischer v. Hayes*, 22 Fed. 92, Justice Blatchford, speaking with reference to the appointment of a deputy clerk as master, when it was shown that the solicitors of the parties had assented to the appointment in open court, although such was not shown in the order, said:

"Under such circumstances, consent being an adequate special reason in a case of the kind, it must be presumed that, as the judge appointed Mr. Shields, he determined that the consent was an adequate special reason. Nothing, therefore, remains but the irregularity of omitting to state the special reason in the decree. * * * The irregularity, if it was one, in a case of consent, of not specifying the consent in the decree as the special reason for the appointment, is a mere defect or want of form, which may be disregarded."

However irregular we might regard the appointment of Mr. Dundy as a master in chancery of this court, the judges were not without

jurisdiction, and such appointment clothed him with the insignia of the office, and, in exercising the powers and functions thereof, his acts were at least those of a *de facto* officer, and are valid so far as they concern the public and third persons, and cannot be questioned in a collateral proceeding. *Cocke v. Halsey*, 16 Pet. 71; *Hussey v. Smith*, 99 U. S. 20; *Ralls Co. v. Douglass*, 105 U. S. 728.

As a further reason why the sale should not be confirmed, it is urged that the appraisement is too low,—much below the actual value of the premises,—and affidavits are filed in support of this view. The right to have the premises appraised, and sold at a price not less than two-thirds of such appraised valuation, does not arise from any provision of the chancery practice, but is a right founded upon the provisions of the state statute providing therefor. Such being the case, the decisions of the highest state tribunal relative to the matter of vacating an appraisement should be followed, when not in conflict with any equity rule. It is the settled law in Nebraska that the appraisers, in making their valuation, act judicially, and their finding cannot be set aside except for fraud, which must be alleged and proven. True, actual fraud need not be proven. Constructive fraud may be shown, but fraud must be charged. *Vought v. Foxworthy*, 38 Neb. 790, 57 N. W. 538; *Smith v. Foxworthy*, 39 Neb. 214, 57 N. W. 994; *Ecklund v. Willis*, 44 Neb. 129, 62 N. W. 493. In *Vought v. Foxworthy*, the court say:

"Appraisers of property about to be sold under execution act judicially, and the value fixed by them on property appraised can only be assailed for fraud. Inadequacy of the appraised value, alone, is not sufficient cause for setting aside a sale, in the absence of fraud. To justify the vacation of a sale on the ground that the appraisement was too low, the actual value of the property must so greatly exceed its appraised value as to raise a presumption of fraud. All the affidavits filed in this case on the question of the value of the property were immaterial. There was no averment, in the motion to set the sale aside, of any fraudulent conduct on the part of the appraisers in making this appraisement, nor averment of any fraud or unfair means resorted to by the appraisers at the sale, or other party to the suit, conducing to the making of this appraisement. No facts were stated in the affidavits showing any fraudulent conduct on the part of any one in the making of the appraisement, nor can any such inference be drawn from the facts stated. The appraisement is assailed for error of judgment upon the part of the appraisers, and this furnishes no ground for setting the sale aside."

In this case no charge of fraudulent conduct is made against the appraisers. It is only shown that, in the judgment of those whose affidavits of value have been given, the value of the premises is greater than is shown by the appraisement to have been the judgment of the appraisers. Such showing is not sufficient. For the reasons given, the exceptions to the master's report are overruled, and the sale confirmed.

CHICAGO, ST. P., M. & O. RY. CO. V. MYERS.

(Circuit Court of Appeals, Eighth Circuit. April 12, 1897.)

No. 848.

1. CARRIERS OF PASSENGERS — VIOLATION OF REGULATIONS — PERSONAL INJURIES.

A carrier of passengers is entitled to insist that passengers shall remain in such places as are provided for them, and comply with reasonable regulations for their safety and comfort, and if a passenger of mature age leaves the place provided for him, and, without occasion for so doing, or to gratify his curiosity, goes to a place of greater danger, he assumes any increased risk of injury incurred by so doing.

2. SAME—CONTRIBUTORY NEGLIGENCE.

A passenger who, of his own volition, incurs an unnecessary risk by leaving a place provided for him, and going to one where he has no right to go, cannot excuse his conduct, and hold a carrier liable, as such, for injuries received while he is in such exposed position, on the plea that he or others believed the place to be safe; and it is error, in an action by a passenger against a carrier for injuries incurred under such circumstances, to refuse to charge the jury that such conduct on the plaintiff's part would prevent a recovery.

3. EVIDENCE—STENOGRAPHIC NOTES OF FORMER TRIAL.

The stenographic report of the testimony given on a former trial by a witness whose attendance cannot be procured may be admitted if the witness was fully examined and cross-examined, and the report is correct and complete; but, if incomplete, as by the absence of photographs used by the witness in illustrating his testimony, it cannot be admitted.

In Error to the Circuit Court of the United States for the District of Minnesota.

Thomas Wilson (L. K. Luse with him on the brief), for plaintiff in error.

Edwin A. Jaggard (O. A. Turner with him on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge. This is a suit for personal injuries. Levi W. Myers, the defendant in error, who was the plaintiff below, purchased a ticket from St. Paul to Chicago over the railroad of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, the plaintiff in error, and was received as a passenger by said company on one of its trains which left St. Paul at 8 o'clock on the morning of September 10, 1894. When the train reached a point a few miles east of Hudson, Wis., it found the track obstructed by a freight train that had been derailed about 4 o'clock a. m. of that day, which train was made up in part of three tank cars, two of which contained naphtha, and one refined coal oil. Several hours before the arrival of the passenger train from St. Paul, the tank containing oil had taken fire, and it was burning fiercely, and making considerable noise, when the passenger train from the west arrived. One of the naphtha tanks had exploded when the wreck occurred, and the other naphtha tank and its contents had been destroyed in the wreck. On the arrival of the passenger train from St. Paul, two openings were made in the fence on the south side of the railroad right of way, one of said openings

being 258 feet west, and the other 256 feet east, of the burning oil car, for the purpose of permitting passengers to pass through the fields around the burning car, at a safe distance therefrom, to a point on the track east of the wreck, where another train was expected to start shortly for the east, carrying the passengers who had arrived from St. Paul. The train from St. Paul stopped abreast of the west opening, and the plaintiff, with other passengers, left the train where it had halted. They passed through the west gap in the fence, as they were directed to do, walked around the burning car over the route that was indicated to them, and reached the east opening in the fence, through which they passed back onto the right of way. While they were standing somewhere in the vicinity of the east opening, awaiting the departure of the train for the east, the burning oil tank exploded, and the plaintiff was very seriously burned and disfigured. The evidence at the trial appears to have been conflicting as to where the plaintiff was standing when the explosion occurred, but the bill of exceptions recites that the defendant company offered testimony tending to show "that no passenger or person at said west gap, or west thereof, or on said route between the said west gap and said east gap, or at, near to, or east of said east gap, was seriously injured by said explosion; that plaintiff, after he had passed around to the said east gap, and to said place designated as a temporary station, as aforesaid, without the knowledge or consent of any officer or agent of the defendant, and of his own volition, left the place so designated, as aforesaid, as a temporary station, at which the passengers should wait, and went west on the defendant's right of way, west of said east gap, toward the said burning tank, more than one-half of the distance between said east gap and the said burning tank, and that while he was there standing within about ——— feet of said burning tank, it exploded, and he was injured, which is the injury complained of, and that he would not have been injured materially or at all had he remained at the said east gap, or at the place designated as a temporary station as aforesaid; that no officer or agent of defendant had actual knowledge that plaintiff was at or near the place at which he was injured as aforesaid, or that he had left the place designated as aforesaid as a temporary station at which the passengers should remain until after the explosion; that the train from St. Paul on which plaintiff was arrived at the point at which it stopped at the west gap at about 10 o'clock in the forenoon, and that the explosion occurred at or about 10:45 o'clock in the forenoon of said day."

The principal question presented by the record is whether the trial court erred in refusing certain instructions which were asked by the defendant company. These instructions were as follows:

"(5) If the jury find that the plaintiff left the point designated as the place for passengers to wait for the train for Chicago, and went to a point nearer to the burning tank, for his own pleasure, or to gratify his curiosity, or to see the burning tank, and was there injured, and that he would not have been injured had he remained at the point designated, then he is not entitled to recover, and the jury should find for the defendant."

"(7) If you find that the plaintiff passed around the burning tank to a point at or near the east gap, and that he understood, or by ordinary observation or the exercise of ordinary care would have understood, that that was the point where he was to take the train for the east, it was his duty, so far as his rela-

tions to the defendant are concerned, to remain there, until the train should arrive."

"(9) If it would have appeared to a man of ordinary intelligence and prudence that the point at which the passengers were to remain was at or east of the east gap, then, if the plaintiff left that point, and went to a more dangerous place, at which he was injured, he cannot recover."

These instructions were refused, and in lieu thereof the court charged the jury, in substance, that it was for them to determine where the plaintiff was standing with respect to the east opening in the fence when the explosion occurred, whether he knew that the place where he was standing was dangerous, and whether he was guilty of contributory negligence in going where he did, or in being where he was when the oil tank exploded. The only modification of this instruction was an instruction to the effect that, if the plaintiff knew that the place where he went and where he was west of the east gap was dangerous, and that he went there voluntarily, and that no prudent man would have done as he did, then he could not recover. But the charge, considered as a whole, was so framed as to permit the jury to decide that the plaintiff was not guilty of any contributory fault, although the fact was that he voluntarily walked up the right of way to the west more than one-half the distance from the east opening in the fence to the burning tank, and was standing there when it exploded, and was injured solely in consequence of his being in such exposed situation.

We feel constrained to hold that the three refused instructions above quoted were applicable to the testimony which was produced at the trial, and that some of them, particularly the one numbered 5, should have been given, inasmuch as the court in its charge gave no equivalent direction. The plaintiff was a man 65 years old, and of more than ordinary intelligence. The evidence shows that for many years he had been a proprietor and editor of a newspaper, and that at the time of the accident, and for four years preceding, he had held the office of American consul at Victoria, in British Columbia. When the train on which he was riding reached the scene of the accident, the ignited oil car was burning fiercely, and making much noise. It was in plain view during all the time that he was standing at the gaps in the fence, or passing through the field outside of the right of way from the west side of the wreck to the east side, and the contents of the tank appear to have been well known to him. Moreover, the fact that openings had been made in the fence on the west and east sides of the burning tank, and at a considerable distance therefrom, and that passengers were directed to go through the field to the point where they were to board the east-bound train, was in itself notice to the plaintiff and other passengers that the space inside the right of way between the two gaps in the fence was either considered dangerous, or that for some reason the defendant company desired the passengers to keep outside of that space. In view of these considerations, we do not see that any greater knowledge could be fairly imputed to the employes of the defendant company than to the plaintiff of the risks incident to approaching too near to the burning tank. But, even if the defendant company could be held chargeable with greater knowledge of the risks in question,

we do not see that such fact should excuse the plaintiff for voluntarily leaving the place which the defendants had appointed for taking up passengers, and going to another place, where the dangers were greater, without invitation of any sort, and merely to gratify his own curiosity. Nor are we able to say that the fact that certain railroad employes were at work on the railroad track between the gaps in the fence excused the plaintiff for approaching nearer to the burning tank than the openings which had been made in the fence for the use of passengers. These employes had duties to perform in clearing the track, which rendered it necessary for them to assume greater risks than passengers were at liberty to assume while the relation of carrier and passenger existed, inasmuch as the defendant company had clearly indicated to passengers, by making openings in the fence, what route they would be expected to take in passing by the burning tank, what part of the right of way they should avoid, and where they should remain until they were taken up by the train. The high degree of care which the law exacts of a carrier of passengers entitles the carrier to insist that passengers shall remain in such places as it has provided for them, and that they shall also comply with such reasonable regulations for their safety and comfort as the carrier may prescribe. If a passenger of mature age leaves the place which he knows has been provided for him, and without any occasion for so doing, or to gratify his curiosity, goes to another, where the dangers are greater, or places himself in a dangerous attitude, which he was not intended to assume, or if he disobeys any reasonable regulation made by the carrier, it should be held that he assumes whatever increased risk of injury is incurred by so doing. This doctrine has been enforced in a variety of cases, and in view of the evidence it was applicable to the case at bar. *Hickey v. Railroad Co.*, 14 Allen, 429; *Railroad Co. v. Jones*, 95 U. S. 439; *Todd v. Railroad Co.*, 3 Allen, 18, 21; *Coleman v. Railroad Co.*, 114 N. Y. 609, 612, 21 N. E. 1064; *Railroad Co. v. Rutherford*, 29 Ind. 82, 85; *Railroad Co. v. McClurg*, 56 Pa. St. 294, 298; *Railroad Co. v. Zebe*, 33 Pa. St. 318; *Bricker v. Railroad Co.*, 132 Pa. St. 1, 18 Atl. 983; *State v. Grand Trunk Ry.*, 58 Me. 176; *De Kay v. Railway Co.*, 41 Minn. 178, 184, 43 N. W. 182; *Railroad Co. v. Ricketts (Ky.)*, 27 S. W. 860; *Turnpike Road v. Cason*, 72 Md. 377, 20 Atl. 113; *Paterson v. Railroad Co.*, 85 Ga. 653, 11 S. E. 872; *Bon v. Assurance Co.*, 56 Iowa, 664, 667, 10 N. W. 225; *Dun v. Railway Co.*, 78 Va. 645. We are of opinion, therefore, that, inasmuch as the evidence tended to show that when the plaintiff reached the east opening in the fence he turned west, and went of his own volition for a considerable distance along the right of way towards the burning tank, and by so doing sustained injuries which he otherwise would have avoided, the court should have charged the jury that such conduct on the plaintiff's part prevented him from recovering. If the plaintiff was guilty of the act last described,—if out of curiosity he went to a place other than that designated by the carrier,—he assumed the extra risk thereby incurred, and it should not have been left to the jury to determine whether he thought that the place where he thus went was safe, or whether other prudent persons thought so. A passenger who, of his own volition, has incurred an unnecessary

risk by going, without invitation or other reasonable excuse, to a place where he had no right to go, should not be allowed to excuse his conduct, and hold the carrier liable as a carrier while he is in such exposed position, on the plea that he believed the place to be safe, and that other persons so believed.

The defendant company assigns for error that the trial court wrongfully excluded a stenographic report of the testimony of a witness by the name of Moses R. Dickey, which had been given on a former trial of the case, after the defendant company had shown that the said Dickey was a resident of the state of Ohio, and that the defendant had been unable to procure his attendance at the second trial. The rule appears to be established in Minnesota—where this case was tried—that such testimony is admissible. *Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co.*, 51 Minn. 304, 53 N. W. 639; *King v. McCarthy*, 54 Minn. 190, 55 N. W. 960. And the same rule, it seems, prevails in some other jurisdictions. *Railway Co. v. Elkins*, 39 Neb. 480, 58 N. W. 164, and cases there cited. We can see no substantial objection to the admission of such testimony when, on the first trial, the witness was fully examined and cross-examined, provided, always, that the stenographic report of his testimony is proven to the satisfaction of the trial court to be correct, by the person by whom it was reported, and provided further that the witness is beyond the reach of the process of the court, and his personal attendance cannot be secured. Such testimony, we think, may very properly be accorded the same weight as a deposition duly taken on notice. Because the rule in question is in force in the state where this case was tried, and seems to be a reasonable rule, we should be disposed to hold that the testimony of the witness Dickey on the first trial ought to have been admitted, were it not for the fact that the record shows that the stenographic report of his testimony as offered was incomplete. The witness, it seems, was present when the oil tank exploded, and was himself burned. He was called as a witness by the defendant company to show at what place the plaintiff, Myers, was standing when the explosion occurred; and to point out the position which Myers occupied he referred to certain photographs that were used at the first trial, which aided materially in fixing the exact place where the plaintiff was standing when he was hurt. These photographs, however, were not produced at the second trial in connection with the testimony of the witness, and because they were not produced, and the testimony offered was therefore incomplete, and in a measure unintelligible, we think that no error was committed by the trial court in excluding it.

An exception was also taken by the defendant company to the admission of evidence showing that the salary and fees which the plaintiff received as consul at Victoria amounted, in the aggregate, to about \$5,000 per annum. It appeared that his commission as consul had expired shortly before the accident occurred, and it was not shown that he had lost any part of the salary or fees of the office in consequence of his injuries. Under these circumstances we are of opinion that the testimony last referred to ought to have been excluded. The proof of his earning capacity should have been confined

to that business which he ordinarily followed, inasmuch as it was not shown that his injuries had occasioned any loss of salary as a public officer.

On the argument of the case, and in the brief of counsel for the defendant in error, considerable space has been devoted to the discussion of the question whether the errors complained of by the plaintiff in error were properly saved and assigned. With reference to this subject it is sufficient to say that the exceptions which we have considered to the refusal of the defendant's instructions, and to the rejection and admission of testimony, are, in our judgment, saved and assigned in such manner as to satisfy the requirements of our rules. For the reasons indicated, the judgment of the circuit court is reversed, and the case is remanded for a new trial.

GERMAN INS. CO. OF FREEPORT, ILL., v. INDEPENDENT SCHOOL DIST. OF MILFORD, DICKINSON COUNTY, IOWA.

(Circuit Court of Appeals, Eighth Circuit. April 12, 1897.)

No. 860.

1. PRINCIPAL AND AGENT—ADVERSE INTEREST OF AGENT IN CONTRACT—FIRE INSURANCE.

The rule that an agent who is adversely interested in the subject-matter of a contract cannot bind his principal thereby does not apply where a school board, by vote, authorizes its president to enter into a contract of insurance through an insurance agent who is also a member of the board, as the latter's interest as a school director in the property insured is nominal, and no greater than that of any resident of the school district.

2. SCHOOLS—EVIDENCE OF PROCEEDINGS OF BOARD OF DIRECTORS.

The minutes of a school board are the best evidence of its proceedings, but where a motion and the vote adopting it are not recorded by the clerk they may be proven by the persons present.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

George F. Henry, for plaintiff in error.

J. W. Cory, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge. The plaintiff below, an Iowa school-district corporation, recovered judgment against the defendant, a fire insurance company of Illinois, upon an alleged oral contract of insurance, claimed to have been made September 17, 1894, whereby the defendant, through its authorized agent, for the premium of \$56.25, then in the hands of such agent, insured the plaintiff's schoolhouse and contents and appurtenant buildings from loss by fire in amounts aggregating \$2,500, for the term of five years from October 11, 1894, at noon, when a previous written policy of the defendant company, covering the same schoolhouse, but with some differences as to the other property, would expire. Up to November 2, 1894, when said schoolhouse and all the property so claimed to have been

insured, was wholly destroyed by fire, said agent had neglected to report such insurance to the defendant, and had not obtained or delivered any written policy of such insurance. Blackert, the agent of defendant, with whom, as such agent, the oral contract of insurance was alleged to have been made, was at the same time one of the directors of the plaintiff school district, and the ruling by the circuit court that this fact did not disqualify him from binding the defendant by such contract is claimed as error.

The rule that an agent cannot bind his principal by contract when the agent is personally, or as representing another, interested adversely in the subject-matter, is founded upon plain reason, and is applied whenever the adverse interest of the agent is real and substantial, presenting a temptation to the agent to sacrifice the interest of the principal. But a merely nominal interest, offering no such temptation, will not disqualify the agent. 1 Mor. Corp. § 521; Northrup v. Insurance Co., 48 Wis. 420, 4 N. W. 350. Blackert was not, as school director, personally interested in the property insured, more than any other resident of the district. The power of an agent of an insurance company to bind his principal by a contract of insurance covering the public buildings of a municipality wherein the agent resides would not be questioned. In this case the board of directors, of which Blackert was but one, by vote at a regular meeting selected and empowered its president to act for the district in making the contract of insurance. Blackert acted solely as agent of the defendant, and was not intrusted by the district with the care of its interests in making such contract. The contract itself was upon the same terms as the previous contract of insurance between the same parties, which covered substantially the same property, and there is no suggestion of fraud or unfairness in reference to the terms of the contract. We think the ruling of the circuit court was correct.

The alleged contract of insurance was shown to have been made at a meeting of the board of directors of the plaintiff school district at which Blackert, as a director, was present. The plaintiff's evidence tended to show that a motion was then adopted by vote of the directors, authorizing the president, on behalf of the district, to make the contract for insurance with Blackert as agent of the defendant. No record of this motion, or of its adoption, was made by the clerk on the minutes or record of the meeting, and the ruling of the circuit court that this action of the board, not having been so recorded, might be proven by oral testimony, is also alleged as error. This action of the board was part of its business at that meeting, and should have been recorded. But it was the vote of the directors which gave authority to the president to act on behalf of the district, and the negligence of the clerk in failing to record the action of the board could not nullify that authority. Had the clerk made the record, it would have been competent evidence, and the best evidence, of the action of the board. But, as he failed to make such record, the fact could be proven by the persons present. Moss v. Averell, 10 N. Y. 449, 453; Handley v. Stutz, 139 U. S. 417, 422, 11 Sup. Ct. 530; Athearn v. School Dist., 33 Iowa, 108; Morgan v.

Wilfey, 71 Iowa, 212, 32 N. W. 265; Westerhaven v. Clive, 5 Ohio, 136; Rock Creek Tp. v. Coddling, 42 Kan. 649, 22 Pac. 741; School Dist. No. 1 of Township of Pine River v. Union School Dist., 81 Mich. 339, 45 N. W. 993. The school district for which the president acted does not question his authority, but ratifies his action. The oral contract of insurance claimed to have been made between the president and Blackert, though made at the meeting, was no part of the business of the board, and could only be proved by oral testimony.

Other assignments of error have been carefully considered, and found to present no question that need be discussed. The case was fairly presented to the jury, and the judgment is affirmed.

TALIAFERRO v. TRAVELERS' PROTECTIVE ASS'N OF AMERICA.

(Circuit Court of Appeals, Eighth Circuit. April 12, 1897.)

No. 868.

ACCIDENT INSURANCE—DEATH IN QUARREL.

A benefit certificate insuring against "death by accident" does not cover a case where the assured was shot in a quarrel in which he was the aggressor, and violently attacked his adversary with a pistol, accompanying the act with the exclamation that he must have revenge, and warning his adversary to "put himself in shape."

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

George M. Block, for plaintiff in error.

Henry T. Kent, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge. This was a suit on a benefit certificate issued by the Travelers' Protective Association of America, the defendant in error, to Edward McC. Taliaferro, on November 10, 1893. The certificate contained the following provision:

"Every member of the Travelers' Protective Association in good standing shall be entitled to the following benefits, upon satisfactory proof being presented to the national board of directors. Four thousand dollars shall be paid to the heirs of any deceased member in case of death by accident. * * *

The petition in the suit which was filed by Maud F. C. Taliaferro, the plaintiff in error, who was the widow of said Edward McC. Taliaferro, alleged, in substance, that on May 31, 1894, said Edward McC. Taliaferro came to his death by accident, and not from natural causes, being shot with a pistol by one Henry Frith, at Bunkie, in the state of Louisiana; and under the aforesaid provision of the certificate the plaintiff demanded a judgment against the defendant company in the sum of \$4,000. At the trial, which took place before a jury, it was conceded by the parties that the sole question for determination was whether the death of the insured was occasioned by accident, within the meaning of that term as used in the benefit certificate. At the conclusion of the testimony the trial court directed the jury to

return a verdict in favor of the defendant company, and the giving of such instruction is the only assigned error which is subject to review. The testimony was very brief. None of the facts stated by the two witnesses who were sworn were denied, and the facts so stated may be summarized as follows: For six weeks prior to May 31, 1894, the deceased and his wife had been boarding with Mrs. Annie C. Frith, at Bunkie, La. On that day the deceased had had some trouble with his wife (the present plaintiff), and had paid his bill, and left the house; and when he left Mrs. Frith directed him not to return. He did return, however, in the evening, while the family were at supper, and inquired of Mrs. Frith for his wife. He was told by her—which was the fact—that Mrs. Taliaferro had left the house, and was stopping with her sister, who lived some three miles out of town. The deceased nevertheless insisted on coming into the house, and did enter the hall. Mrs. Frith then called her son, Henry Frith, who was at the time in the dining room, taking supper. The latter, when called into the hall, directed the deceased to leave the house, as he had been warned not to return. To this the deceased replied that he was not "hunting a difficulty," but that if he (meaning Henry Frith) "wanted trouble, he could get it." The latter replied that he did not want any trouble, whereupon the deceased left the house, and went out of the gate. As he was going out of the gate, however, and as Mrs. Frith and her son Henry were going back into the house, having accompanied the deceased to the porch, the deceased asked the said Henry Frith to come outside the gate, as he wished to speak with him. Henry Frith went outside of the gate, as he was requested to do, and entered into a conversation with the deceased, which was carried on at first in a low tone, and apparently in a friendly spirit. What was said by the parties at first was not understood. The conversation finally became louder, and both parties seemed to become angry. Very soon Frith was heard to say, "I don't want any trouble," and the deceased replied, "You must not insult me," to which Frith answered, "You must not insult me." Thereupon the deceased was heard to say "he must have revenge; put yourself in shape," whereupon Frith pulled off his coat, and threw it upon the fence. Immediately thereafter the deceased pulled a pistol, rushed upon Frith, and struck him with the pistol in the face, knocking him against a tree. Frith then drew his own pistol, and shot the deceased several times, inflicting wounds of which he shortly thereafter died. The deceased did not fire his own pistol, but, after striking his opponent with it in the face, he retired a few steps, still holding it in his hand ready for use. The pistol which the deceased drew, and with which he struck his opponent, was a heavy Colt's revolver, and the blow delivered in the face was a violent one. The shots fired by Frith were so fired after he had rushed forward and clinched with his antagonist, and had thrown his arm around him. Frith was not a quarrelsome person, but a man of good repute and peaceable disposition. He did not draw his own pistol until the deceased had drawn one and struck him in the face. On this state of facts, which was undisputed, we think the trial court properly ruled that the plaintiff could not recover. From the inception of the difficulty, the deceased appears to

have been the aggressor. He was the first to draw a deadly weapon, accompanying that action with the exclamation that "he must have revenge," and at the same time warning Frith "to put himself in shape." This can be regarded in no other light than an invitation to a deadly encounter, in which the deceased voluntarily put his life at stake, and deliberately took the chances of getting killed. Where a person thus invites another to a deadly encounter, and does so voluntarily, his death, if he sustains a mortal wound, cannot be regarded as accidental by any definition of that term which has heretofore been adopted. It might as well be claimed that death is accidental when a man intentionally throws himself across a railroad track in front of an approaching train, or leaps from a high precipice, or swallows a deadly poison. It is possible that death may not result from either of these acts, but death is the result which would naturally be expected, and, if such is the result, it is not accidental. The case on which counsel for the plaintiff in error appears to place most reliance is *Lovelace v. Association*, 126 Mo. 104, 114, 28 S. W. 877, but in that case, while it appeared that the deceased had engaged in a quarrel which he might very well have avoided, it did not appear that he had drawn a weapon of any sort, or that he knew, when he engaged in the quarrel, that his opponent was armed. So far as the case showed, the deceased had no reason to expect, when he engaged in the rencounter, that it would result in any bodily harm to either party, and for that reason the court appears to have held that the unexpected result of the affray was an accident, so far as the deceased was concerned. The case in question, and the other cases to which our attention has been particularly invited, to wit, *Hutchcraft's Ex'r v. Travelers' Ins. Co.*, 87 Ky. 300, 8 S. W. 570, *Phelan v. Insurance Co.*, 38 Mo. App. 640, and *Supreme Council Order of Chosen Friends v. Garrigus*, 104 Ind. 133, 140, 3 N. E. 818, are clearly distinguishable from the case at bar. According to the undisputed facts disclosed by the present record, the deceased voluntarily engaged in an encounter with deadly weapons, the result of which was not an unlikely result, but was such as any reasonable person might have foreseen. Finding no error in the record, the judgment of the circuit court is accordingly affirmed.

UNITED STATES v. DENISON.

(Circuit Court of Appeals, Eighth Circuit. April 19, 1897.)

No. 782.

DISTRICT ATTORNEYS—EMPLOYMENT OF STENOGRAPHER.

Under the provisions of the sundry civil appropriation bills of 1894 and 1895 (27 Stat. 609; 28 Stat. 417) the attorney general has power to authorize the employment by the district attorney of a stenographer to assist in preparing indictments, and the government is liable for the compensation of such stenographer.

In Error to the District Court of the United States for the District of Colorado.

William H. Clopton and William S. Anthony, for the United States.
John D. Fleming, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN,
District Judge.

SANBORN, Circuit Judge. The attorney general of the United States authorized the district attorney for the district of Colorado to employ the defendant in error, Henry L. Denison, who was a stenographer, to take from dictation, and to copy, certain complaints and indictments and a certain opinion of the district judge in some criminal cases which the United States was prosecuting in that district. Denison was accordingly employed, and between April 29, 1894, and July 28, 1894, he rendered services in these cases as a stenographer and copyist, which were worth \$165.30. The rendition of these services enabled the district attorney to discharge a grand jury earlier than he otherwise could have done, and saved to the government expenses much greater than the value of the services. Denison presented his accounts for these services to the judge of the district court for the district of Colorado, and he approved them. The accounting officers of the treasury of the United States refused to audit or pay them. The defendant in error then sued the United States for these services in the court below, under the provisions of the act of March 3, 1887 (24 Stat. 505, c. 359), and recovered a judgment for the amount of his claim. The government has brought this writ of error to reverse that judgment. Its counsel insist that neither the district attorney nor the attorney general had any authority to employ this stenographer on its behalf. They cite *U. S. v. Shields*, 153 U. S. 88, 91, 14 Sup. Ct. 735, *Gibson v. Peters*, 150 U. S. 342, 14 Sup. Ct. 134, and *Ruhm v. U. S.*, 66 Fed. 531, and urge that fees allowed to public officers are matters of strict law, and cannot be paid unless their payment is authorized by the very words of the acts of congress. But the authorities they present and the propositions they maintain do not govern this case. Denison was not a public officer. He did not sue for fees allowed by acts of congress to such an officer, but for compensation for clerical services which he had rendered to the United States at the request of the officers of its department of justice. The acts of congress provide that there shall be an executive department known as the "department of justice" and that the attorney general shall be the head thereof (Rev. St. § 346); that the attorney general shall exercise general superintendence and direction over the attorneys and marshals of all the districts in the United States and the territories as to the manner of discharging their respective duties (section 362), and that he shall exercise general supervisory powers over the accounts of the district attorneys, marshals, clerks, and other officers of the courts of the United States (section 368). The acts making provisions for sundry civil expenses of the government for the fiscal years ending June 30, 1894, and June 30, 1895, contain this provision:

"For payment of such miscellaneous expenses as may be authorized by the attorney general, including the employment of janitors and watchmen in rooms or buildings rented for the use of courts, and of interpreters, experts, and stenographers; of furnishing and collecting evidence where the United States

is or may be a party in interest, and moving of records, one hundred and seventy thousand dollars." 27 Stat. 609, c. 208; 28 Stat. 417, c. 301.

In view of this legislation, the proposition that the attorney general had no authority to employ a stenographer to facilitate the transaction of the public business in the office of a district attorney does not seem to us to merit serious consideration. The supreme court has held that a district attorney can lawfully purchase blank indictments at the expense of the United States, and we have no doubt that the attorney general had ample authority, under the acts of congress to which we have adverted, to authorize him to hire a stenographer to write out indictments or complaints, if blanks failed to fit his cases. *U. S. v. Harmon*, 147 U. S. 268, 270, 13 Sup. Ct. 327; *Harmon v. U. S.*, 43 Fed. 560; *Stanton v. U. S.*, 75 Fed. 357, 358. The judgment below must be affirmed, and it is so ordered.

UNITED STATES v. FLEMING.

(Circuit Court of Appeals, Eighth Circuit. April 19, 1897.)

No. 783.

1. DISTRICT ATTORNEYS—SERVICES OUTSIDE OF DISTRICT—COMPENSATION.

A district attorney is not entitled to special compensation for services rendered by direction of the attorney general in an appellate court outside of his district. 22 C. O. A. 223, 76 Fed. 359, followed.

2. SAME—EXPENSES.

Under Rev. St. § 370, a district attorney sent by the attorney general to conduct a cause in a court outside of his district is entitled to recover expenses necessarily incurred.

In Error to the District Court of the United States for the District of Colorado.

William H. Clopton and Walter D. Coles, for the United States.
John D. Fleming, in pro. per.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge. The writ of error in this case challenges an item of \$288.10 for which John D. Fleming, the defendant in error, recovered a judgment against the United States in the court below under the act of March 3, 1887 (24 Stat. 505, c. 359). Fleming was the district attorney for the United States for the district of Colorado from March 23, 1889, to March 23, 1893, during which time the defendant in a criminal case took an appeal from a judgment of the district court of Colorado to the circuit court of the Eighth judicial circuit. The judge of the circuit court was sitting at Little Rock, in the state of Arkansas, and at the request of the attorney general Fleming followed the case out of his district to Little Rock, and there appeared and acted for the United States before the circuit judge. He necessarily traveled 2,562 miles, and spent \$88.10 and six days in making this trip. The attorney general and the court below allowed him \$200 special compensation for

his services and \$88.10 for his expenses in this matter, and he recovered a judgment against the United States for these amounts.

The right of a district attorney to special compensation for services which he renders by direction of the attorney general in an appellate court outside of his district was considered by this court in *U. S. v. Ady*, 40 U. S. App. 312, 22 C. C. A. 223, and 76 Fed. 359, 364. The acts of congress which prohibit a recovery of such compensation are cited, and parts of them are quoted, in the opinion in that case. For the reasons there stated, the defendant in error was not entitled to the \$200 which was allowed him for services in the judgment below. *Rev. St. §§ 367, 1764, 1765; 18 Stat. 109, c. 328; 25 Stat. 545; U. S. v. Smith*, 158 U. S. 346, 355, 15 Sup. Ct. 846; *Gibson v. Peters*, 150 U. S. 342, 14 Sup. Ct. 134; *Ruhm v. U. S.*, 66 Fed. 531, 533. But the necessary expenses which this district attorney incurred at the request of the attorney general in attending a court more than 1,000 miles from his residence stand on a different footing. The attorney general is the head of the department of justice. *Rev. St. § 346*. He is authorized to exercise general supervision and direction over the attorneys of the United States in the various districts as to the manner of discharging their respective duties. Section 362. He has general supervisory powers over their accounts. Section 368. He has authority to employ and retain such attorneys as he may think necessary to assist the district attorneys. Section 363. He has power to send an officer of the department of justice to any state or district of the United States to attend to the interests of the nation in any suit pending in any of the courts of the United States. Section 367. And section 370 provides:

"Sec. 370. Whenever the solicitor general, or any officer of the department of justice, is sent by the attorney general to any state, district, or territory, to attend to any interest of the United States, the person so sent shall receive, in addition to his salary, his actual and necessary expenses while absent from the seat of government; the account thereof to be verified by affidavit."

These provisions of the statutes confer ample authority on the attorney general to incur the expense of sending some attorney to any court of the nation to attend to any interest of the United States. If he sends an officer of the department of justice from Washington, that officer can recover the amount of his expenses, in addition to his salary, under section 370. If he employs and retains an attorney to assist a district attorney and sends him, he can undoubtedly recover his expenses. If he sends the district attorney, the acts of congress prohibit the payment to him of any special compensation for the services he renders without his district (sections 367, 1764, 1765); but they contain no prohibition of the repayment to him of the actual and necessary expenses which he incurs on such a mission. No reason occurs to us why, in this state of the case, he should not be reimbursed for these expenses. The attorney general, vested with ample authority from the United States, requests him to go to a distant state, and attend to the interests of the government in a lawsuit. He complies with the request, travels thousands of miles, and incurs necessary expenses in performing the service. In the absence of a prohibitory statute, the authorized request of

the attorney general and the compliance of the district attorney raise an implied promise on the part of the government to repay to the latter his necessary disbursements. *Coleman v. U. S.*, 152 U. S. 96, 99, 14 Sup. Ct. 473; *U. S. v. Great Falls Manuf'g Co.*, 112 U. S. 645, 654, 5 Sup. Ct. 306. The judgment below must be reversed, and the cause remanded to the court below, with directions to enter judgment in favor of the defendant in error in accordance with the views expressed in this opinion; and it is so ordered.

UNITED STATES v. EDGERTON (four cases).

(District Court, D. Montana. April 21, 1897.)

Nos. 227-230.

1. GRAND JURIES—SECRECY OF PROCEEDINGS—PRESENCE OF OTHER PARTIES.

No person, other than a witness undergoing examination and the government attorney, can be present at the sessions of a grand jury; and an indictment should be quashed where an expert witness remained in the jury room while another witness was being examined, and put questions to him.

2. CRIMINAL LAW — TESTIFYING AGAINST ONESELF — EXAMINATION BEFORE GRAND JURY.

An indictment should be quashed when it appears that defendant was compelled by subpoena to attend before the grand jury, and give material testimony, without knowing that his own conduct was under investigation.

P. H. Leslie, U. S. Atty., and Geo. F. Shelton, Asst. U. S. Atty.

Toole & Wallace, John B. Clayberg, and N. W. McConnell, for defendant.

BELLINGER, District Judge. The questions for decision arise upon motions to quash four several indictments against the defendant, Erastus D. Edgerton, and upon pleas in abatement to said indictments. The motions and pleas are upon the same grounds, except that it is alleged as a ground of separate plea that said defendant was required by a subpoena to appear before the grand jury as a witness, and that he did appear in obedience to such subpoena, and was sworn and examined and required to testify to matters and things relating to and material to the charge made in the indictment against him, and this without being informed or having knowledge that the grand jury had under consideration any matter involving a criminal charge against him. The grounds upon which it is sought by both motions and pleas to have the indictments quashed are that one S. R. Flynn was allowed to testify as an expert before the grand jury, without being first examined as to his qualifications as an expert; that said Flynn was permitted to remain in the grand jury room while other witnesses were being examined in connection with the charge against the defendant, and propounded questions to such witnesses; that the grand jury were not selected according to law; and that, as to a portion of such jury, those comprising it were not possessed of the qualifications required by law; and that the foreman of the grand jury and at least 11 other members thereof, who found and returned the indictments against the defendants, were in such a

hostile and vindictive state of mind towards him as prevented them from acting impartially; and it is alleged in the pleas that the defendant was prejudiced in his rights by the several matters complained of. The pleas are supported by the affidavits of the defendant as to the facts upon which they rely. I shall consider but two questions in the case, inasmuch as these will dispose of the demurrers and motions, and are questions of universal application. These questions relate to the presence and conduct of the expert Flynn in the grand jury room, and to the examination of the defendant, Edgerton, as a witness against himself, under compulsion of a subpoena.

It is not necessary to inquire how far the laws of the states apply in criminal proceedings in the courts of the United States, under section 721 of the Revised Statutes. It is beyond question that no person, other than a witness undergoing examination, and the attorney for the government, can be present during the sessions of the grand jury. The rule is inherent in the grand jury system with all the force of a statutory enactment. The cases where bailiffs and stenographers have on occasions been temporarily present in the grand jury room are only apparent exceptions. The rule, in its spirit and purpose, admits of no exception. In the present case it is suggested that the only testimony heard while the expert Flynn was present related to the production of certain books of account, touching which the expert interrogated the witness who was testifying as to his possession of such books or other documents, and that this could not have prejudiced the defendant. The court cannot know that this suggestion represents the fact. The case as presented is one where an expert was not only present in the grand jury room while a witness was testifying, but took part in the investigation by interrogating the witness. The court cannot inquire as to the effect of this conduct. There must not only be no improper influence or suggestion in the grand jury room, but, as suggested in *Lewis v. Commissioners*, 74 N. C. 194, there must be no opportunity therefor. If the presence of an unauthorized person in the grand jury room may be excused, who will set bounds to the abuse to follow such a breach of the safeguards which surround the grand jury? It is common knowledge that expert witnesses are more likely to testify from interest than any other class. They usually testify to support or overthrow a theory, and frequently, if not usually, after an *ex parte* investigation, which strongly predisposes them in favor of the party or cause in whose services they are enlisted. In the case of *U. S. v. Kilpatrick*, 16 Fed. 765, the court quashed an indictment upon motion upon a case much like the present as to this point.

It is fatal to the indictments that the defendant was called to testify in the particular matter from which they resulted, without being informed or knowing that his own conduct was the subject under investigation. In the case of *U. S. v. Brown*, 1 Sawy. 531, Fed. Cas. No. 14,671, it is held that there is no such thing as a criminal action or proceeding, within the meaning of the Oregon statutes, which protect a defendant in a criminal case from testifying against himself, until an indictment has been filed in court, and that the examination of a person before the grand jury, although such an examination

tends to connect him with a criminal offense, is not the investigation of a "criminal charge." But the supreme court of the United States, in *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, holds otherwise. There it is held that under the fifth amendment to the constitution of the United States, which declares that no person shall be compelled in any criminal case to be a witness against himself, an examination of a person before the grand jury in an investigation into certain alleged violations of the interstate commerce act, where his testimony might tend to criminate him, constitutes a "criminal case," within the meaning of the constitutional provision. The adjudged cases in both the federal and state courts are fully reviewed in the opinion. It makes no difference, in my judgment, that the case was one where the witness declined to answer, and the question decided was raised on habeas corpus proceedings to release him from imprisonment for contempt in such refusal. The court holds, upon obvious principles, that the constitutional provision referred to, as well as the like provisions adopted by the various states, must have a liberal construction for the protection of personal rights. Neither evasion nor subterfuge can be permitted to destroy them.

It is argued that it must be made to appear that the defendant has suffered injury in what has been done, before the objection that is made can be sustained. This is true as to technical requirements and formalities, but not as to matters of substance. Where a witness is compelled to testify against himself, the injury inheres in the violence done to his rights. It is not susceptible of proof, nor the policy of the law to require it, and the injury done to the public in such case outweighs that suffered by the defendant. It is a matter of the highest public policy that crime shall be punished by legal methods. When these are disregarded, there is the mob, between which, in the pursuit of vengeance, and the officers of the law, acting in its name, but in disregard of it, there is no distinction.

Without these questions, I should still feel it my duty to quash these indictments, in view of the passion under which the grand jury seems to have acted. The report filed is so exceptional as to excite surprise. The feeling out of which it grew may be explained by the circumstances existing at the time, and, while what has been done may be thus excused, it only adds to the reasons for quashing these indictments, to the end that whatever action is required may be had without excitement, and upon mature deliberation. The demurrers to the several pleas are overruled, and the motions to quash allowed.

UNITED STATES v. BOOKER.

(District Court, D. North Dakota, S. E. D. May 6, 1897.)

NATIONAL BANKS—FALSE REPORTS.

It is not a necessary ingredient of the offense of making a false entry in a report, under Rev. St. § 5209, that the report shall be one of those mentioned in sections 5211, 5212, or one which the bank is bound by law to make. It is sufficient if the report is one made in the due course of business. *U. S. v. Potter*, 56 Fed. 83, 97, disapproved.

Tracy R. Bangs, U. S. Atty.

John D. Benton and Alexander Hughes, for defendant.

AMIDON, District Judge. The defendant has demurred to an indictment drawn under section 5209 of the Revised Statutes, charging him, as president of the Grand Forks National Bank, of Grand Forks, N. D., with making false entries in reports of the condition of that bank to the comptroller of the currency. There are nine counts in the indictment, which are substantially the same in form, varying mainly as to the party whom it is charged the defendant intended to defraud or deceive by the false entry. After alleging the incorporation of the bank under the national bank act, and that it had been engaged in business for a period of more than one year preceding the 25th day of July, 1894, the indictment alleges: That the Grand Forks National Bank on that day made to the comptroller of the currency a report of the condition of the association at the close of business on the 18th day of July, 1894, according to a form theretofore prescribed by the comptroller. That the report was one which it was the duty of the association by law to make to the comptroller, being one of the five reports required by law to be made in each year by every such association. That the report was verified by the oath of the defendant, Booker, president of said association, and attested by the signatures of three of the directors. That said Booker, so being president of the association, unlawfully, knowingly, and willfully did make certain false entries in the report; that is to say, a false entry to the effect that at the close of business on the 18th day of July, 1894, the amount due the said association from approved reserve agents was \$60,042.01, in the words and in figures following, that is to say:

	Dollars. Cts.
12. Due from approved reserve agents, subject to check (see schedule)	60,042 01

That said entry was false, in this: that said association did not at said time have due from approved reserve agents the sum of \$60,042.01, or any part thereof, except the sum of \$25,042.01, as the said Booker then and there well knew. That said Booker at the time of making said false entry thereby intended to defraud and injure said Grand Forks National Bank, and divers other persons, whose names are to the grand jurors unknown. The demurrer to each of the counts is in the following language:

"Defendant demurs to the first count of said indictment for the reason that the report in which the false entry is charged to have been made is not set forth in full; because there is no proper description of said report; and for the reason that such indictment contains no allegations from which it can be determined whether the report in which said false entry is charged to have been made is in the form prescribed by the comptroller of the currency of the United States, or as to what class of reports required by the statutes of the United States it belongs, or as to whether the report charged to have been made is such a report as is required by the statutes of the United States."

It was also urged upon the argument of the demurrer that, inasmuch as the false entry refers to a schedule, the schedule itself should have been set out in the indictment. All the questions thus raised will be solved by a correct answer to the following question: Is it

an ingredient of the offense of making a false entry in a report of a national bank, under section 5209 of the Revised Statutes, that the report should be one which it was the legal duty of the association to make? If it is essential that the report should be of that character, then a false entry in any other report would not constitute the offense; and it would therefore be necessary that the indictment should, by apt averments, show that the report in which the false entry is charged to have been made possessed all the elements specified in the statute. Among other things, in addition to the specifications contained in the indictment in this case, it should be averred that the report had been called for by the comptroller, and that he had specified the day in respect to which the report was made as the one for which the report should exhibit in detail the resources and liabilities of the association. But, on the contrary, if it is only necessary that the report should be one that was made in the due course of the business of the association, then all that would be required of the indictment would be to identify the report with a degree of precision and certainty sufficient to apprise the defendant of the particular offense with which he is charged. The distinction which it is essential to observe is that which exists between pleading all the ingredients of a crime, and identifying the particular act for which the defendant is called upon to answer. On the face of section 5209 there is nothing which would naturally limit the offense to reports which the association was legally bound to make. The language of the statute is as follows:

"Every president, director, cashier, teller, clerk, or agent of any association * * * who makes any false entry in any report or statement of the association with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association or any agent appointed to examine the affairs of the association, * * * shall be deemed guilty of a misdemeanor," etc.

This language is as broad as it could well be made,—“any report or statement of the association.” It is to be noticed, also, that the fraudulent intent to injure or deceive is not confined either to the association or to the officers to whom the report is required to be made, but extends to “any company, body politic or corporate, or any individual person.” It is evidently the intent of the statute to shield each of these classes against the wrongful act mentioned. The only legislative provisions requiring national banks to make reports are contained in sections 5211 and 5212 of the Revised Statutes, and I am unable to discover anything in section 5209 which would restrict its provisions to the reports mentioned in those sections. Suppose the board of directors of a national bank should call upon the cashier and president, as its executive officers, to present to them a report of its condition, and in such report these officers should make false entries with intent to deceive the board of directors; would not their act come within the language of the statute, and also within the mischief which it was intended to provide against? It often happens that the stockholders of such a corporation become alarmed and dissatisfied as to its condition. Suppose that they should call upon the president and cashier to make a report to be submitted to a meeting of the stockholders, and in this report these officers should make false entries for the purpose of deceiving or defrauding the stockholders.

There is nothing in the statute which makes it the legal duty of the association to make any such report, or of the president or cashier to do so. The duty to make the report would arise solely out of the agency of the officers. And yet it is difficult to see why such a false entry does not come within the letter and the mischief of the statute as fully as a similar entry in a report to the comptroller of the currency. It should also be noticed that the statute is not confined to "reports" alone, but also embraces "statements." The only term used in sections 5211 and 5212 is "report," and to confine section 5209 to those reports would certainly have the effect of rendering the term "statement," in that section, nugatory. The authorities on this subject are not entirely harmonious. In the case of *U. S. v. Potter*, 56 Fed. 83, 97, after a very careful consideration, the conclusion is reached that section 5209 is confined to such reports as the association is bound by law to make. The court says:

"In the absence, therefore, of any authority cited to the contrary, I hold that no report is within the purview of this penal statute unless it is shown to be in conformity with the law in everything except in the matter of the false entry."

In that case a demurrer to an indictment was sustained for the reason that the verification and attesting of the report were not pleaded with sufficient fullness. The only authority cited in support of the ruling was the case of *U. S. v. Ege*, 49 Fed. 852. It would seem, however, that the latter case could properly be explained on other grounds. In that case a bank examiner requested the defendant, who was a clerk in a national bank, to make the statement or report in question, "on the ground of the illness of the examiner's assistant," and it appears from the evidence "that it was the custom of the examiner to make such a statement personally, and that it was no part of the duty of the bookkeeper to do it." It is manifest, therefore, that in doing this work the clerk was not the agent of the bank, but of the examiner; and the judge bases his instruction upon that ground, stating that the defendant could not be held responsible "for the services he rendered the examiner. His act in complying with the examiner's request was voluntary. As an officer of the bank he was not required to perform it." That is, as I understand, it was not within the scope of his agency. In the case of *Cochran v. U. S.*, 157 U. S. 286, 15 Sup. Ct. 628, it is expressly held that it is not necessary to allege in the indictment that the report in which the false entry was made was verified by the oath of the president or cashier, or attested by the signatures of the directors. The same rule is also adopted in the case of *U. S. v. Hughitt*, 45 Fed. 47. I am therefore led to the conclusion that it is not necessary that the report should be one which the association was bound by law to make, but that it is sufficient if the report was made in the due course of the business of the association. From this conclusion it follows that it is not necessary that the indictment should set forth facts from which the court can see that the report was one of the reports mentioned in section 5211 or 5212. It is only necessary to show that the report is one which was made in the due course of the business of the association, and to identify it with sufficient clearness and certainty to satisfy the rules of criminal pleading in that respect. The averments of the indict-

ment in this case are ample for both of these purposes. The other objections raised to the indictment are severally held to be untenable in the case of *U. S. v. French*, 57 Fed. 382. The demurrer is therefore overruled.

MEAD et al. v. WEST PUB. CO.

(Circuit Court, D. Minnesota. July 14, 1896.)

1. COPYRIGHT—EXTENT OF PROTECTION.

When an author has expended his time and talent upon a book, his property right in it is one which the law will protect against any one who attempts to avail himself of the results of the author's labor. This rule applies not only to works in which the forms of expression are the result of the author's own research and thought, but also to compilations of the works of others upon a common subject.

2. SAME—INFRINGEMENT—RECOMPILATIONS—LAW TREATISES.

Where an author producing a new compilation of an unprotected law treatise by a third person has introduced into the text new chapters upon subjects not treated in the original, it is not an infringement for a still later compiler of the original work to derive from the first compilation the idea of also treating these new topics, provided he does not reproduce any of the new matter in the first compilation.

3. SAME—REPRODUCTION OF CITATIONS.

Where new compilations have been made, by two different authors, of an unprotected law book by a third party, with some additional matter, notes, and citations, the mere fact that the second compiler has reproduced, in connection with the same subjects, some of the new citations found in the first compilation, will not be held an infringement of the copyright thereon, where in nearly all such cases it appears from internal evidence that he made an independent examination of the authorities so cited.

This was a suit in equity by Wilson L. Mead, Charles E. Gill, James E. Callaghan, N. A. Clark, and Frederick Darvill, co-partners as Callaghan & Co., against the West Publishing Company, for alleged infringement of a copyright in an annotated edition of "Stephen's Pleading," entitled "Andrews' Stephen's Pleading." The alleged infringing book was the second edition of a law book entitled "Shipman's Common-Law Pleading," and was prepared and edited for defendant by Mr. W. L. Clark. The cause was heard upon a motion for a temporary injunction.

Shipman on Pleading (first edition) was published August, 1894. Andrews on Pleading was published in November, 1894. Shipman on Pleading (second edition) was published in September, 1895. Shipman on Pleading constitutes one of the "Hornbook Series" now being published by the defendant. Twelve volumes have been already published, and 16 more are in course of preparation. These books are elementary in their character, and primarily intended for the use of law students. Andrews' Pleading, plaintiff's book, is a verbatim reprint of the text and notes of Stephen, except that the titles of the cases cited in Stephen's notes have, in certain instances, been interpolated. In addition thereto, Andrews has annotated the text of Stephen, and added some 60 pages of introductory matter. Shipman's Pleading, defendant's book, is not a verbatim reprint of Stephen, but is based upon that treatise, and adopts the language and arrangement of Stephen throughout. This book is also annotated by the compiler, and some original matter is introduced into the text. The bill states that the first edition of Shipman's Pleading "was unfavorably received and severely criticised, and was and is a very defective and inferior book," and alleges, in substance, that the preparation of the second edition of Shipman involved the use of the editorial labor expended in the compilation of Andrews' Pleading. The affidavit of Mr. West, president of

the defendant corporation, states that it is the policy of the defendant, "as has been repeatedly announced by it to the faculties of the several law schools throughout this country," to publish new editions of the several books comprised in the Hornbook Series "whenever the criticism and advice of those using or desiring to use the books show that such new editions are necessary to meet their requirements; that in pursuance of said policy the said second edition of Shipman's Common-Law Pleading was prepared and published, as was also a second edition of another book of said series, viz. Norton on Bills and Notes." He further states that the second edition of Shipman's Pleading "was prepared in accordance with, and because of, the criticisms and suggestions of certain law-school professors, and other literary advisers" of the defendant, and not in consequence of the publication of Andrews' Pleading, and that said second edition would have been published, for the reasons stated, even if Andrews' Pleading had not been in existence. He further states that Mr. Andrews, compiler of Andrews' Pleading, after said work was published, "visited a large number of the law schools, and personally solicited the use of his book in said schools, and at that time severely criticised said first edition of Shipman's Common-Law Pleading, and that that criticism, as affiant is informed and believes, is the severe criticism of said first edition to which said Andrews refers in his affidavit."

The bill admits that the text and notes of Stephen are common property, not subject to copyright, but charges: (1) That the cases cited in part 1, pp. 1-60, of Andrews' Pleading, were copied by the person who prepared the second edition of Shipman. (2) That part 2, §§ 43-47, pp. 69-77, of Andrews' Pleading, were copied in the second edition of Shipman on pages 6, 11, 120, 121, 126, 127. (3) That over 200 cases were copied from the notes in Andrews' Pleading. (4) That large portions of the notes in Andrews were reproduced in Shipman in the identical language, or with colorable alterations. (5) That the citations in the original notes to Stephen, as corrected and amended by Andrews, were copied in the second edition to Shipman. (6) That a note in Andrews (pages 474-477) is found in substance in the second edition of Shipman. (7) That the index in Andrews "has to a large extent been utilized, referred to, and copied from, and embodied in the second edition" of Shipman. (8) That over 300 cases in the table of cases in Andrews "were taken and copied directly" from said table in the preparation of the table of cases in Shipman, second edition. (9) That the defendant made a wrongful and piratical use of Andrews in the preparation of Shipman, and availed itself "of the labor, pains, care, skill, and experience expended and embodied in said Andrews' Stephen's Pleading."

Mr. Hale, who made the index to the second edition of Shipman's Pleading, makes affidavit that he made same "from the proof sheets of said work, and from them alone," and that "he made no use of or reference to the index of Andrews' Stephen on Pleading."

Mr. Jehle, the foreman of defendant's composition rooms and mechanical department, states, in an affidavit, that the table of cases to the second edition of Shipman's Pleading, prepared under his supervision, was, "in accordance with the usual method employed in preparing such tables," made "from the page proofs of said book, and that no reference whatever was made to the table of cited cases published in the work known as 'Andrews' Stephen's Pleading.'"

It is shown by the affidavit of Mr. Clark that the number of cases cited, respectively, in Shipman (first edition), Shipman (second edition), and Andrews, including the cases in Stephen's original notes, were checked under his supervision, and produced the following results, viz.:

(1) Number of cases cited in the respective volumes:

(a) Shipman (first edition).....	2,301
(b) Shipman (second edition).....	4,045
(c) Andrews	2,140

(2) Number of cases common to the respective volumes:

(a) Shipman (first and second editions).....	1,940
(b) Andrews and Shipman (first edition).....	396
(c) Andrews and Shipman (second edition).....	260
(d) Andrews, Shipman (second edition), and Stephen.....	86
(e) Andrews and Shipman (second edition) without Stephen....	174

(B) Citation of cases common to Andrews and Shipman (2d Ed.):¹

Cases cited from Stephen.....	233
Cases cited differently.....	94
Cases quoted differently.....	15
Cases cited to a different point.....	89

Mr. Clark states in his affidavit that he cannot now remember the details of his work, nor the circumstances under which each case was cited, but that he does remember the general manner in which his work was done, and the sources from which he obtained his data. The sources consulted in the preparation of the specific chapters are stated by Mr. Clark to be as follows: (1) Chapters 1 and 2, pp. 1-129: (a) Shipman (first edition); (b) Stephen on Pleading; (c) Chitty on Pleading; (d) Clark on Contracts; (e) Cobbey on Replevin; (f) Ewell on Ejectment; (g) other text-books, not now recalled. (2) Chapter 3, pp. 130-141: (a) Shipman (first edition), c. 3; (b) Clark on Contracts, for new matter on page 132, notes 7, 8. (3) Chapter 4, pp. 142-198: (a) Shipman (first edition), c. 2; (b) Stephen on Pleading; (c) Chitty on Pleading; (d) cases cited in the second edition. (4) Chapter 5, pp. 199-256; (a) Shipman (first edition), c. 1; (b) Chitty on Pleading; (c) Stephen on Pleading; (d) cases cited in second edition. (5) Chapters 6-12, pp. 257-499: (a) Stephen on Pleading; (b) Shipman (first edition); (c) Chitty on Pleading; (d) cases taken from Chitty. The sources consulted in the preparation of the whole book, in addition to those already referred to, are stated by Mr. Clark to be as follows: (1) Kinney's Illinois Digest; (2) a Michigan digest; (3) a Massachusetts digest; (4) a Pennsylvania digest; (5) a New York common-law digest; (6) the United States Digest; (7) the American Digest; (8) Ames' Selected Cases on Pleading; (9) the Illinois Reports; (10) the Michigan Reports; (11) the Massachusetts Reports; (12) the Vermont Reports; (13) the New York Common-Law Reports; (14) the New York Court of Appeals Reports; (15) the Indiana Reports; (16) the United States Supreme Court Reports (Co-op. Ed.); (17) the National Reporter System; (18) the American Decisions and Reports; (19) the reports of other states, not now remembered; (20) the English Common-Law Reports; (21) reports also examined at the state law library in St. Paul.

Mr. Clark admits that he made use of Andrews to the following extent, viz.: (1) That "in several instances" he cut the original text of Stephen from Andrews in order to save copying. (2) That he checked his work with Andrews, in common with other works on Pleading, for omitted topics, and that it was thereby suggested to him to treat briefly the following subjects, viz.: (a) Writ of Entry; (b) Forcible Entry and Detainer; and (c) Trespass to Try Title. In treating these topics he did not copy, either directly or indirectly, the language or the ideas contained in Andrews' Pleading. The sources consulted by him were, among others, Blackstone's Commentaries and Ewell on Ejectment. (3) That he did not check Andrews for omitted cases, although it is possible that he may have found a case here and there by reason of its being cited in Andrews; that he did not cite any case from Andrews without first examining the original report. (4) That he had intended to read the work of Andrews, but read only a small part of same,—not as much as half.

Aldrich, Reed, Brown & Allen, for complainants.

W. E. Dodge and Homer Eller, for defendant, filed the following brief:

The Issue in the Case.

The issue in this case is in large measure an issue of fact. The plaintiff charges that the defendant has been guilty of "piracy," or, as it is sometimes called, "literary larceny," in the preparation of the second edition of its book. The defendant denies the charge, without reservation, and claims that this second edition of its book was prepared in a legitimate manner, without making any unlawful appropriation of any sort or kind from the book of the plaintiff. In other words, the plaintiff charges that the second edition of

¹Some cases are cited more than once.

Shipman was compiled from Andrews' Pleading; that the text and citations found in Andrews were copied, with such colorable changes as were necessary to conceal the fact of copying; and that even the table of cases and index found in Andrews were substantially reproduced in defendant's book. The defendant denies the copying charged, and the alleged use of the material in plaintiff's book. It states in detail the sources from which the matter contained in its book was derived, and explains with great specificness the methods followed by its editor in the compilation of its book. The charge of the plaintiff involves fraud on the part of the defendant of the most reprehensible character. It declares, in effect, that the defendant did not avail itself of the original sources of information, but resorted to the labor-saving expedient of copying citations and other material which the research of the plaintiff had discovered. In such a case the animus furandi (that is to say, "the intention to take for the purpose of saving labor") must be clearly established. Has such fraudulent intent been so clearly established by the plaintiff at this stage of the proceedings as to warrant the granting of a temporary injunction? The affidavit of Mr. Andrews in support of the charges of the bill is very voluminous, covering over 300 pages of typewritten matter. The following facts, shown by the affidavit of Mr. Clark, should be noted in connection with this affidavit of Mr. Andrews, viz.: (1) Two hundred and thirty-three citations referred to as copied from Andrews appear in the original notes of Stephen. (2) Andrews repeatedly refers to statements and notes as being copied from Andrews' Pleading which are part of the original text of Stephen. (3) Andrews repeatedly refers to many cases as being copied from Andrews' Pleading which are cited in the first edition of Shipman. (4) Ninety-four citations claimed to have been copied from Andrews are cited differently, as to titles, volume, or page of the report, in the second edition of Shipman. (5) Fifteen cases and authorities claimed to have been copied from Andrews are accompanied in Shipman's second edition with specific statements of fact or quotations not found in Andrews. (6) Eighty-nine citations claimed to have been copied from Andrews are cited in Shipman to a different point, or in a different connection. (7) Twenty-one alleged errors common to both Andrews' Pleading and Shipman's Pleading (second edition) are referred to in the affidavit. These errors are duly listed with accompanying explanations on page 19 of this brief.¹

The Rights of the Defendant.

There can be no question that the defendant had a right, in the compilation of its book, to resort to the digests, law reports, and standard text-books in the manner described by Mr. Clark. *Gray v. Russell*, Fed. Cas. No. 5,728, 1 Story, 11; *Emerson v. Davies*, Fed. Cas. No. 4,436, 3 Story, 768; *Simms v. Stanton*, 75 Fed. 6. Were it otherwise, it is obvious the book of the plaintiff would have no standing in this court. "What," says Judge Story, "would become of the treatises in our own profession, the materials of which, if the works be of any real value, must essentially depend upon faithful abstracts from the reports and from juridical treatises, with illustrations of their bearing?" *Gray v. Russell*, supra. "Take," he continues, "the case of the work on insurance written by one of the learned counsel in this cause, and to which the whole profession are so much indebted; it is but a compilation, with occasional comments upon all the leading doctrines of that branch of the law, drawn from reported cases or from former authors, but combined together in a new form, and in a new plan and arrangement." *Id.*

The Test of Piracy.

"It may be laid down as the clear result of the authorities," says Judge Story, "in cases of this nature, that the true test of piracy or not is to ascertain whether the defendant has in fact used the plan, arrangements, and illustrations of the plaintiff as the model of his own book, with colorable alterations and variations, only to disguise the use thereof, or whether his work is the result of his own labor, skill, and use of common materials and common sources of knowledge, open to all men, and the resemblances are either accidental, or arise from the nature of the subject. In other words, whether

¹See note at end of opinion.

the defendant's book is, quoad hoc, a servile or evasive imitation of the plaintiff's work, or a bona fide original compilation from other common or independent sources." *Emerson v. Davies*, Fed. Cas. No. 4,436, 3 Story, 768; *Simms v. Stanton*, 75 Fed. 6.

Publication of Second Edition.

The piracy charged cannot be inferred from the fact that the defendant published a second edition of its book within a year after the publication of the plaintiff's book. The second edition of this book would have been published in any event, for the reasons stated in Mr. West's affidavit, even if the plaintiff's book had not been published. Granting, however, that the production of plaintiff's book led to the production of the second edition of defendant's book, no presumption of fraud can be predicated upon that hypothetical fact. The defendant had a right, in the course of legitimate business competition, to protect its book with a new and improved edition, if the publication of plaintiff's book made it necessary from a commercial point of view. "Fair competition is perfectly legitimate, and the fact that one work is affected by the publication of another of a similar nature is no damage or injury, be the loss what it may." *Hogg v. Kirby*, 8 Ves. 225; *Chamler*, Copyr. 124. "If a work is successful, it is competent to any other person perceiving that success to set about a similar work, bona fide his own." *Id.*

Right to Copy Text of Stephen.

The bill admits that the original text and notes of Stephen are reproduced "word for word" in plaintiff's book. It also admits that said text and notes are common property and not subject to copyright. It follows, therefore, that the defendant was at liberty to copy or cut said text and notes, in so far as it saw fit, from the printed pages of plaintiff's book. A mere copyist has no exclusive right, under the statute, to multiply copies of his copy of a book. See *Drone*, Copyr. 202, 204, 424, 160; *Chase v. Sanborn*, Fed. Cas. No. 2,628; *Banks v. Publishing Co.*, 27 Fed. 50; *Davidson v. Wheelock*, 27 Fed. 61; *West Pub. Co. v. Lawyers' Co-op. Pub. Co.*, 64 Fed. 360. The fact that the titles of the cases cited by Stephen were added in certain instances by the plaintiff does not vest a copyright in those titles. The defendant did not copy or cut the text of Stephen from plaintiff's book save in exceptional instances, and the titles of the cases in Stephen's notes were not copied from plaintiff's book, having been already published in the first edition of Shipman.

Right to Read Book of Plaintiff.

It cannot be inferred that defendant copied plaintiff's book from the fact that Mr. Clark admits that he read part of said book. It was both the right and the duty of Mr. Clark, as a conscientious compiler, to read and study all the literature which related to the subject which he was treating. Such investigation tended to increase, rather than to save, the labor of Mr. Clark. In *Emerson v. Davies*, Fed. Cas. No. 4,436, 3 Story, 768, which was the case of a school arithmetic, Judge Story inferred that the defendant had "examined all the existing works published," including that of the plaintiff, but held that it did not necessarily follow that Davies had copied or adopted any part of the work of Emerson. See, also, *Drone*, Copyr. 394, and cases cited; *Simms v. Stanton*, 75 Fed. 6. The fact that this examination of plaintiff's book suggested to Mr. Clark the discussion in defendant's book of the subjects of Writ of Entry, Forcible Entry and Detainer, and Trespass to Try Title, does not involve any presumption of piracy by Mr. Clark in the treatment of those subjects. See *Drone*, Copyr. 394, and cases cited in note, particularly *Jarrold v. Houlston*, 3 Kay & J. 708; *Banks v. McDivitt*, Fed. Cas. No. 961, 13 Blatchf. 163; *Simms v. Stanton*, 75 Fed. 6. It would have been proper for Mr. Clark, in this connection, to have checked defendant's book with that of plaintiff for omitted cases, if he had seen fit to do so, provided he had subsequently verified these citations with the original reports. See *Drone*, Copyr. 397, note 1; *West Pub. Co. v. Lawyers' Co-op. Pub. Co.*, 64 Fed. 360; *Simms v. Stanton*, 75 Fed. 6. Checking of this character is held to be legitimate, even in the case of rival directories. *Drone*, Copyr. 396. Mr. Clark states that he did not look through plaintiff's book for omitted citations, although he admits that he

may "have found a case here and there" in his incidental examination of the book. This statement is strikingly confirmed by the fact that defendant's book does not cite the case of *Hannay v. Smurthwaite*, 69 Law T. (N. S.) 677, which is reported in full on pages 445-448 of plaintiff's book; also by the fact that, out of 4,045 cases cited in defendant's book, only 174 of said cases are to be found in plaintiff's book, exclusive of the 86 cases cited in Stephen's notes; also, by the great variation in the form of these citations, as illustrated by the several exhibits attached to the affidavits of Mr. Clark and Mr. Fisher.

Citation of the Same Cases.

It is true that one or more cases cited in the second edition of defendant's book to specific propositions are likewise cited in plaintiff's book to similar propositions. It is obvious, however, that the propositions discussed in the two books must of necessity be more or less identical in their character, and must be supported by the same cases, where the compilers of both books are dealing with a common subject, and drawing their authorities from a common source. In view of the fact that the defendant cites twice as many cases as the plaintiff, it is surprising that only 174 of these cases, exclusive of the cases in Stephen's notes, are common to both books. On the other hand, nearly 400 cases cited in plaintiff's book are to be found in the first edition of defendant's book.

Use of Same Language.

It is true, also, in certain instances, that language found in plaintiff's book is reproduced, in substance or in fact, in defendant's book. This language, however, will be found upon examination to have its origin in every instance in some source from which it was copied by the plaintiff and the defendant. Thus, for instance, the affidavit of Mr. Andrews calls attention to a note in plaintiff's book (page 139) which is reproduced on page 161 of defendant's book. He states that this "is a note prepared by affiant," but, as a matter of fact, it is a copy of the syllabus to the case of *Greer v. Young*, originally written by the defendant, and published in 11 N. E. 167. The defendant cites the *Northeastern Reporter* in this connection, but the plaintiff fails to do so. It is shown by the affidavit of Mr. Fisher that specific cases cited in the first edition of defendant's book to given propositions are subsequently reproduced in plaintiff's book in discussing similar propositions; also, that there is in certain instances some similarity or absolute identity in the language used in these two books. The illustrations given by Mr. Fisher do not exhaust the existing identities between the two books, and are merely presented for the purpose of showing that the plaintiff, in dealing with a common topic and working from a common source, could not, any more than the defendant, avoid producing results that were more or less similar.

Common Errors.

It is true that there are some errors in the spelling or paging of cases cited in Andrews which have been reproduced in the second edition of Shipman. These errors are listed and explained on pages 19-30 of this brief.¹ It appears from an examination of this list that several of these alleged errors are not errors in fact. In several instances the alleged error consists in giving the page of the report where the point is discussed, or the opinion of the court begins. The errors in spelling are usually trivial in their character,—such, for instance, as substituting "m" for "n"; spelling a name with two "t's" instead of one, or with one "l" instead of two. In several instances these errors occur in citing the original cases found in Stephen's notes. In other instances they can be traced back to Chitty on Pleading, or some other original source. Similar errors are to be found in the first edition of defendant's book, and have been subsequently reproduced in plaintiff's book. In some instances these errors are to be found in both the first and second editions of defendant's book and in plaintiff's book. Many errors are also to be found in plaintiff's book which have not been followed in the second edition of defendant's book. In one or two instances two or more errors found in a single note of plaintiff's book are reproduced in a single note of defendant's book. Thus, in note 1,

¹Reproduced in the note at end of the opinion herein.

p. 386, of plaintiff's book, are found four errors which are reproduced in note 24, p. 456, of defendant's book. The specific errors are, with one exception, trivial in character; and the plaintiff cites in the same note seven cases not cited by the defendant, while the defendant cites in the corresponding note ten cases which are not cited by the plaintiff. The natural inference would seem to be that these errors were derived from a common source. It is hardly to be presumed that plaintiff's editor, who claims to be a careful and experienced compiler, would have made so many original errors in a single short note. If it is assumed that these errors were originally made by the plaintiff and subsequently copied by the defendant, then it is fair to presume that the defendant subsequently verified the propositions of law supported by the cases, but failed to correct the spelling and paging of the citations. In this connection it must be borne in mind that all these alleged errors are purely clerical in their character, and that the citations were sufficiently definite to guide an investigator to the cases cited; also, that the cases cited support the legal propositions to which they are cited. In one instance it is claimed that this is not the case, but an examination of the authority cited proves otherwise.* It is evident that neither Mr. Andrews nor Mr. Clark gave close attention to the clerical accuracy of their citations. Their attention was concentrated on the propositions of law which they were investigating, and they did not take time to consider whether "Panton" should be spelled with an "e" or an "a," or whether the words "and Marine" should or should not be included in the title of the "Clay Fire and Marine Insurance Company." The verification of such matters is purely clerical, and is usually delegated to competent experts after the manuscript is completed, when such verification is deemed material. In this instance the defendant did not consider that such verification was material; taking it for granted, as the result proves, that Mr. Clark's citations would be substantially correct, in view of the fact that he would necessarily examine every case which he cited, in order to determine whether it would support the proposition to which he proposed to cite it. If the defendant had merely copied the citations from plaintiff's book, as is charged, the defendant would naturally, and as a mere ordinary precaution, have clerically verified all the citations, in order to conceal the fact of copying. *Banks v. McDivitt*, Fed. Cas. No. 961. A case of this kind must be distinguished from that of a directory, where the correct spelling of the name and correct number of the place of residence is the ultimate and essential fact. The reproduction of such errors in a competing directory necessarily creates a presumption of copying. In such cases, however, this presumption is fortified not merely by clerical errors, but by the reproduction "of names of persons who never existed," and "of names of deceased persons," or other conclusive errors of fact. *Publishing Co. v. Keller*, 30 Fed. 772, 774. The question is, in the present instance, were the cases cited examined by the subsequent compiler? And it is not to be presumed that they were not examined, if they can be found as cited, even though there are slight errors in the spelling of the names, or the pages given are not the pages on which the reports of the respective cases begin. *Lawrence v. Dana*, 15 Fed. Cas. 64. In such a case as this, which involves the question of dependent labor in the compilation of a legal treatise, those errors only are material which involve a misstatement of the points of law decided in the specific cases. *Callaghan v. Myers*, 9 Sup. Ct. 177, 128 U. S. 617; *West Pub. Co. v. Lawyers' Co-op. Pub. Co.*, 64 Fed. 360; *Drone, Copyr.* 428-430, note 2; *Simms v. Stanton*, 75 Fed. 6. If this view is not correct, then it is true that clerical errors of the character described, common to the first edition of *Shipman* and the book of plaintiff, show that the plaintiff made a piratical use of the first edition of defendant's book in the preparation of *Andrews' Pleading* which he now claims is infringed by the second edition of *Shipman's Pleading*. *Banks v. McDivitt*, Fed. Cas. No. 961.

Segregation of Notes Alleged to Infringe.

If it be held that the common errors found in one or more of the notes in defendant's book establish the fact that this note or notes were copied from plaintiff's book, then the injunction must be restricted, in any event, to said

*See instance No. 12 in note at end of case.

note or notes. This is not a case in which the matter claimed to have been pirated cannot be readily separated from the original material in defendant's book. *Banks v. McDivitt*, Fed. Cas. No. 961; *West Pub. Co. v. Lawyers' Co-op. Pub. Co.*, 64 Fed. 360; *Lawrence v. Dana*, Fed. Cas. No. 8,136; *Farmer v. Elstner*, 33 Fed. 494.

Alleged Infringement Immaterial.

In the event of segregation there would be nothing to enjoin, under this hypothesis, but two or three short notes, which the defendant would be at liberty to reproduce upon correcting the spelling and paging in the cases cited. In such a case, where the infringement is immaterial, and fair use has been pleaded, the court will not grant an injunction. *Farmer v. Elstner*, 33 Fed. 494, 498; *Lawrence v. Dana*, Fed. Cas. No. 8,136. In *Farmer v. Elstner* the defendants did not plead fair use, the animus furandi was established, and some 11 pages of defendants' pamphlet were enjoined. But Judge Brown, now of the supreme court, added: "It is true there are about 20 extracts in the following 50 pages; but we think the court may take judicial notice of the fact that most, if not all, of them, are of facts which were not originally published by plaintiff, and which the defendants could easily, if they did not actually, obtain from other works readily accessible to the public." See, also, *Simms v. Stanton*, 75 Fed. 6.

LOCHREN, District Judge (orally). This is the first case of the kind that has come before me, and comes under a branch of the law with which I am not entirely familiar, so far as an examination of decided cases is concerned. The law provides, and properly, that, when an author has expended his time and talent upon a book, his property right in it is one which the law will protect against any one who attempts to avail himself of the results of the author's labor. This rule applies, as I understand the law, to books written by an author, of which the forms of expression are his own, and the result of his own research and thought, and also to compilations of the works of other parties upon a common subject. To that extent, there is no doubt that extracts from works of others, combined so as to add to the value of a book, become properly the subject of copyright. Many books, after having labor of that kind expended upon them, become much more valuable than before they were so treated. Lawyers are familiar with such books: *Saunders' Reports*, for instance, as they came from the hands of the author, were of little value until they were enriched by the notes of Serjeant Williams, when they became of great value to the profession. The same may be said of *Phillips on Evidence*, which was really a book of but little value as it was issued by the author, but when there was added to it *Cowen & Hill's* notes it became one of the most valuable works on the subject of Evidence published at that time. There is no doubt that the authors in these or similar cases are entitled to copyright to preserve to themselves the benefits resulting from their labors. The case of *Lawrence v. Dana* was referred to by counsel in their argument, from which I understand a new edition of *Wheaton's International Law* was annotated by Mr. Lawrence, and afterwards a later edition of the same was gotten out by Mr. Dana. It was claimed, and seems to have been established, that the latter used the labor and thought of Mr. Lawrence in aid of his own work, and it was held that Dana had infringed the copyright of Lawrence.

Now, in the case that we have before us, works upon Pleadings,—especially where each is a reproduction of the work of an older author (both of these books being a reproduction of the work of Stephen on Pleading, and professedly claiming to bring that work down to the present time), there is little room for original literary work. It is rather the work of an editor, compiling, in connection with the original work, new rules which have since grown up through the decisions of the courts, exceptions to the old rules, and notations as to things which have become obsolete in matters of practice, from changes in the practice of the courts. But, while this may be merely the work of an editor or compiler, there is no question that, in producing a work of this kind, such changes, additions, and explanations can be made and added as would make a book of far greater value than the original, and that such new matter would be the subject of copyright.

It seems that about the same time these two publishing houses, without any consultation, and without the knowledge of each other's intention, set about and acted upon substantially the same idea, to wit, putting upon the market the work of Mr. Stephen on Pleading, carried down to the present time, and that each employed its own men to prepare that work. The result of this employment was the first edition of Shipman by the defendant, and the edition by Mr. Andrews published by the plaintiff. Almost immediately after these two books came out, a new edition was commenced and prepared by Mr. Clark for the defendant. The complaint is that in the second edition Mr. Clark absorbed, or made illegal and improper use of, the work of the edition of Stephen which had been prepared by Andrews, as the plaintiff's book. There is no objection, and there could be none, to editions of this kind being issued by either of these publishing houses, and one company could not restrain the other from issuing a work of that kind; but neither would have the right to use the work and labor of the other. In this case it is claimed that the defendant did use and reproduce the work and labor of plaintiff's editor, Mr. Andrews.

It is admitted that the book issued by plaintiff was used by defendant's editor, to some extent, in preparing the second edition of defendant's book. It is also admitted, as I understand it, that, as far as the original text of Stephen is concerned, the same was cut, to a certain extent, from plaintiff's edition, and used as copy by defendant, but it is denied that any substantial use was made of Andrews' book any further than that. Of course, plaintiff could have no copyright upon this text of Stephen as it was embodied in plaintiff's book; and I do not understand that the use made of it by defendant, as I have described it, is complained of. It is also admitted by the affidavit of defendant's editor that he got the idea of adding to his work certain matters upon the subjects of Forcible Entry and Detainer, Writ of Entry, and Trespass to Try Title, which were subjects not treated of in the old treatise of Stephen, by perusing the plaintiff's book; and that it occurred to him, from seeing these subjects there treated of, that it would be well to have something

in his second edition upon those subjects. He says that he did thereupon insert in his second edition some subjects of the law and practice under those subheads. I do not understand that it is claimed that he had not a perfect right so to do. The mere fact that Mr. Andrews has added, to matters treated by Stephen, these other subheads, would not prevent any other publisher from taking the same course. But the latter would not have the right to reproduce or copy the matter which Mr. Andrews had inserted in his book,—to take it from that, and transfer and reproduce it in his own book. I do not understand there is any claim that he did so. There have been no resemblances pointed out to me, indicating that there was such a transfer from one book to the other. It is true, the idea of treating these subjects was obtained from Mr. Andrews' book, but I do not think it is claimed that the defendant appropriated any of the treatment of those subjects made by Mr. Andrews; that is, that he took any of such matter and inserted it in his own book.

The matter comes down really to the question of taking the authorities in one book, and inserting them in the other. No case has been pointed out to me, and I do not think one exists, as far as I have been able to observe by an examination of the books, where sentences have been transferred from one book to the other; but complaint is made that, on the same subjects, references to text-books and reports were taken from plaintiff's book and inserted in defendant's second edition, and that this is an invasion of the plaintiff's copyright. It would certainly be impossible, in treating of the different rules of pleading, and the exceptions to those rules, their extent and limitation, not to express the same ideas, though probably in different language; for the same ideas would have to be expressed in both books, especially where the same original work was taken as a basis of those two books. That could not be avoided. The authorities upon which these rules and the exceptions and limitations rest would naturally be the same, and different authors treating the subject would ordinarily refer to the same authorities, if they made the same research. Therefore it is not a matter of surprise to find the same authorities cited to substantially the same proposition. It is claimed, on account of the fact, which is doubtless true, that about a dozen of these authorities occur in which the same errors appear in both of these books, that these citations were copied, without any examination of the original authorities, from Mr. Andrews' to the defendant's book. In the course of the argument, my attention has been called to many more of such cases, in which it appears that there must have been further research made by Mr. Clark, even if he obtained these references from the plaintiff's book, for the reason that in many of these instances he quotes an additional book where the citation may be found. For instance, where Mr. Andrews' book gives the American Decisions as his authority, Mr. Clark gives the citation in the original reports where the case may be found. There is also another class of cases where the same reports appear in the series published by the West Publishing Company, such as the Northeastern and Northwestern and other Reporters, and in many of these cases Mr. Clark has added to the original reference the page and

volume of these Reporters where the case may be found. So there is this evidence, as far as it goes, that those cases were not just simply copied from Mr. Andrews' work, but that there was further work and labor expended upon them by Mr. Clark. How far, perhaps, we cannot tell, but certainly to the extent of ascertaining and showing whether these cases in the original reports were in other publications, or in the West series, and of making the notations accordingly. The number of cases in which it is claimed there is proof that these authorities were taken from Mr. Andrews' book becomes small. In some of them, of course, the mistakes may have been obtained by reference to another authority in which the same mistake occurs; and, as suggested, they may have been taken from Mr. Andrews' book, and, after being examined in the original reports, the mistake may have been overlooked and not corrected.

The question, upon the whole case, is whether there has been such an appropriation of the work of Mr. Andrews as to injure the plaintiff in this case to such an extent that the sale of defendant's book should be restrained by an injunction. After full and careful consideration of the whole case, I do not come to that conclusion. It seems to me that this injunction ought not to be granted, and the motion will be denied.

List of Errors Referred to in Andrews' Affidavit.

The following errors, common to both Andrews' Pleading and the Second Edition of Shipman's Pleading, are referred to in the affidavit of Mr. Andrews. Each error is followed by an explanation in behalf of the defendant. The explanation in each instance is based upon the affidavit of Mr. Clark, together with such additional suggestions as seem pertinent upon a further comparison of the books in controversy.

1.

Davis v. Easley, 18 Ill. 192

Ship. 111, n. 305

for

Davis v. Easley, 18 Ill. 192

Andr. 58, n. 6

Error. None.

Explanation. The report of the case begins on page 192.
See Clark's affidavit, page 9.

2.

Morris v. Graves

Ship. 164, n. 43

for

Norris v. Graves

Andr. 143, n. 3

Error. Morris for Norris.

Explanation. Andrews cites *Oates v. Clendenard*, 87 Ala. 734.
Shipman cites *Oates v. Clendenard*, 87 Ala. 734, 6 South. 332.
Shipman cites three cases not cited by Andrews.
Andrews cites twenty cases not cited by Shipman.
See Clark's affidavit, 13.

3.

- Roberts v. Moore, 5 Term R. 488 Ship. 165, n. 53
 for
 Roberts v. Moon, 5 Term R. 487 Andr. 189, n. 1
- Error. *Moore* for *Moon*.
 Explanation. Correct citation is page 487.
 Shipman cites *three* cases not cited by Andrews.
 Andrews cites *six* cases not cited by Shipman.
 See Clark's affidavit, 18.

4.

- Whittaker v. Izod, 2 Taunt. 114 Ship. 174, n. 75
 for
 Whitaker v. Izod, 2 Taunt. 115 Andr. 160, n. 4
- Errors. 114 for 115.
 "tt" for "t."
- Explanation. 2 Taunt. cites 114 in the index.
 2 Taunt. cites 114 in the table of cases.
 2 Archb. Prac. (1838) 170, cites 114.
 Archb. Prac. (1840) 1023, cites *Whittaker*.
 See Clark's affidavit, 9.

5.

- Hazen v. Lundy, 83 Ill. 241 Ship. 259, n. 2
 for
 Hazen v. Pierson, 83 Ill. 241 Andr. 150, n. 1
- Error. *Lundy* for *Pierson*.
 Explanation. Andrews cites *Shaw v. Redmond*, 11 S. & R. 277.
 Shipman cites *Shaw v. Redmond*, 11 Serg. & R. (Pa.) 27.
 The correct page is 27.
 Andrews cites *Everett v. DeGross*, 1 Cow. 213.
 Shipman cites *Everitt v. DeGross*, 1 Cow. (N. Y.) 213.
 Correct citation should be *Everitt v. DeGross*, 1 Cow. (N. Y.) 212.
 Andrews cites *Whiting v. Cochran*, 9 Mass. 533.
 Shipman cites *Whiting v. Cochran*, 9 Mass. 532.
 The report of *Whiting v. Cochran* begins on page 531.
 Andrews cites *Gillespie v. Smith*, 29 Ill. 478.
 Shipman cites *Gillespie v. Smith*, 29 Ill. 476.
 Gillespie v. Smith is the correct title.
 Gillespie v. Smith begins on page 473.
 See Clark's affidavit, 14.

6.

- Herlakendew's Case Ship. 321, n. 164, 165
 for
 Herlakenden's Case Andr. 275, n. (z) & (a)
- Error. "u" for "n."
 Explanation. Cited from the original note of Stephen.
 Andrews cites (n. 1, page 275) *four* cases not cited by Shipman.
 See Clark's affidavit, 11.

7.

- Arlett v. Ellis, 7 Taunt. 346 Ship. 344, n. 24
 for
 Arlett v. Ellis, 7 Barn. & C. 346 Andr. 296, n. 1
- Error. "*Taunt.*" for "*Barn. & C.*"
 Explanation. Chitty, 567, n. (y) cites *Taunt.*
 2 Saund. Pl. & Ev. part I, 659, cites *Taunt.*
 Shipman cites *Osborne v. Rogers*, 1 Saund. 267; Id. 268, n. 1; Id. 269, n. 2.
 Andrews (n. y) only cites 1 Saund. 268, n. 1, 269, n. 2.
 Shipman cites *seven* cases not cited by Andrews.
 Andrews cites *one* case not cited by Shipman.
 See Clark's affidavit, 9.

8.

Penton v. Holland, 17 Johns. 92

Ship. 355, n. 13

for

Panton v. Holland, 17 Johns. 92

Andr. 305, n. 1

Error.

"e" for "a."

Explanation. Shipman cites *Executors of Grenelife*, Dyer, 42b.
 Andrews (n. d) cites *Executors of Grenelife*, Dyer, 42b.
 Correct citation is *Executors of Grenelife*, Dyer, 42a.
 Andrews cites *Comstock v. McEvoy*, 52 Mich. 324.
 Shipman cites *Comstock v. McEvoy*, 52 Mich. 324, 17 N. W. 931.
 Andrews cites six cases not cited by Shipman.
 Cited *Patten v. Hollam* in 48 Barb. (N. Y.) 409.
 Cited *Panton v. Holland* in 4 Rob. (N. Y.) 467.
 Cited *Panton v. Holland* in 45 Mo. 372.
 See Clark's affidavit, 10.

9.

Gaffney v. Colwell, 6 Hill (N. Y.) 567

Ship. 357, n. 24

for

Gaffney v. Colwill, 6 Hill (N. Y.) 567

Andr. 307, n. 2

Error.

Colwell for *Colwill*.

Explanation. Cited to a different legal proposition.
 Shipman cites five cases not cited by Andrews.
 Andrews cites three cases not cited by Shipman.
 See Clark's affidavit, 11.

10.

Ferguson v. Meredith, 1 Wall. 25

Ship. 357, n. 24

for

Clearwater v. Meredith, 1 Wall. 25

Andr. 307, n. 2

Error.

Ferguson for *Clearwater*.

Explanation. Cited *Clearwater* in the Co-operative Edition of the Supreme Court Reports. See Digest, 1209, and indexed citations.
 Shipman cites *Robinson v. Rayley*, 1 Burrows, 318.
 Andrews (n. 1) cites 1 Burr. 320.
 Shipman cites six cases not cited by Andrews.
 Andrews cites three cases not cited by Shipman.
 See Clark's affidavit, 10.

11.

Watris v. Pierce, 36 N. H. 236

Ship. 374, n. 68

for

Watriss v. Pierce, 36 N. H. 232

Andr. 318, n. 1

Error.

236 for 232.

Explanation. Cited *Watris* in Shipman, *Watriss* in Andrews.
 Report commences on page 232.
 Opinion commences on page 236.
 Cited 236 in Shipman, *First Edition*, 265.
 Cited 236 in Shipman, *Second Edition*, 374, 456.
 Cited 232 in Shipman, *Second Edition*, 370, 424.
 Cited 236 in Chitty (16th Ed.) 286, 566, 588, 680.
 Cited 236 in 18 Amer. & Eng. Encyclopedia of Law, 562, 564, 572.
 Andrews cites four cases not cited by Shipman.
 See Clark's affidavit, 10.

12.

Milliken v. Jones, 77 Ill. 373

Ship. 374, n. 68

for

Milluktn v. Jones, 77 Ill. 373

Andr. 313, n. 1

Error.

Milliken for *Milluktn*.

Explanation.

Andrews cites *four* cases not cited by Shipman.

Andrews alleges that the case does not support the text. The text is to the effect that "it is necessary, as we have seen, to obtain the leave of the court to make use of several matters of defense, the application for leave being addressed to the discretion of the court."

The second paragraph of the syllabus to the case cited reads as follows.

"2. Where a defendant, after filing the general issue, and the continuance of the cause, discovers that he has a substantial defense not admissible under the general issue, he should, at the earliest convenient day, ask for special leave of the court to file an additional plea, so as not to take the plaintiff by surprise or delay the business of the court."

This case will be found digested in Kinney's Illinois Digest, pp. 2228, 2229, 2232.

See Clark's affidavit, 10.

13.

Clay Fire Insurance Company v. Wusterhausen for

Ship. 374, n. 68

Clay Fire and Marine Insurance Company v. Wusterhausen

Andr. 318, n. 1

Error.

"And Marine" omitted.

Explanation.

Shipman, 336, includes "and marine."

Andrews, 293, omits "and marine."

See Clark's affidavit, 12.

14.

Childs v. Wescott

Ship. 411, n. 96

for

Childes v. Wescot

Andr. 350, n. m

Error.

Childs for *Childes*.*Wescott* for *Wescot*.

Explanation.

Cited from the original note of Stephen.

Cited *Childs v. Wescot* in 2 Cro. Eliz. 470.Cited *Childes v. Wescot* in 2 Cro. Eliz. 482.Cited *Child v. Westcot* in 14 Vin. Abr. 479.Cited *Child v. Westcoat* in 23 Vin. Abr. table of cases.Cited *Childes v. Westcot* in Stephen (Heard) 814.Cited *Childs v. Westcot* in Stephen (Heard) table of cases.

See Clark's affidavit, 12.

15.

Wyat v. Alaud, 1 Salk. 324

Ship. 449, n. 1; 450, n. 5

for

Wyat v. Alaud, 1 Salk. 324

Andr. 381, n. e; 382, n. h

Error.

Alaud for *Alaud*.

Explanation.

Cited from the original note of Stephen.

Shipman (449) cites *Siblay v. Brown*, 4 Pick. (Mass.) 137.Andrews (381, n. 1) cites *Libbey v. Brown*, 4 Pick. 137.The case should be cited *Sibley v. Brown*, 4 Pick. (Mass.) 132.Shipman (450, n. 5) cites *Sibley v. Brown*.Shipman (450, n. 6) cites *Rex v. Stevens*, 5 East, 255.Andrews (382, n. h) cites *King v. Stevens*.

See Clark's affidavit, 10.

16.

Mauser's Case, 2 Coke, 3

for

Manser's Case, 2 Coke, 3

Ship.	{ 450, n. 7
	{ 451, n. 9
Andr.	388, n. 1

Error.

Explanation.

Mauser for *Manser*.

Cited from the original note of Stephen.

Shipman cites (n. 7, 450) *Dovaston v. Payne*, 2 H. Bl. 530.Andrews (382) cites *Devaston v. Payne*.Correct citation is *Dovaston v. Payne*, 2 H. Bl. 537.

See Clark's affidavit, 11.

17.

Spencer v. Southwick, 9 Johns. 313

for

Spencer v. Southwick, 9 Johns. 314

Ship. 456, n. 24

Andr. 386, n. 1

Error.

313 for 314.

Explanation.

Cited 313 Chitty, 566, n. (f).

Shipman cites *nine* cases not cited by Andrews.

See Clark's affidavit, 13.

18.

Mishner v. Granger, 4 Gilm. (Ill.) 78

for

Misner v. Granger, 4 Gilm. (Ill.) 69

Ship. 456, n. 24

Andr. 386, n. 1

Errors.

78 for 69.

Mishner for *Misner*.

Explanation.

Report commences on page 69.

Opinion commences on page 73.

Discussion of the point of pleading commences on page 72.

Shipman cites *Watriss v. Pierce*, 36 N. H. 236.Andrews does not cite *Watriss v. Pierce*.Shipman cites *ten* cases not cited by Andrews.Andrews cites *seven* cases not cited by Shipman.

See Clark's affidavit, 13.

19.

Spruck v. Forsythe, 40 Ill. 440

for

Spurck v. Forsyth, 40 Ill. 438

Ship. 456, n. 24

Andr. 386, n. 1

Errors.

440 for 438.

Spruck for *Spurck*.*Forsythe* for *Forsyth*.

Explanation.

Report commences on page 438.

Opinion commences on page 439.

Discussion of the point of pleading commences on page 440.

Shipman cites *Watriss v. Pierce*, 36 N. H. 236.Andrews does not cite *Watriss v. Pierce*.Shipman cites *ten* cases not cited by Andrews.Andrews cites *seven* cases not cited by Shipman.

See Clark's affidavit, 13.

20.

Dyett v. Pendleton, 8 Conn. 728

for

Dyett v. Pendleton, 8 Cow. 728

Ship. 456, n. 24

Andr. 386, n. 1

Error.

Conn. for Cow.

Explanation.

Correct citation is 727.

Shipman cites *ten* cases not cited by Andrews.Andrews cites *seven* cases not cited by Shipman.

See Clark's affidavit, 13.

21.

Piercy v. Sabin, 10 Cal. 27
for

Ship. 499, n. 39

Piercy v. Sabin, 10 Cal. 22

Andr. 430, n. 8

Error.

27 for 22.

Explanation.

Report commences on page 22.

Opinion commences on page 23.

Discussion of the pleadings commences on page 27.

Cited 27 in *People v. McCumber*, 72 Am. Dec. 515.Andrews cites *People v. McCumber*, 72 Am. Dec. 515.Andrews (n. 1.) cites *Sade v. Drake*, Hob. 295.Shipman cites *Slade v. Drake*, Hob. 295.Citation should be *Slade v. Drake*.Andrews (n. 1.) cites *Smith v. Yeomans*, 1 Saund. 316.Shipman cites *Smith v. Yeomans*, 1 Saund. 316, 317.Andrews cites *three* cases not cited by Shipman.

See Clark's affidavit, 13.

AMERICAN SULPHITE PULP CO. V. HOWLAND FALLS PULP CO.¹

(Circuit Court of Appeals, First Circuit. April 16, 1897.)

No. 186.

1. PATENTS—PRIOR USE IN FOREIGN COUNTRY—KNOWLEDGE OF INVENTOR.

Where one claiming to have made an independent invention in this country received knowledge, before applying for a patent, of a prior use of the invention in a foreign country, such knowledge will not deprive him of the protection of the patent laws, if, before receiving the information, his idea had been so developed and applied as to constitute invention if expressed in a patent.

2. SAME.

An inventor working independently in this country conceived the idea of a lining for a wood-pulp "digester" composed of a homogeneous, cementitious mixture put on in a plastic state. He had discovered the acid-resisting force of such compositions as against highly-heated bisulphite liquor, consisting of lime, sulphurous acid, and water, and was experimenting with varying degrees of success with cements composed of various ingredients, including hydraulic cement and sand alone, and hydraulic cement with other ingredients, including silicate of soda and sand. With these mixtures he had put the discovery in operative form, so as to stand the test of the conditions of actual use, but had, perhaps, not discovered all the materials or compositions capable of performing the necessary function. While his invention was in this stage, and before application for a patent, he received knowledge of the use of a like invention in Europe. *Held*, that this knowledge did not deprive him of a right to a patent, and that he was entitled to claim, not only the composition with which he had successfully experimented, but also those which he described with sufficient clearness to be understood by persons skilled in the art, and such as would naturally develop, in the growth of the art, without invention. 70 Fed. 986, reversed.

3. SAME—FAILURE TO DISCLOSE INVENTION.

The silence of an inventor for more than a year after his experiments had reached a practical and operative stage *held* not to have prejudiced his right to a patent, where his silence resulted from a reasonable fear of losing control of the invention.

4. SAME—CONSTRUCTION OF CLAIMS—REFERENCE TO SPECIFICATIONS—WOOD-PULP DIGESTERS.

The specifications of a patent for a wood-pulp digester described "a continuous lining or coat, B, of acid-resisting material, applied in a plastic condition," which lining "is of the nature of a cement" composed "of any material or mixture of materials which is acid-resisting, and capable of being made plastic and adhesive." "A convenient material for the purpose

¹ Rehearing pending.

is commercial cement,—preferably, Portland,” etc. “Other cement-like materials or mixtures having similar properties or characteristics may be used, such as the ordinary cement mixtures, sand and Portland cement, sand and tar, and the like.” The claims were for “the improved pulp digester herein described,” having “a continuous lining or coat, B, of cement, as described,” “applied to the interior of the said shell for the purpose set forth.” *Held*, that the use of the word “cement” did not limit the claim to ordinary hydraulic cement, or to the particular cementitious mixtures which the inventor had chemically and commercially isolated as individuals, but that the claims must be construed in connection with the references therein to the specifications as including all cementitious mixtures which ordinarily skilled, practical chemists might be expected to find as answering the described conditions, or such as would naturally develop in the growth of the art without invention. 70 Fed. 986, reversed.

5. SAME.

The Russell reissue, No. 11,282 (original No. 445,235), for improvements in wood-pulp digesters, consisting in lining the same with a continuous coating of cementitious composition, construed, and *held* valid and infringed. 70 Fed. 986, reversed.

Appeal from the Circuit Court of the United States for the District of Maine.

This was a bill in equity by the American Sulphite Pulp Company against the Howland Falls Pulp Company for alleged infringement of reissue patent No. 11,282 (original No. 445,235), for an improvement in wood-pulp digesters. The circuit court dismissed the bill (70 Fed. 986), and the complainant has appealed.

Causten Brown and Alex. P. Browne, for appellant.

John L. S. Roberts, for appellee.

Before COLT, Circuit Judge, and WEBB and ALDRICH, District Judges.

ALDRICH, District Judge. This cause involves the validity of a patent for an invention relating to improvements in the construction of vessels ordinarily called “digesters,” and, as a leading feature of the improved construction, provides for what the complainant calls a “protective lining” for the shells thereof. These digesters are used in the sulphite wood-pulp process, and may be either stationary or rotary, and are constructed with an outer shell of iron. The structures are large and expensive, varying in size (sometimes 15 feet in diameter by 30 in length), and are designed to receive blocks of wood and wood substances to be subjected to the sulphite process; and the metal shell, being corrodible by the acids and gas used in the process of cooking or dissolving the wood fiber, requires an interior protective lining. It is manifest—indeed, it is conceded—that the practical workings of the sulphite process had disclosed a fundamental and imperative necessity for some means of protection against the hazard and explosive dangers incident to the corroding influences and the great pressure, under highly-heated conditions, of bisulphite acid solutions necessarily involved in the process for dissolving the wood substances; and in this connection we cannot do better than quote from the opinion of the circuit court on this phase of the case, where it is said:

“It is very evident that the art to which the patent relates had been for a long time urgent for a practical lining for the iron or steel shells of digesters, which would be reasonably economical, and that the urgency had been so

great as to have become a fundamental necessity. For several years no one had been able to respond; so that, under the circumstances, whoever should solve the whole problem, or should make advances of practical use in that direction, whether by adoption from other arts or otherwise, would have been entitled to be held an inventor, both by the common judgment and by the courts. Mitscherlich accomplished this in part, but he always had a lead lining in direct juxtaposition with the shell, and his interior material was not continuous. The Russell device displaced the lead, and furnished a continuous and homogeneous lining."

The prior state of the art, the anticipatory character of American and foreign patents, questions of fraud in reissue in respect to the patent in suit, questions as to prior public use in the United States and in foreign countries, and finally the question whether the problem presented to the patentee involved patentable novelty, are not raised by the assignment of errors, and are not before us. These questions were all resolved in favor of the patent in suit by the circuit court, and thus our investigations are narrowed to the question whether George Fred Russell's conception and discovery in August, 1889, at the time he received information from Cologne, were so far reduced to operation and practical use, or, in other words, had so far generated an idea of practically operative means, as to become a discovery or an invention entitled to patentable protection; and, if the problem of invention is determined favorably to the patent, then the question as to the validity and meaning of the claims and specification, and the question of infringement, will require our consideration. The claims are stated in the reissue patent as follows:

"I claim: (1) The improved pulp digester herein described, having an outer shell, A, and a continuous lining or coat, B, of cement, as described, applied to the interior of the said shell, for the purpose set forth. (2) The improved pulp digester herein described, having an outer shell, A, a continuous lining or coat, B, of cement, substantially as described, applied to the interior of the said shell, and an interior lining of tiles, C, all substantially as set forth."

The complainant contends for a broad construction of his claims, and that his device and process, under reasonable construction—

"Consists in an improved pulp digester, in which the metal shell, corrodible by the acid solution employed, is protected against its attacks by a continuous coat or lining of cement of proper thickness applied upon the interior of the shell; the term 'cement' including any material or mixture of materials which resists the acid solution under high heat and pressure, and which is capable of being made plastic and adhesive to the digester shell, and so compact as, in practice, to prevent the acid solution from reaching the iron shell in consequence of the high steam pressure used in the process."

On the other hand, the defendant in error stands here, as in the court below, upon the defense that, while Russell was experimenting in that direction, he had made no advance in the art at the time he received information from Cologne that Wenzel, an Austrian, was successfully lining digesters with hydraulic cement and sand. The defendant does not urge that the Russell claims should be limited to hydraulic cement, and it may be here remarked that the learned counsel on both sides agree, in argument, that the construction limiting Russell's claims to hydraulic cement is impossible, and cannot stand. The scope of the claims, however, will be considered later. The position of counsel in argument is given in this connection for the purpose of better understanding the questions which we are to consider.

The patentee claims a broad discovery, to become operative by applying, without joints or seams, plastic materials in the nature of cement, which he says he had sufficiently described, while the defendant, admitting that Russell had conceived the idea of a homogeneous protective lining, insists that he had made no invention, that he had not advanced beyond the field of experiment, had not discovered the material necessary to reduce his conception to practice, and that his claims, covering all materials or mixtures of materials which will serve as a one-piece or continuous lining, are void. There would seem to be no doubt, upon the evidence, that Wilhelm Wenzel had conceived the idea of a continuous digester lining, and that he was using a composition of cement and sand successfully for that purpose, before Russell's discovery. Wenzel covered his device as early as May, 1888, by a secret Austro-Hungarian patent for an acid-resisting protective material, and on August 15, 1889, secured a Swedish patent covering the same device, which was not, however, published until November, 1889. On the 30th of July, 1889, Mr. Springer, who was connected with the Russell Paper Company, and then traveling abroad, sent a communication to William A. Russell from Cologne, in which he said, in speaking of digesters:

"I have found a cement lining which, if it turns out to be what it now appears, is the best thing yet. It is simply a cement and is put on as one would plaster a wall."

This information was conveyed to the patentee, Russell, early in August in the same year. It therefore becomes necessary to ascertain how far Russell had progressed in his discovery and invention, and whether he had so far advanced the art at the time he received knowledge of the Springer letter from Cologne as to entitle him to protection as an inventor. The circuit court approached this phase of the case with the observation that while Russell "must have had before that time a clear and positive conception of the substance of what was afterwards patented," where the "substantial question," as in the case at bar, "is whether the patentee, Russell, invented at all, we do not deem it in fact necessary that the complainant should prove that the alleged invention was put into a practical, concrete, or visible form before the patentee received the information contained in Springer's letter." Holding this view, the circuit court, under its construction limiting the claims to hydraulic cement, found and held that Russell had not solved the problem of invention, and dismissed the bill. We are inclined to consider the question of invention here presented upon lines perhaps less favorable to the patentee than those drawn by the circuit court, and to determine his rights with reference to the rules which would govern questions of patentability. Therefore, had his advance in the art at the time he received information of the Wenzel experiments reached such a stage as would entitle it to protection as involving invention, if expressed in letters patent? If so, the information from Cologne would not deprive him of the fruits of his discovery. At least, a higher advance in the art is not required to protect him against information of this character than would be required to protect his discovery, as an invention described in a patent, under the rules regulating patentability and nonpatent-

ability. So it becomes necessary to inquire as to what Russell had done at the time he received information of the experiments and developments by Wenzel, and this, as all agree, could not have been earlier than the first week in August, 1889. Now, what was Russell's conception, and what had he done to demonstrate the practicability of his discovery before August, 1889? Had he conceived the idea of such a structural lining before he received information from Cologne, and had he so far demonstrated the practicability of his conception by devising and employing ideas and means for adapting it to the required use as to entitle him to the position of inventor? Or did he borrow the discovery from Wenzel? By this test the patent must stand or fall. It is clearly established by the uncontroverted evidence that Russell, nearly a year prior to the Cologne letter, having observed the imperfect workings and the dangerous conditions incident to a lining composed of different materials with leaded and cemented joints, conceived the idea of a seamless, homogeneous lining, to be composed of materials from which brick, tile, and artificial stone are made, which should be acid-resisting, and so far adhesive that it would attach to the shell and become a part of the structural formation, and so far cohesive, expansive, and resilient as to respond to the expansive and retractive force of the iron shell when subjected to the varying conditions of heat and cold, as was necessary in the process of cooking and curing the wood. This was unquestionably a step in the direction of invention, and one which contemplated an important and useful advance in the art. Having conceived the idea of such a structural lining so adhering to the shell as to become a part of the main structure, he entered the field of experiment for the purpose of discovering the forces in nature which would respond to the required purposes, and be equal to the test to which the structural lining, in practical operation, would be subjected. The invention did not start with a discovery of a force in nature, or a particular ingredient, but with the idea of a homogeneous structural lining, and the search for material was for the discovery of means for reducing the inventive idea to practical utility; and in this line he had little digesters constructed, similar to those used in the actual process; made something like 50 experiments and tests with briquetts, pipe retorts, and little digesters, with various compositions in the nature of cement, including compositions of sand, pitch, and tar, tar and sand with cement and without, tar and sand with clay and asbestos, sand and silicate of soda and cement, and others of sand and cement alone,—some of the compositions standing the test imperfectly, others fairly well, but sand and cement being the most satisfactory. Having conceived the idea of a homogeneous lining, and having demonstrated the adaptation and utility of cementitious, adhesive material or mixtures in plastic form for such purposes under digester conditions, should he have stopped on hearing of the Wenzel experiments, or was he entitled to perfect the art in a commercial sense, and secure the fruits of his conception and invention by letters patent? At the time the information came from Cologne, his homogeneous lining, to be composed of acid-resisting, adhesive, and cohesive mixtures in the nature of cement, was a foregone conclusion. That was his invention. That advanced the art. It had oc-

curred to Russell, while experimenting for suitable cement materials to take the place of lead in the joints of the linings, that, if he could succeed in finding a suitable cement for such purposes, he could make the whole lining of the same material; and months before the Cologne letter, while reasoning from the fact that, if, as was known, artificial stone, brick, and tile would withstand the digester conditions of heat, pressure, and acid, the materials from which they were made would stand the same test, he had conceived the idea of a homogeneous lining whereby the artificial stone and brick, with dangerous cemented and leaded joints, were to be supplanted by a continuous wall composed of cementitious ingredients or materials from which artificial stone, brick, and tile were made, applied in a plastic state. It should be observed at this point that the sulphite process cannot be conducted in an open vessel, for the reason that the bisulphite liquor cannot be raised under such conditions to the required high degree of temperature without losing the sulphurous gas which is the sole or principal agent in effecting the required change; and, while continuous, homogeneous linings were known in the arts, no method had been suggested or devised for adapting such conditions to digesters used in the sulphite process. This conception, therefore, of a one-piece structural lining for such purposes, was new; and Russell's experiments had already demonstrated the fact, contrary to the belief of the scientific world, that cement mixtures, which were known not to resist the effects of cold sulphite liquor, would stand the test of such liquors under conditions of high heat and pressure. He had discovered that the thick inner coating of cementitious mixtures, adhering to and protecting the outer shell somewhat from intensity of heat and expansion, possessed sufficient expansibility and contractibility to withstand the maximum expansion and contraction of the iron under such changed and protected conditions. He had discovered that his continuous lining composed of cementitious material applied in a plastic state, when hardened, would stand against the hot sulphite liquor; that it adhered to and protected the iron from the corroding influences of the acids; that its cohesive, expanding, and resilient qualities would withstand the strains resulting from the expansion and contraction of the iron shell under the protective conditions incident to the thick homogeneous wall or lining, when subjected to the degree of heat and pressure necessarily employed in the sulphite process. He had discovered a new property or force in matter (Poillon v. Schmidt, 6 Blatchf. 299, Fed. Cas. No. 11,241; Smith v. Ely, 5 McLean, 76, Fed. Cas. No. 13,043; Parker v. Hulme, 1 Fish. Pat. Cas. 44, Fed. Cas. No. 10,740; LeRoy v. Tatham, 14 How. 156, 175; Collar Co. v. White, 2 Ban. & A. 60, Fed. Cas. No. 14,396; Ansonia Brass & Copper Co. v. Electrical Supply Co., 144 U. S. 11, 12 Sup. Ct. 601; Rob. Pat. § 101), and had made practical application of such newly-discovered force to an object. His operative mode was to apply the matter containing the newly-discovered force in plastic form to his object, and his object was a homogeneous lining covering the inner metal walls of the digester shell.

Having conceived the idea of a cementitious lining, and having newly discovered the acid-resisting force of cementitious compositions as against highly-heated bisulphite liquor consisting of lime, sulphur-

ous acid, and water, he was experimenting in the field of cementitious matter, including hydraulic cement and sand alone, and hydraulic cement with other ingredients, including silicate of soda and sand. He had discovered the fact of this force (Telephone Cases, 126 U. S. 1, 534, 536, 8 Sup. Ct. 778), and had applied it to the inner walls of shells under conditions substantially like the conditions existing in the practical sulphite process, and had tested its adhesive, cohesive, and acid-resisting power, and, although not necessary in order to secure a patent for his conception, his discovery, and his process (Telephone Cases), was experimenting with various materials in the nature of cement, all of which would do the work more or less successfully, for the purpose of "bringing his art to the highest degree of perfection" in the mechanical and commercial sense. At the time in question, Russell had conceived and put in form a continuous lining more distinctively homogeneous than that of the metal bathtub (Steel-Clad Bath Co. v. Mayor, 77 Fed. 736); for in his conception and practice the lining material, applied in a plastic form, in the hardening process, under heat and pressure, closely adhered to, and became a part of, the outer structure or shell itself. He had discovered acid-resisting forces in matter under new conditions. He had made successful experiments, and put in operative form his newly-discovered force in ingredients and in compositions which stood the test of digester conditions. He had not, perhaps, discovered all the materials, or all the matter, or all the compositions which contained this force, and which were capable of performing the necessary function, but as to such as he had discovered and put in operative form, and such as he could describe with reasonable clearness, he was entitled to protection, and these include sand, silicate of soda, and cement, sand, pitch, and tar, and hydraulic cement and sand as well. Some of these compositions stood the test better, made better linings, and did the work more successfully, than others; and as to such as he used, such as he described, and such as those skilled in the art could understand, he is entitled to protection. At this time he had advanced the art in the sulphite-process line not in a slight degree, but in a high degree. He was an inventor not in a narrow sense, but in a broad sense, and as such was entitled to a patent covering his homogeneous structural lining, his adaptation of the forces in matter which he had discovered, and the cementitious compositions in the nature of cement with which he had successfully experimented, and which he had adapted to the required conditions and use, as well as those which he described with sufficient clearness to be understood by persons skilled in the art, and such as would naturally develop, in the growth of the art, without invention. We look at this as an invention of an improved structure, with a devised and described process for creating it and putting it in operation in connection with a new and pressing emergency, and not for any particular ingredient or composition. It is true, the ingredients must possess certain described characteristics; but after all the ingredients are only a part of the invention involved in the construction of the inner part of the shell, and, in order to answer the prescribed purpose, they must possess certain described plastic, adhesive, cohesive, and acid-resisting characteristics. The required characteristics being described, the kind

and quality may be found by the ordinary mechanic skilled in the art, and applied according to the method described, namely, in plastic conditions, with a trowel.

It would seem that Russell at this time had practically solved the problem presented, and that his discovery, demonstrations, and prescribed process present a meritorious and useful invention; and, in our view, Wenzel's unpublished and unknown discoveries in Austria should not deprive him of the benefits of his own independent and original discovery and experiments in this country. Upon the question whether Russell had so far completed his discovery and accomplished his purpose when he received information from Cologne as to entitle him to a patent, and before passing to other questions in the case, let us look for a moment at the development of his conception in connection with his newly-discovered fact or force in matter under heat, pressure, and acid conditions, and his actual adaptation of means and process to the required purpose, in the light of the reasoning of Mr. Chief Justice Waite in the Telephone Cases, 126 U. S. 1, 532, 8 Sup. Ct. 778. There Bell was the first to discover the fact that, by gradually changing the intensity of a continuous electric current so as to make it correspond to the changes in the density of the air caused by the sound of the voice, vocal sounds could be transmitted and reproduced at a distance, but he had not advanced so far as to actually transmit spoken words so that they could be distinctly heard at the receiving end of the line. Bell had discovered the fact that a force in nature (the electric force), under changed conditions, would produce a new and unknown result,—that of reproducing vocal sounds at a distance from the speaker, although words had not been transmitted. Upon the question of the patentability of his discovery, and his imperfect art, Mr. Chief Justice Waite said:

"But it is insisted that the claim cannot be sustained, because, when the patent was issued, Bell had not in fact completed his discovery. While it is conceded that he was acting on the right principle, and had adopted the true theory, it is claimed that the discovery lacked that practical development which was necessary to make it patentable. In the language of counsel, 'there was still work to be done, and work calling for the exercise of the utmost ingenuity, and calling for the very highest degree of practical invention.' It is quite true that when Bell applied for his patent he had never actually transmitted telegraphically spoken words so that they could be distinctly heard and understood at the receiving end of his line, but in his specification he did describe accurately, and with admirable clearness, his process (that is to say, the exact electrical condition that must be created to accomplish his purpose); and he also described, with sufficient precision to enable one of ordinary skill in such matters to make it, a form of apparatus which, if used in the way pointed out, would produce the required effect,—receive the words, and carry them to and deliver them at the appointed place. The particular instrument which he had, and which he used in his experiments, did not, under the circumstances in which it was tried, reproduce the words spoken so that they could be clearly understood; but the proof is abundant, and of the most convincing character, that other instruments, carefully constructed, and made exactly in accordance with the specification, without any additions whatever, have operated, and will operate, successfully. A good mechanic of proper skill in matters of the kind can take the patent, and, by following the specification strictly, can, without more, construct an apparatus which, when used in the way pointed out, will do all that it is claimed the method or process will do. Some witnesses have testified that they were unable to do it. This shows that they, with the particular apparatus they had and the skill they employed

in its use, were not successful; not that others, with another apparatus, perhaps more carefully constructed or more skillfully applied, would necessarily fail. As was said in *Loom Co. v. Higgins*, 105 U. S. 580, 586, 'when the question is whether a thing can be done or not, it is always easy to find persons ready to show how not to do it.' If one succeeds, that is enough, no matter how many others fail. The opposite results will show that in the one case the apparatus used was properly made, carefully adjusted, with a knowledge of what was required, and skillfully used, and that in the others it was not. The law does not require that a discoverer or inventor, in order to get a patent for a process, must have succeeded in bringing his art to the highest degree of perfection. It is enough if he describes his method with sufficient clearness and precision to enable those skilled in the matter to understand what the process is, and if he points out some practicable way of putting it into operation. This Bell did."

And this Russell did in respect to his conception and process. And, as to the Bell patent, it may be further observed in this connection that Bell was in doubt whether the magneto or the variable resistance methods were the better for conducting the force, but thought the magneto method was; and as to this the chief justice says (page 538, 126 U. S., and page 784, 8 Sup. Ct.):

"Indeed, he said, in express terms, he preferred it, but that does not exclude the use of the other, if it turns out to be the most desirable way of using the process under any circumstances."

And again he says (page 539, 126 U. S., and page 785, 8 Sup. Ct.):

"Surely a patent for such a discovery is not to be confined to the mere means he improvised to prove the reality of his conception."

Under the reasoning of this case, it would seem clear that Russell's patent should not be declared void because he was in doubt as to which of the compositions would prove the most satisfactory in a commercial sense, or because he had not practically and finally tested and chemically isolated all the matter or material containing the required cohesive, adhesive, and acid-resisting qualities.

As has been said, the information from Cologne reached the patentee in August, 1889; and the fact that he remained silent as to his discovery until about the time of his application for a patent, in October, 1890, requires our attention. The record shows that the patentee was in the employ of the Russell Paper Company, in which his father was treasurer and his uncle president, during the period covering the supposed acts of invention, as well as during the later period in which his application was pending in the patent office, and that certain experiments were made by the paper company during that time, in which the patentee took part without disclosing the discoveries and experiments involved in his invention. If there were a controversy upon the evidence as to what the patentee had actually done in the line of the art, or if the conditions were such as to require him to speak, this evidence would have weight. But the evidence discloses no controversy in respect to the first proposition, and the only question fairly raised is whether his conception and discovery amount to invention,—whether he had carried it forward to a practical demonstration by developing the idea of means. As to the second proposition, his father and uncle were prominent officers in the company, and active and influential in the management of its business. The

company of which they were officers was a member of a syndicate (to which it was responsible) composed of several large companies, where the purpose was to secure and control inventions useful in the sulphite process. According to the testimony of the patentee, he feared that he might lose control of his discovery by disclosing it, and was in doubt about the proper course to pursue, but finally decided to say nothing until his rights were secured by the action of the patent office. Silence under conditions requiring a man to disclose would raise suspicion, but here the evidence as to the experiments is undisputed and undoubted. There is no question between this patentee and another person claiming the invention. There is no question about the Wenzel discovery, and no question about the time at which knowledge of that came to young Russell. The only question is whether he had gone far enough to entitle him to protection at the time he acquired knowledge of what Wenzel was doing. It would seem that in remaining silent he was simply acting the part of precaution, and whether wisely or not is probably immaterial, as we think there was nothing in his conduct, under the circumstances, which in any way affects the credibility of his story.

The inventor, having advanced the art in a certain line, as he believed, in order to secure his rights stated his claims, and described his invention and the operative means for putting it into practice; and we now come to a consideration of the questions relating to the scope and validity of his patent, construing it with reference to his claims, description, and specification, as set forth in his application of October 18, 1890, and the reissue patent No. 11,282, dated November 16, 1892. In the circuit court, as has been said, a result was reached limiting the claims to a coat or lining of hydraulic cement. In discussing the question as to the scope of the claims, that court said:

"The whole substance of the patent is in the first claim. This consists of only two elements,—the shell and the continuous lining or coat of cement. Its language is so unequivocal that its construction needs no aid from secondary rules, and is not enlarged nor limited by the redundant, and, in some particulars, somewhat obscure, language of the specification, whether of the original patent or of the reissue, except in one particular."

And again, in referring to the word "cement" as used in the claim, it was said:

"But this word has the ordinary commercial meaning of hydraulic cement, and also a larger, and perhaps more accepted, sense. It cannot, in this patent, be given the latter without substantially giving the patentee the whole art, and much more than he can claim to have actually invented or discovered. Therefore we are compelled to limit the word which he has himself chosen to its ordinary commercial sense. An examination of the file wrapper leads to the same results, but we need not enlarge on this. The word 'cement' having various significations, its precise definition for this purpose must thus be determined. With that exception, we need only say that we are not to construe what does not need to be construed, and that the simple phraseology of this claim can neither be added to nor taken from by what appears in the specification, by what occurred in connection with the reissue, or by any alleged implied disclaimer arising in relation thereto. We know of no mystery relating to ascertaining the legal meaning of claims in patents; and we apply to this case the fundamental rules by which is read every instrument whose language is clear in itself."

It would thus seem that the court below construed the claims without reference to the description of the invention, and the method and process of putting it into operative form, which the specification contained. In connection with this limited interpretation, we feel bound to observe that counsel on neither side, either in brief or in argument in this court, maintain this position, but, on the contrary, expressly renounce it as one not possible, and of which the claims are not susceptible. In our view, this question of construction should not be determined upon lines so technically and closely drawn. We look upon this invention as one in which a description or specification is given in accordance with the requirements of section 4888 of the Revised Statutes, of the manner and process of "making, constructing, compounding and using" in order "to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected to make, construct, compound, and use the same," and where the claims and the specifications are to be read together, not for the purpose of enlarging the invention stated in the claims, but "for the purpose of better understanding the meaning of the claim" (*Howe Mach. Co. v. National Needle Co.*, 134 U. S. 388, 394, 10 Sup. Ct. 570), the limit and extent of the invention, and the object of the inventor, and the construction, method, and process, as understood by him (*Vance v. Campbell*, 1 Fish. Pat. Cas. 483, Fed. Cas. No. 16,837; *Wilson v. Coon*, 18 Blatchf. 532, 6 Fed. 611; *Gottfried v. Brewing Co.*, 5 Ban. & A. 4, 36, Fed. Cas. No. 5,633; *Brass Co. v. Miller*, 9 Blatchf. 77, 97, Fed. Cas. No. 17,254; *Seymour v. Osborne*, 11 Wall. 516, 547; *Rob. Pat. § 750*; *Curt. Pat. [4th Ed.] §§ 225, 227*). In the case last cited (*Seymour v. Osborne*), Mr. Justice Clifford said:

"Where the claim immediately follows the description of the invention, it may be construed in connection with the explanations contained in the specifications; and, where it contains words referring back to the specifications, it cannot properly be construed in any other way."

Mr. Curtis, in his explanation of the purposes of the claims and specifications, and the relations which they sustain to each other, observed (section 227) that "the claim is not intended to be any description of the means by which the invention is to be performed, but is introduced for the security of the patentee," and that one object of the specification "is to make known the manner of constructing the machine, if the invention is of a machine." And Mr. Chief Justice Fuller, in *Howe Mach. Co. v. National Needle Co.*, 134 U. S. 394, 10 Sup. Ct. 572, says:

"Doubtless a claim is to be construed in connection with the explanation contained in the specification, and it may be so drawn as, in effect, to make the specification an essential part of it."

Now, let us see what Russell stated in his claims, and the means which he described in his specification to which he referred for reducing his invention to form and practice. The inventor, in his claims, which immediately follow his description of the invention, says: "I claim (1) the improved pulp digester herein described, having an outer shell, A" (thereby referring to his diagram and to his specification), "and a continuous lining or coat, B, of cement, as described" (again referring to his specification), "applied to the interior of the said shell

for the purpose set forth" (thus again referring to the specification). The inventor, in his second claim, which is substantially the same as the first, refers to his "continuous lining or coat, B, of cement, substantially as described." Now, what is the effect of this? Doubtless, it is to limit his claim to a pulp digester with a lining of cement. It does not cover structures with linings of other material, but limits itself to a cement-lined structure with an outer shell, described in the specification as a metal shell, and a lining described in the specification as of cement mixtures. In other words, he limits his patent to a cement-lined structure, and, by express and necessary reference to his specification and diagram, describes the material, the process, and the operative means for constructing the improved pulp digester as a whole; and, while his reference to the specification may not enlarge or extend the invention claimed, it may and must be examined in order to understand the manner of making and constructing the shell, and compounding the cement materials necessary to reduce his conception to use. This reference to, and a consideration of, the specification, definitively exclude the idea that the conception and the operative means are limited to hydraulic cement, or any one particular cementitious ingredient. Answering one part of the requirements of section 4888, he "particularly points out and distinctly claims" his invention as an improved digester, with an outer metal shell combined with an interior continuous cement lining; and then, further answering another part of the requirements of section 4888, he proceeds to "file in the patent office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same." In this description which the statute requires, he says:

"My invention relates to improvements in the construction of the vessels, ordinarily called 'digesters,' in which wood pulp is manufactured by what is known as the 'sulphite process.' Its object is to improve the construction of these digesters, so as to prevent their injury by the solution employed. * * * The shell of the digester is marked A, and within it are shown linings, B and C, the construction whereof I will now proceed to describe: A represents the outer shell of the digester. It is ordinarily constructed of metal,—such as iron, steel, or brass,—which is liable to be injuriously affected by the acid solution employed. Upon the interior of the shell of the digester, I form a continuous lining or coat, B, of acid-resisting material, applied in a plastic condition. This lining or coat is of the nature of a cement, and may be composed of any material or mixture of materials which is acid-resisting, and capable of being made plastic and adhesive to the shell of the digester, and so compact as to prevent the acid solution from reaching the iron shell in consequence of the high steam pressure required in practice. A convenient material for the purpose is commercial cement, preferably Portland, made plastic with water, and applied with any suitable implement upon the interior of the digester shell, so as to form a continuous covering therefor. Other cement-like materials or mixtures having similar properties or characteristics may be used, such as the ordinary cement mixtures, sand and Portland cement, sand and tar, and the like."

He then proceeds to describe the necessary thickness and compactness of the lining under different conditions. Thus, it would seem to be clear that the inventor intended to cover acid-resisting cementi-

tious mixtures, which could be applied in plastic condition, which would adhere to the outer shell, become a part of it, and so compactly form and harden under the pressure and process of application which he described as to prevent the acid from reaching the iron; and while describing commercial cement as a convenient material, and while he expressed a preference for Portland cement made plastic with water, as to other cementitious mixtures he left the acid-resisting and adhesive qualities to be ascertained by the practical chemist, or other "person skilled in the art or science to which it" appertained. This is manifestly the purpose of the inventor, and the argument strenuously made against it is that it is so broad a claim of the art, and so indefinite and vague, as to be inoperative and void; and this presents, perhaps, the most serious question in the case. We will look at this question first in connection with the principle enunciated and elaborated in the Telephone Cases, 126 U. S. 1, 8 Sup. Ct. 778. Let it be observed at the outset that this invention is not for a structure alone, but for a structural improvement which involves a process of making the improved structure, and the process is the idea of means; and the idea of means, in turn, involves what might perhaps be called a sub-invention, or subdiscovery, whereby a newly-discovered force in matter is adapted to a useful purpose, in becoming the means of making the broad, inventive idea of a homogeneous, adhesive structural lining operative and useful, or, in other words, through which cementitious materials, which would not stand cold bisulphite conditions, are adapted to the required purpose of resisting hot bisulphite conditions under steam pressure. But, however this may be, the idea of a continuous structural lining, and the process for making it, are to be considered together. In the case to which we last referred, the chief justice says (page 536, 126 U. S., and page 783, 8 Sup. Ct.):

"The law does not require that a discoverer or inventor, in order to get a patent for a process, must have succeeded in bringing his art to the highest degree of perfection. It is enough if he describes his method with sufficient clearness and precision to enable those skilled in the matter to understand what the process is, and if he points out some practicable way of putting it into operation."

This we think Russell did. He said, in effect:

"I have conceived the idea that the old linings of brick and tile with cemented and leaded joints, which do not stand under pressure and acid conditions, may be displaced, and we may have a homogeneous lining formed of the materials of which such bodies are made. We will let it harden as one piece, adhering to the outer shell as a continuous lining; and, if the brick and tile will stand the pressure and acid conditions, this will. I have experimented in the field of cementitious material, and I have found several mixtures that will answer the purpose which I have described, and I have found, by subjecting them to the sulphite liquor conditions, that they will answer the purpose. I have said that the materials must be capable of being made plastic and adhesive to the shell, and must be acid-resisting; and this means acid-resisting under digester conditions, which means highly-heated bisulphite conditions. I have said that other cement-like materials or mixtures, having similar properties or characteristics, may be used, such as the ordinary cement mixtures, sand and Portland cement, sand and tar, and the like; and this explanation of my discovery, and this explanation of the conditions which are necessary to make the test, will enable any practical chemist or skilled person to discover the required qualities."

Now, considering this feature of the case upon the evidence, outside of the description of discoveries and of the necessary qualities in matter contained in his specification, Russell says repeatedly that his experiments demonstrated that mixtures of cement, generally speaking, did stand the test; and it may be observed that the expert evidence in the case abundantly shows that there exists in cementitious mixtures generally, when formed of acid-resisting materials, a common hot bisulphite resistant quality. It is not necessary to comment at length upon the testimony of the chemists and technologists, and it seems quite sufficient to refer to the statement of Dr. Carmichael as to the chemical action in the sulphite process. He says:

"The remarkable fact appears that, while bisulphite liquors attack hydraulic cement quite freely at ordinary temperatures, they have no action whatever at the high temperature at which the sulphite process is conducted." Again: "It is a curious fact, which the employment of the Russell lining has brought out, that, even if original defects exist in the Russell lining, they become filled in use." Again: "All cement linings are more or less porous when first applied, but in use soon fill up with sulphate and sulphite of lime. They then become practically impervious to liquor, and afford complete protection to the shell beneath. Such liquor as may work through a crack is quickly rendered harmless through reaction with the lime salts composing the cement."

As said by Mr. Justice Strong in *Smith v. Vulcanite Co.*, 93 U. S. 486, 495, "to find a material, with a mode of using it, * * * had been an object long and earnestly sought." Russell discovered that cement materials generally, which possess the quality of being made plastic, when applied in that condition, as a thick, one-piece lining to an iron shell to be used in the process of disintegrating wood substances, generally speaking, had the quality of adhering to the shell, of resisting the hot acid, and of performing the function of protecting the iron from the highly-heated conditions to which it would otherwise be subjected, and that the expansive and resilient qualities of such materials were equal to the expansion and contraction of the shell with the temperature of the iron so reduced. The evidence demonstrates—and quite likely Russell understood—that some cement mixtures, commercially speaking, were more desirable than others; and the word "cement," used in the claims, must be understood, when considered in connection with the statutory description, as referring generally to cementitious mixtures having the qualities which he described. As to those which he expressly named, like commercial cement, preferably Portland, made plastic with water, and as to the ordinary cement mixtures,—sand and Portland cement, and sand and tar,—there can, of course, be no doubt in the mind of any person possessing ordinary skill in the art as to what he intended; and as to his general expression, "any material or mixture of materials which is acid-resisting, and capable of being made plastic and adhesive to the shell of the digester, and so compact as to prevent the acid solution from reaching the iron," he described the conditions which, in the hands of persons skilled in the art, would develop, whether in a given mixture the required property and qualities do or do not exist. He discovered that in such cementitious materials as could be made plastic, and were adhesive, cohesive, and self-hardening, the required properties, in a degree, existed as a quality common to them all. This

we think brings his invention and description within the reasoning of the supreme court in Incandescent Lamp Patent, 159 U. S. 465, 16 Sup. Ct. 75. There Sawyer and Mann supposed they had discovered in carbonized paper the best material for an incandescent conductor, but instead of confining themselves to carbonized paper, as the court say they might properly have done, they make a broad claim for every fibrous or textile material; while Russell, as it may be said, to contradicting his claim from that of Sawyer and Mann, limited his claims and specification to material in the cementitious class which possessed the required qualities. In other words, Sawyer and Mann, having discovered the required quality in carbonized paper, claimed all carbonized, fibrous, and textile material, whereas Russell, having discovered that his required quality was common to cement material generally, still, in the general description employed in his specification, limited his claims to such cement materials as were acid-resisting. He not only limited himself to a class of matter which, generally speaking, possessed the necessary qualities, but expressly described the tests and conditions to which the required materials must respond. In other words, Sawyer and Mann claimed broadly in the fibrous and textile kingdoms, without limiting themselves to a particular material, or even to a class, while Russell not only does not claim so broadly, but, on the contrary, expressly limits himself to a class of material, and still further, though not claiming all material within that class, again expressly limits himself to a material possessing the required acid-resisting qualities. The reasoning of Mr. Justice Brown, used for the purpose of showing that Sawyer and Mann had discovered no general quality in fibrous and textile materials common to their purpose, and that their claims were therefore invalid, as claiming the art too broadly, includes propositions which are clearly applicable to the case under consideration, and sufficiently broad and comprehensive to sustain the patent in this suit. He says:

"If the patentees had discovered in fibrous and textile substances a quality common to them all, or to them generally, as distinguishing them from other materials, such as minerals, etc., and such quality or characteristic adapted them peculiarly to incandescent conductors, such claim might not be too broad. * * * If, as before observed, there were some general quality running through the whole fibrous and textile kingdom, which distinguished it from every other, and gave it a peculiar fitness for the particular purpose, the man who discovered such quality might justly be entitled to a patent. * * * If Sawyer and Mann had discovered that a certain carbonized paper would answer the purpose, their claim to all carbonized paper would perhaps not be extravagant."

The Incandescent Lamp Case, just referred to, was recently under consideration by Judge Townsend in *Read Holliday & Sons v. Shulze-Berge*, 78 Fed. 493, as to its bearing upon the somewhat analogous question of equivalents, where it was cited, together with the opinion of the circuit court in this case (70 Fed. 988), to the point:

"That a patentee must clearly conceive and accurately state his invention or discovery, and that he cannot claim a monopoly of the whole art, nor by speculation include unknown elements within the limitations of his claim."

Judge Townsend then proceeds to explain what he understands to be the limitation upon this rule, as follows:

"I think the law must be that where the new ingredient is such as would have been known to or employed by the ordinary skilled, practical chemist, or is such as would naturally have been developed in the growth of the art, and the substitution thereof involves no alteration or new operation or result, it is covered by the patent, provided the specifications and claims are sufficiently broad to include it." Rob. Pat. § 257; Walk. Pat. § 354.

In conclusion, the specification in the case at bar was so referred to in the claims that either may aid in the interpretation of the other. *Pearl v. Ocean Mills*, 2 Ban. & A. 469, Fed. Cas. No. 10,876; Rob. Pat. § 517. And we think, upon principle and authority, that Russell, having discovered that cement material generally possesses the qualities required for his conception of a homogeneous digester lining, should not be limited to such materials in the class of cementitious mixtures as he had chemically and commercially isolated as individuals, but that his claims and description should be construed as including all cementitious mixtures which ordinary skilled practical chemists might be expected to find as answering the requirements of the described conditions, or such as would naturally develop in the growth of the art without invention.

In our opinion, the patent is valid, and protection should be commensurate with the invention stated in the claims and the discovery and process described in the specification; and in our view the patent covers homogeneous structural linings composed of adhesive, acid-resisting materials in the nature of cement, which possess the required qualities described in the specification. The circuit court has found that:

"If the patentee, Russell, was entitled to his patent at all, the defendant's method of obtaining a continuous lining of cement is plainly within its scope; and it differs so unsubstantially from the method described in the patent that it has the appearance of a mere evasion, easily devised when sought for, and plainly within the rules touching equivalents."

In this we fully agree, and, as the result of our conclusions sustains the patent, it follows that the decree of the circuit court must be reversed. The decree of the circuit court is reversed, and the cause is remanded to that court, with instructions to enter a decree in favor of the complainant for a perpetual injunction and an accounting as prayed for, and for further proceedings in accordance with law; the complainant to have its costs in this court and in the court below.

W. T. C. MACALLEN CO. v. JOHNS-PRATT CO.

(Circuit Court, D. Connecticut. April 10, 1897.)

PATENTS—CONSTRUCTION OF LICENSE.

A license under a patent for an "insulator" recited that the licensee desired a license "covering the use of said invention in connection with trolley wires or guard wires for electric railways." The grant was of an exclusive right to make and sell insulators "for electric railways, embodying the invention, or any material or substantial part thereof, set forth in said letters patent." A condition was added, giving the licensor a right to make improvements embodying the invention without liability to the licensees, the contract then continuing: "In other words, this license is intended to be limited to the form of said insulators shown in said patent, so far as it re-

lates to trolley or guard wires for electric railways, and is not to include improvements therein" made by the patentee. *Held*, that "form," as used in the last sentence, did not mean "shape," but "kind," and the license embraced all insulators embodying the invention that were used to prevent the current from escaping from trolley and guard wires.

This was a suit in equity by the W. T. C. Macallen Company against the Johns-Pratt Company for alleged infringement of certain patents relating to electric insulators.

Macleod, Calver & Randall, for claimant.

Edmund Wetmore and H. R. Williams, for defendant.

TOWNSEND, District Judge. To the bill herein for infringement of certain patents, defendant has interposed a plea of license to its assignor, as to patent No. 449,943. Said license is as follows:

"License and Agreement.

"Whereas, Louis McCarthy, of Boston, county of Suffolk, state of Massachusetts, is the owner of letters patent of the United States, No. 449,943, dated April 7th, 1891, granted to him for insulator; and whereas, the Gould & Watson Company, a corporation duly organized under the laws of Maine, and having a place of business at said Boston, is desirous of acquiring an exclusive license under said letters patent covering the use of the said invention in connection with trolley wires or guard wires for electric railways: Now, therefore, be it known that I, Louis McCarthy, of Boston, Massachusetts, for and in consideration of the sum of three hundred dollars to me in hand paid, the receipt whereof I do hereby acknowledge, paid by the said the Gould & Watson Company, do hereby give and grant unto the said the Gould & Watson Company the exclusive right and license to manufacture and sell insulators for trolley wires or guard wires for electric railways embodying the invention, or any substantial or material part thereof, set forth in said letters patent No. 449,943, dated April 7th, 1891; said license to continue in force to the full end of the term for which said letters patent are granted. It is understood and agreed that this license is accepted by the said the Gould & Watson Company, subject to the condition that the said Louis McCarthy shall have the right personally to invent or make insulators which are an improvement on the one shown in said letters patent, even if said improvement infringes thereon, without in any way being liable to the said the Gould & Watson Company hereunder. In other words, this license is intended to be limited to the form of said insulators shown in said patent so far as it relates to trolley or guard wires for electric railways, and is not to include improvements thereon when said improvements are embodied in insulators which are made by the said Louis McCarthy personally, or the firm or corporation by which he is employed, or of which he is a member; but in case the said Louis McCarthy leaves said employ, or ceases to be such member, then said firm or corporation shall cease to be protected by this provision of this license.

"In witness whereof, I have hereunto set my hand and seal, this twenty-first day of September, A. D. 1891. Louis McCarthy. [Seal.]

"In presence of Wm. A. Macleod."

The complainant assented to the transfer to defendant of said license, and of all of said assignor's rights thereunder. The insulators manufactured by defendant embody the construction covered by said patent, and certain elements (notably a covering of insulating material) embraced in the other patents in suit. The question of infringement of said other patents is not involved herein. Said insulators are technically known as strain insulators, being so constructed that they both resist heavy strains, and intercept the current from the trolley wire, and prevent its escape to the

ground. They are capable of use, and have been used, to a limited extent, for purposes other than those connected with trolley wires; but defendant has never made, sold, or used them for any purpose other than for use with trolley or guard wires of electric railways.

The sole contention between the parties is whether, under the grant of "the exclusive right and license to manufacture and sell insulators for trolley or guard wires for electric railways, embodying the invention or any substantial or material part thereof," the defendant has the right to make said insulators. It appears from the model in evidence (a section of the Hartford street-railway system) that defendant, as part of its equipment, uses these insulators in a variety of positions between the trolley and guard wires and their supports. The defendant contends that the insulators are covered by said license, because they are embraced within its terms, according to the plain, natural, and obvious meaning of its language, because their primary function is to intercept the current, and prevent its escape by insulation, and because the term "insulators for trolley wires or guard wires" is a generic term, including various classes of insulators used for such purposes. It appears that, prior to the date of said license, the licensor was in the employ of the original licensee; that immediately thereafter he left it, to engage with the complainant company in the manufacture of insulators for electroliers and gaseliers; and that for more than three years thereafter said licensee and this defendant, its assignee, advertised, manufactured, and sold these insulators, with the knowledge of complainant, and without remonstrance on its part. The defendant contends that these facts show an intentional division of the business; that the limitation contended for by complainant would defeat the purposes of the grant; that no concern would buy from defendant one special kind of insulators for trolley wires if it could not also buy from it the other kinds of insulators required for said wires; that the license is to be construed more strongly against the licensor; and that its acquiescence shows its interpretation of said grant in accordance with defendant's claim. Counsel for complainant contends that the words "insulators for trolley wires or guard wires" are limited to insulators serving to insulate the trolley wire from a span or cross wire or a bracket, and that such insulators were illustrated in certain forms shown in sheet 1 of the patent drawings, and that they were the only insulators known at the date of the said license, to those skilled in the art, as insulators for trolley wires or guard wires. In support of this contention, he cites the following language of said license agreement: "This license is intended to be limited to the form of said insulators shown in said patent so far as it relates to trolley or guard wires for electric railways."

I have been unable to adopt complainant's view, for the following reasons: The license states that the licensee "is desirous of acquiring * * * an exclusive license * * * covering the use of the said invention in connection with trolley wires or guard wires." Defendant's assignor was licensed to manufacture and sell such insulators "for electric railways, embodying the invention or

any substantial or material part thereof set forth in said letters patent." It was a condition thereof that even the licensor might invent infringing improvements without being liable therefor to the licensee. The language above quoted, limiting the license to the form shown in said patent, and the connection in which said limitation is expressed, show that the word "form" was not used in the sense of shape, but obviously in the sense of kind, of insulators, namely, insulators for trolley roads, such as are shown in Figs. 1, 2, and 3, and that the intent of the licensor was to exclude such improvements as the said McCarthy or his firm might thereafter make. This view of the construction of said license is supported by the language of the patent itself, and by Fig. 3 of the drawings. The patentee says:

"Fig. 3 is a section showing my invention as embodied in a pull-off insulator for electric railways. * * * At Fig. 3 I have shown a modification of my insulator. The construction is, however, substantially, the same," etc.

Of another figure the patentee says:

"The size and shape of the parts may be changed * * * to adapt the shape and size of the device to the conditions under which it is to be used."

But Fig. 3, with the pull-off removed, would be adapted for use, and like those actually used by defendant in the construction shown in the Hartford model, and would be operatively located on the wires, which in said construction horizontally take the strain off the wires.

Much expert testimony has been introduced as to what insulators are included in the term "insulators for trolley wires or guard wires for electric railways." Defendant's witnesses claim that it includes "all appliances designed to confine the current in the trolley wire, and prevent this current from charging span wires, pull-off wires, and anchor wires; in fact, all wires which may be used to suspend or hold in position the trolley wire itself. In the case of guard wires, the term is used to designate the appliances used to insulate the guard wires from such suspension wires as run to the poles." Complainant's witnesses claim that said term, as used at the date of the license, was limited in its meaning to insulators from immediate supports of span wire or bracket. But while the five expert witnesses for complainant all testify that said term would be understood to cover such devices, and, in the ordinary use in the trade, do not generally include the defendant's construction, it is most significant that not one of them testifies either that defendant's insulators are not in fact "insulators for trolley wires or guard wires," or that they are necessarily excluded, by their construction or use, from said class of insulators, or were so excluded in 1891, the date of said license.

Defendant's experts testify that the insulating system shown by the Hartford model is typical of the method usually employed in this country at the time when said license was given. The term "insulators for trolley wires and guard wires" is not found in the patent. Defendant's insulators are used for such wires only. I think the licensor chose said term in order thus to embrace all such insulators embodying the patented invention as were to be used

to prevent current from escaping from such trolley and guard wires. This construction accords with the plain, obvious meaning of the language used, is the only one which gives effect to the whole contract and makes the license of practical value, is in accordance with the apparent understanding and intent of both parties and with their practical interpretation of the license, and will therefore be adopted by the court. It is not claimed that defendant has used any "improvements thereon, when said improvements are embodied in insulators which are made by the said Louis McCarthy personally, or the firm or corporation by which he is employed or of which he is a member." The plea is sustained.

THE M. G. LEONARD.

THE CARROLL BOYS.

THE M. E. LAUGHLIN.

SWEENEY v. THE M. G. LEONARD.

(Circuit Court of Appeals, Second Circuit. April 8, 1897.)

COLLISION—TUGS AND TOWS—ENTERING SLACK WATER.

A tug towing a barge on a hawser from Jersey City around the Battery to the East river *held* solely in fault for a collision of the barge with a schooner in tow of a tug rounding the Battery in the opposite direction, because she miscalculated or neglected to consider the space necessary for the turn of the barge in going through the slack water.

Appeal from the District Court of the United States for the Southern District of New York.

This is an appeal from the decree of the district court for the Southern district of New York holding the steam tug Carroll Boys solely in fault for a collision between her tow, the barge M. G. Leonard, and the schooner George Hurst, in tow of the tug M. E. Laughlin.

The opinion of the court below (BROWN, District Judge) was in full as follows:

About noon on the 12th of September, 1894, as the libellant's schooner, George Hurst, was going around the Battery from the East into the North river, in tow on a hawser from the steam tug M. E. Laughlin, she came in collision with the barge M. G. Leonard, which was in tow of the steam tug Carroll Boys, which had crossed the North river from the Jersey Central piers, Jersey City, and was bound up the East river in the last of the ebb tide. The stem of the barge struck the port side of the schooner, aft of the mainmast, at an angle of about five or six points, in consequence of which she sank in a few minutes. The above libel was to recover the damages.

The libel charged that the collision was caused by the negligence of the barge Leonard in not following the course of her tug, the Carroll Boys, but in allowing her to take a sheer to port shortly before the collision. It is contended that the two tows, but for that sheer, would have passed clear of each other, as the tugs had done, by a fair margin of from 75 to 100 feet. The answer of the barge denied any negligence or any sheer, and alleged that the fault was in the tug in not keeping the tow sufficiently away; and under the fifty-ninth rule the barge brought in the two tugs as additional defendants, both of which denied fault and assigned the alleged sheer of the Leonard as the cause of the collision.

If there was any sheer to port by the barge shortly before the collision, the evidence does not warrant the finding of any negligence on the part of the barge as the cause of it. All the witnesses who testified on the subject express the opinion that it was the force of the North river ebb upon the stern of the barge, as her bows entered the slacker water to the eastward between the currents of the North and East rivers, that caused the sheer they speak of; and they suggest that it should have been counteracted by a port wheel on the barge. But the barge's evidence leaves no doubt that her wheel was put hard a-port; that the wheelman put the wheel over as soon as he saw the pilot of the tug port his wheel; and that additional men on the barge helped to keep the wheel hard a-port. The witnesses on the barge, moreover, deny that she sheered to port at all, but state that in fact the barge turned one or two points to starboard, although this was less than she would have turned under the same wheel but for the force of the ebb tide on her stern as her bows went into the slack water.

Upon a careful consideration of all the testimony I am satisfied that the account of the men on the barge is substantially true. I am persuaded that what the defendants' witnesses call a sheer was no sheer through any mistake in handling the wheel, and probably no real sheer at all, but only a relative slowness in a change to starboard under a port wheel, by which, as compared with the position and more rapid swing of the tug Carroll Boys, there was such a difference in the pointing of the barge and the tug as to give the witnesses the impression that the barge sheered to port. The place where the collision occurred, taken in connection with the angle of collision and the heading of the schooner at the moment of collision, tend strongly to confirm the statement of the Leonard's witnesses that there was no sheer at all to port, but that they merely came around slowly to starboard, on account of the stronger ebb current at their stern than at their bows.

Nearly all the witnesses agree that the collision occurred in the slack water to the southwest of the Battery wall, and the place of collision is pretty accurately fixed from the position of the sunken schooner, which the witness Timmons testifies was about 600 feet from the Battery wall and about 50 feet easterly from a line drawn from the bath house (which is between the barge office and Castle Garden) to the easterly side of Liberty Island. This point was about three hundred feet to the eastward of the line where the North river ebb is sensibly felt, which, according to the witness Windsor, is at that stage of the tide about on a line from the end of pier 1 to a point on Governor's Island 300 feet easterly from the easterly side of Fort William.

Considering that the hawser was 150 feet long and the barge 105 feet long; that their progress was at the rate of about three or four knots through the water, and that they were heading, at the time when the signal of one whistle was exchanged, nearly directly across the North river, and about for the barge office, there can be no doubt that at the time when the whistles were exchanged the barge was drawing very near to the slack water and very soon entered it, and that the effect of the gradual slackening of the current at her bows while the current at her stern was stronger was to retard the action of her port wheel.

The great majority of witnesses do not place the angle of collision at above five points, and the heading of the schooner at that time, according to the testimony of the pilot of the Laughlin, must have been one or two points to the north of a line from the schooner to the Pennsylvania Railroad Ferry at Jersey City. An angle of five points from this course would make the barge heading at least two or three points to starboard of any possible course by which the tug and tow could have arrived off Castle Garden from the Central Ferry in the ebb tide. The master of the schooner, however, says that at the time of collision he was heading towards the New York shore, above Castle Garden, and that the angle of collision was seven points. This would make the heading of the barge at the collision about the same as the above; while if the heading of the schooner is correctly given by her master, and the angle of collision was only five points, the barge at collision must have turned to starboard about three to four points from the heading by which the river must have been crossed; and this indicates that there was no actual sheer by the barge to port, but only a slower turning to starboard than the tug, giving the deceptive appearance of a sheer to persons upon other moving vessels. The *Sam Sloan*, 65 Fed. 125, and cases there cited.

The two witnesses from the shore, who speak of a sheer, did not see any actual sheer, and probably spoke from the great divergence between the direction of the tug and the barge.

The responsibility for the collision seems to me to lie with the Carroll Boys alone. It was the Carroll Boys that was bound to keep out of the way. When the signal of one whistle was given, viz., when the tugs were from 300 to 500 feet apart, it became the duty of the Carroll Boys not only to keep to the right, as her whistle indicated she would do, but to keep far enough to the right, and to direct her tow to take that course early enough, to prevent any swing by the barge upon the course of the Laughlin and the schooner, which were already quite near the shore. The barge was a long boat, and not quickly handled like a tug. Her wheelman was not chargeable with knowledge of the tide currents to the same extent as the pilot of the tug, and cannot be charged with negligence for not porting until he had some notice that he was required to do so, either by some direction from the tug or by seeing the tug port. He was watching the tug, and he ported as soon as he saw the tug port; and no signal at all was given to him by which he might have been apprised of the need of porting earlier. The true cause of the collision was that the Carroll Boys delayed her own porting, and omitted signaling to the other tug, or to give directions to her own tow until it was too late for the tow to clear. She was going towards the left-hand side of the East river for the benefit of the slack water there, and no doubt miscalculated or neglected to consider the space necessary for the turn of the barge in going through the slack water. This evidently was a risk of the tug and not of the tow.

I do not see any sufficient reason for charging the Laughlin with fault. The evidence seems to show that as soon as her pilot perceived that the barge was not swinging to starboard as much as the tug, giving the appearance of a sheer, he did all he could do to prevent a collision between the barge and the schooner, by putting his wheel hard a-port, shouting to the schooner to do the same, and pulling to starboard full speed. This was the only chance of escape.

Decree for the libelant against the Carroll Boys, with costs; dismissal of the libel as against the barge and the Laughlin, with costs; and an order of reference to compute damages if not agreed upon.

Samuel Park, for appellant, The Carroll Boys.

Nelson Zabriskie, for The M. G. Leonard.

Lawrence Kneeland, for The M. E. Laughlin.

Stewart & Macklin, for Elizabeth Sweeney.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. We do not find in the record sufficient reason to reverse the decision of the district judge, who heard and saw the witnesses. The testimony indicates quite clearly that they differed greatly in intelligence. While we do not in all respects agree with the theory of the movements of the vessels as set forth in his opinion, we concur in the conclusion of the district judge that the proximate cause of the collision was the navigation of the Carroll Boys, which was evidently making for the left-hand side of the East river, and "miscalculated or neglected to consider the space necessary for the turn of the barge in going through the slack water" of the Battery. The decree of the district court is affirmed, with interest, and costs to the Leonard against the appellant.

ZIMMERMAN v. SO RELLE.

(Circuit Court of Appeals, Eighth Circuit. April 26, 1897.)

No. 862.

1. STATE AND FEDERAL COURTS—CONCURRENT SUITS BETWEEN SAME PARTIES FOR SAME CAUSE OF ACTION—QUIETING TITLE.

Suits between the same parties to quiet title to the same land are of such a nature that when one is pending in a state court, and the other in a federal court, and the state court first acquires jurisdiction by service of process, the federal court should stay its hand until the cause in the state court is determined. But it should not dismiss the suit where the state court may leave some matters at issue undetermined, which may properly be adjudicated by the federal court.

2. EQUITY PLEADING—SETTING DOWN PLEA FOR ARGUMENT—DEMURRER.

The filing of a demurrer to a plea, instead of setting the plea down for argument, is contrary to equity procedure; but, if no substantial rights have been affected thereby, the irregularity may be ignored. The filing of the demurrer, therefore, may be treated as the equivalent of setting the plea down for argument, and an order overruling the demurrer may be regarded as, in effect, an order that the plea be allowed; and in such case the plaintiff will be entitled to then take issue with the facts stated in the plea.

3. EQUITY PRACTICE—PENDENCY OF ANOTHER SUIT.

The former practice of referring to a master a plea of the pendency of another suit between the same parties as to the same matter, instead of setting it down for argument, has no application where the former suit is not in the same court, but in one of a different jurisdiction.

Appeal from the Circuit Court of the United States for the District of Colorado.

This suit was brought by Eugene Zimmerman, the appellant, against Wiley E. So Relle, the appellee, in the circuit court of the United States for the district of Colorado, on December 27, 1895. For present purposes, it is unnecessary to state the averments of the bill in detail. It showed, substantially, that a controversy had arisen between the parties to the suit, relative to the ownership of certain real estate situated in the town of Aspen, Pitkin county, Colo., to wit, the southerly 75 feet of lots R and S in block 88, which had at one time been sold by Zimmerman to So Relle, and had thereafter been reacquired by Zimmerman at a trustee's sale, under a power of sale contained in a deed of trust, that had been executed by So Relle to secure the payment of a part of the purchase money; that in equity the property belonged to Zimmerman, although it was at the time in the possession of So Relle; that the complainant's title derived through the aforesaid trustee's sale was defective, because the notice under which said sale had been made was not published for the requisite length of time; that, by virtue of such defect in the notice of sale, the complainant had not acquired at such sale a good legal title, under which a recovery could be had against the defendant by a suit in ejectment; that the defect in said notice of sale was due to the negligent and fraudulent conduct of the defendant, So Relle, who was an attorney by profession; and that, by virtue of such fraud and negligence, he was in law estopped from taking advantage of the defect in the plaintiff's legal title, and from further retaining possession of the property. In view of the allegations of the bill, the complainant prayed that "the defendant may be decreed to be forever estopped from setting up or claiming any right, title, or interest whatsoever in and to said premises, or from in any manner claiming that said foreclosure, and the sale of said property thereunder, was illegal or insufficient, and that your orator may be decreed to have a good and perfect title to said premises, * * * and that any cloud may be removed which may rest upon the title of your

orator to the said property, by virtue of any defect in said foreclosure sale or in the notice thereof." To the aforesaid bill the defendant below filed the following plea: "And this defendant further says: That at the time of the commencement of said suit, and at the time when service of the writ of subpoena issued thereunder was attempted or pretended to be made upon this defendant, another suit was, and at all times herein mentioned has been, and now is, pending in the district court of Pitkin county, state of Colorado (No. 1,718), between the said Eugene Zimmerman and the said Wiley E. So Relle, involving the same subject-matter, and wherein similar relief was sought. That the said suit in the said district court of Pitkin county was commenced by filing a bill in equity on the 4th day of October, 1895, and wherein said Wiley E. So Relle is plaintiff, and the said Eugene Zimmerman, the Mortgage Trust Company of Pennsylvania, and Biddle Reeves are defendants. That summons and complaint was served upon each of the said defendants on the 5th day of October, A. D. 1895. That the subject-matter in said suit in said district court of Pitkin county is the title to the southerly seventy-five (75) feet of lots R and S in block 88 of the town site and city of Aspen, in Pitkin county, Colorado. That the relief sought therein is to quiet the title of said premises in the said Wiley E. So Relle, and for general relief, by injunction and otherwise. That on the 26th day of October, 1895, the said Eugene Zimmerman filed therein a notice of application to remove the said cause to the federal court, together with a petition and bond for removal. That on the 4th day of November, 1895, the separate answer of the said Reeves and the said Mortgage & Trust Company of Pennsylvania was filed therein. That on the 4th day of November, 1895, the said Eugene Zimmerman filed a demurrer to the complaint therein. That on the 14th day of November, 1895, the said Wiley E. So Relle filed a motion to make the answer of Reeves and the said Mortgage & Trust Company of Pennsylvania more specific. That on the 18th day of November, 1895, said Zimmerman filed therein his motion to withdraw his demurrer. That on the 12th day of December, 1895, a motion to dissolve an injunction issued in said cause was heard and overruled. That on the 30th day of December, 1895, said Zimmerman filed his separate answer therein. That on the 20th day of January, 1896, the said So Relle filed a demurrer therein. That on the 25th day of January, 1896, the said So Relle filed replications to the answers of the said Zimmerman, Reeves, and the said Mortgage & Trust Company of Pennsylvania. That on the 28th day of January, 1896, the said Zimmerman filed his motion to strike out the said replication. That on the 8th day of February, 1896, the motion of said Zimmerman to strike out the said replication was heard and overruled by the said district court in said Pitkin county. That on Wednesday, the 13th day of November, 1895, a motion of the said Eugene Zimmerman to docket the cause pending in the said district court of Pitkin county, and to file in the circuit court of the United States for the district of Colorado a transcript of the record from the said district court of Pitkin county, was heard by this honorable court, and, after the court was fully advised in the premises, the last aforesaid motion was overruled. That the said suit in the said district court of Pitkin county, Colo., is still pending, and is now at issue; and that adequate relief may be had by all parties therein. * * * Wherefore this defendant prays the judgment of this honorable court whether he ought to be required to appear in accordance with any writ of subpoena issued in said suit." To the foregoing plea, the defendant below interposed a demurrer, on the ground that it did not state facts showing any reason why the suit might not be prosecuted by the plaintiff, and for the reason that the plea was uncertain, defective, and ambiguous in stating the matters alleged to be involved in the litigation pending in the district court of Pitkin county, Colo. The trial court overruled said demurrer, whereupon the complainant asked leave to file a replication to said plea, which leave was denied, and the bill of complaint was thereupon ordered to be dismissed. The present appeal was taken from such order of dismissal.

Robert G. Withers and Charles J. Hughes, Jr., for appellant.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The plea which was filed by the defendant below, who is the appellee here, shows, we think, with sufficient certainty that the suit at bar and the suit previously brought in the district court of Pitkin county, Colo., by So Relle against Zimmerman, are substantially of the same character, the parties thereto being simply reversed. In the case pending in the state court So Relle is attempting to quiet his title against Zimmerman, who is claiming title to and possession of the premises in controversy by virtue of a trustee's deed, executed under a power of sale contained in a mortgage that was made by So Relle; while in the suit at bar Zimmerman seeks to quiet his title and gain possession of the property, by enjoining So Relle from asserting that the sale by the trustee was insufficient to pass the legal title. Both suits concern the same property, and necessarily involve a consideration of the same evidence and a decision of the same questions. Such being the state of facts disclosed by the defendant's plea, we think that the case pending in the state court was of such a nature that the trial court was not at liberty to proceed with the hearing of the suit at bar, within the doctrine which was recently applied by this court in the case of *Merritt v. Steel-Barge Co.*, 79 Fed. 228. We held in that case that when a suit is brought to enforce a lien against specific property, or to marshal assets, or administer a trust, or liquidate an insolvent estate, and in all other cases of a similar kind where, in the progress of the case, the court may find it necessary or convenient to assume control of the property in controversy, the court which first acquires jurisdiction of such a case by the issuance and service of process is entitled to retain it to the end, without interference on the part of any other court of co-ordinate jurisdiction. We held, further, that a rigid adherence to this rule, both by the federal and state courts, is necessary in order to prevent unseemly conflicts which might otherwise arise. The doctrine in question has been so recently and fully considered both in the case last referred to and in *Gates v. Bucki*, 12 U. S. App. 69, 4 C. C. A. 116, and 53 Fed. 961, that a further discussion of the subject seems to be unnecessary. It is manifest, we think, that the suit brought in the state court by So Relle against Zimmerman is of such a nature that that court may see fit at any time to issue an injunction against Zimmerman restraining him from prosecuting a suit to recover the possession of the property in controversy in any other forum, and we cannot doubt its right to make such an order; whereas in the case at bar, if the trial court had permitted it to proceed, it may be that at some stage of the proceedings it would have been found necessary to appoint a receiver of the property to collect the rents thereof, and otherwise care for it, pending the litigation as to the title. Possibly, the state court may deem it proper to make a similar order. The controversy, then, is of such a nature that the pendency of the two suits at the same time, in different jurisdictions, is liable at any moment to create a conflict of authority, and give rise to conflicting titles. No court ought to proceed with the hearing of a case under such circumstances so long as the prior suit remains pending and undetermined. We concede, as a matter of

course, that two suits, involving the same questions and between the same parties, may be pending at the same time, the one in a state and the other in a federal court, and that in such event a plea of *lis pendens* may not be available as a defense to the suit which was last brought. This is always the case where the two suits are strictly in personam. *Stanton v. Embrey*, 93 U. S. 548. And in *Orton v. Smith*, 18 How. 263, 265, it was said, in substance, although the question was not strictly involved in that case, that the pendency of a suit in ejectment in one jurisdiction will not serve to stay prosecution of a later suit in ejectment for the same land brought in another court of co-ordinate jurisdiction. But when, as in the case at bar, two suits in chancery are pending between the same parties, the one in a state and the other in a federal court, the object of both suits being to quiet the title to the same tract of land, that court which first acquires jurisdiction by the issue and service of process must be allowed to proceed with the hearing and determination of the case; and, so long as the first suit remains pending and undetermined, the action of the court in which it is pending should not be embarrassed by proceedings taken or orders made in the case which was last brought. *Orton v. Smith*, *supra*. It would be manifestly improper, however, to order a dismissal of a second suit because of the pendency of a prior suit between the same parties in those cases where the bringing of the second action was a necessary or proper step, either to create or preserve a lien, or to avoid the bar of the statute of limitations, or to give due notice by *lis pendens* of the plaintiff's rights, or to guard against the results of a possible dismissal of the first suit before its determination upon the merits. *Heidritter v. Oil-Cloth Co.*, 112 U. S. 294, 304, 5 Sup. Ct. 135; *Gates v. Bucki*, 12 U. S. App. 69, 4 C. C. A. 116, and 53 Fed. 961. In all such cases the proper practice is to suspend further action in the second suit until the first suit is tried and determined, instead of dismissing it. Indeed, considering the numerous reasons which may render it advisable and not improper to commence a second suit, although a prior suit is pending in which the plaintiff's rights may be fully adjudicated, we think it is the better practice in all cases to pursue the course last indicated, when a plea of *lis pendens* is interposed and sustained. The mere pendency of a second suit, if no action is taken therein, does not affect the orderly prosecution of the first suit; and the court is much better able to determine, after the first suit has ended, whether it is necessary or proper to grant further relief in the action which was last brought. In our opinion, therefore, the trial court, when it overruled the demurrer to the plea, should have entered an order staying all further proceedings until the case in the state court was determined, instead of entering a final order of dismissal. It may be that the judgment of the state court will leave some matters at issue between the parties undetermined, which may properly be adjudicated by the federal court. If not, an order dismissing the action should then be entered.

Complaint is further made that the trial court did not allow the plaintiff below to file a reply to the plea, after the demurrer thereto had been overruled. With respect to this contention, it should be ob-

served that the filing of a demurrer to the plea, instead of setting the plea down for argument, was irregular, and contrary to the established course of procedure in equity. If a party desires to test the sufficiency of a plea, either in form or substance, the proper practice is to set the plea down for hearing. No such proceeding as a demurrer to a plea in equity is recognized. When a plea is thus set down for hearing, the sole question for determination is whether it is sufficient in form and substance. If the decision on this question is in the affirmative, and the plea goes to the whole bill, the usual order is that the plea "be allowed." When the plea is thus allowed, the complainant is entitled to take issue with the facts alleged in the plea, and the issue thus raised is the sole question to be tried. *Bassett v. Manufacturing Co.*, 43 N. H. 249, 253, and cases there cited; *Davison's Ex'rs v. Johnson*, 16 N. J. Eq. 112; *Daniell, Ch. Pl. & Prac.* (5th Ed.) pp. 697, 692. Although the practice pursued in the present case was irregular, yet it was not objected to; and, as the irregularity in question does not affect the substantial rights of the parties, it may well be ignored. The filing of a demurrer to the plea was tantamount to setting the plea down for argument, and subserved the same purpose. *Klepper v. Powell*, 6 Heisk. 503, 506. The filing of the demurrer, therefore, may be treated as the equivalent of setting the plea down for argument, and the order overruling the demurrer may be regarded as, in effect, an order that the plea be allowed. After the plea was thus allowed, the complainant was entitled to take issue with the facts stated in the plea, and the denial of that right was an error on account of which the plaintiff may justly complain. *Daniell, Ch. Pl. & Prac.* (5th Ed.) p. 697. We have not overlooked the fact that, according to the former practice in equity, it was not usual to set a plea down for argument when, as in this instance, it alleged the pendency of another suit between the same parties, for the same cause of action, the practice in such cases being to move a reference to a master to ascertain the truth of the facts stated in the plea, without setting it down for argument. This practice, however, went upon the theory that a plea that another suit between the parties, for the same cause of action, was pending in the same court, was obviously good in substance, and that, by setting such a plea down for argument, the only question that could be raised was whether the plea was defective in form. *Daniell, Ch. Pl. & Prac.* (5th Ed.) pp. 637, 692. This rule however, has no bearing on the case at bar. In the case in hand the plea alleged the pendency of a suit in another jurisdiction, to wit, in the state court, and the complainant below was entitled to set the plea down for argument, for the purpose of having it determined whether the pendency of a suit in that forum operated to prevent the federal court from entertaining jurisdiction of the cause during the pendency of the other suit in the foreign jurisdiction. The demurrer raised the question of the sufficiency of the plea in substance, as well as in form; and, by setting the plea down for argument under such circumstances, the complainant cannot be regarded as having waived his right to take issue with the facts alleged in the plea, provided the same was allowed. The decree of the circuit court is accordingly reversed, and the cause is remanded for further proceedings, not inconsistent with this opinion.

GODDARD et al. v. MAILLER et al.

(Circuit Court, S. D. New York. May 7, 1897.)

FEDERAL COURTS—JURISDICTION—NONRESIDENTS OF DISTRICT.

Rev. St. § 740, providing that, if there are two or more defendants residing in different districts of the state, the suit may be brought in either district, was not repealed, either expressly or by implication, by the provision in the judiciary acts of 1875 and 1887-88, that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant.

This was a suit in equity by William Goddard and others, stockholders of the Bowery Insurance Company, against Isaac P. Mailler and others, as the receiver and directors of that company, for an accounting because of alleged malfeasance resulting in the impairment of the company's capital stock.

Henry M. Ward and Masten & Nichols, for complainant.
Alexander Tison and Seth S. Terry, for defendant.

COXE, District Judge. This is an action by 10 of the stockholders of the Bowery Insurance Company against its receiver and directors praying for an accounting by reason of the alleged malfeasance of the defendants and the consequent impairment of the capital stock of the company. The complainants are citizens of Rhode Island and Maryland and the defendants are citizens of New York, New Jersey, Illinois and Kentucky. The sole ground of jurisdiction is the diverse citizenship of the parties. The defendant Mailler has filed a plea disputing the jurisdiction of the court upon the ground that he is not an inhabitant of the Southern district of New York but resides in the Eastern district. The act of August 13, 1888 (25 Stat. 433), is clear and explicit. It provides that no civil suit shall be brought in this court against any person "in any other district than that whereof he is an inhabitant." There is but one exception to this rule to be found in the statute. Where jurisdiction is founded solely upon diverse citizenship the suit may also be brought in the district of the plaintiff, if a citizen, provided he can there obtain service upon the defendant. This proviso is not now involved. The act of 1888, correcting the act of 1887, has been repeatedly construed by the courts. It has been held that the words "plaintiff" and "defendant" as used in the first section are not intended to restrict the act to causes where there is but one plaintiff and one defendant, but that the words are used in a collective sense and apply to cases where there are several parties on one side or both sides of the controversy. Accordingly, in a cause like the present, if no other law applies, all of the defendants must be inhabitants of the district where the venue is laid. *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303; *Bensinger Self-Adding Cash-Register Co. v. National Cash-Register Co.*, 42 Fed. 81. The general object of the act of 1888 was to restrict and not to enlarge the jurisdiction of the circuit courts and where the jurisdiction is based on citizenship it requires that the suit shall be brought "in the state of which one of the parties is a citizen, and in the district therein of which he is an inhabitant and resident." *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup.

Ct. 935. It is manifest that if Mailer were the only defendant the court would be without jurisdiction, as in that event none of the parties to the action would be a resident of this district. It is equally clear that under the act, as interpreted by the courts, the fact that some of the defendants are residents of this district does not give the court jurisdiction of the defendant Mailer who is not a resident. The plaintiffs do not dispute this proposition, but they maintain that jurisdiction can be sustained under the provisions of section 740 of the Revised Statutes which provides that "if there are two or more defendants residing in different districts of the state, it [the suit] may be brought in either district and a duplicate writ may be issued." If this section be still in force it is conceded that the plea must be overruled, and, on the other hand, it is conceded that if it has been repealed the plea must be allowed. The question then is narrowed to the simple inquiry, has section 740 been repealed by subsequent legislation? The section has not been expressly repealed; it is not mentioned *eo nomine* either in the act of 1875, or in the act of 1888. The act of 1875 (18 Stat. 470), after enacting that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he may be found at the time of serving such process," etc., repeals all acts and parts of acts in conflict therewith. The act of 1888 expressly provides that it shall in no way affect any jurisdiction or right mentioned in sections 641-643, 722, and title 24 of the Revised Statutes or section 8 of the act of March 3, 1875, or the civil rights act of March 1, 1875. The act of 1888 expressly repeals the last paragraph of section 5 of the act of March 3, 1875, section 642 of the Revised Statutes and "all laws and parts of laws in conflict with the provisions of this act." The question here involved has never been directly decided by the supreme court. In several cases, as in *Shaw v. Mining Co.*, *supra*, section 740, is referred to, and is treated, apparently, as part of the existing law, but the question here discussed seems not to have been the subject of judicial investigation in that court. The nearest approach to an expression of opinion is found in *Greeley v. Lowe*, 155 U. S. 58, 15 Sup. Ct. 24, where the court, at page 72, 155 U. S., and page 27, 15 Sup. Ct., says:

"As no exception was made in that act [1875] of the cases provided for by sections 740, 741, and 742, Rev. St., it is at least open to some doubt as to whether suits will lie against nonresident defendants under those sections."

The question has, however, been squarely decided in *East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co.*, 49 Fed. 608, where the court in a well-reasoned opinion reaches the conclusion (page 616):

"That the special cases for which provision was made by the act of May 4, 1858, embodied in sections 740, 741, and 742 of the Revised Statutes, relating to the locality of suits in the states containing more than one district, were not within the contemplation of congress when that act [1875] was enacted, and are not repealed by it. * * * The provisions of the act of August 13, 1888, amendatory of the act of 1875, in respect to the questions under discussion, are in no particulars different from the latter act. These recent statutes, therefore, are likewise within the range of the authority of *U. S. v. Mooney*, 116 U. S. 104, 6 Sup. Ct. 304, and, in the opinion of the court, clearly did not repeal sections 740, 741 and 742 of the Revised Statutes."

Repeal by implication is not favored. If the earlier law be not plainly in conflict with the later law it should stand. If effect may be given to both it is the plain duty of the court to uphold the earlier law. "No statute should be construed as repealing a prior one, unless so clearly repugnant thereto as to admit of no other reasonable construction." *Cope v. Cope*, 137 U. S. 682, 11 Sup. Ct. 222; *Red Rock v. Henry*, 106 U. S. 596, 1 Sup. Ct. 434. The court is unable to see that the language quoted from section 740 is inconsistent with the provisions of section 1 of the act of 1888. It provides for a contingency not mentioned in the act. If congress had incorporated it in the act of 1888 the first section would be consistent and harmonious. The act would then provide that no civil suit shall be brought against any person "in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant, but if there are two or more defendants residing in different districts of the state, it may be brought in either district." The construction contended for by the plaintiffs is not only in harmony with the statute of 1888, but also with the constitution, which provides (article 3, § 2), that "the judicial power shall extend * * * to controversies between citizens of different states." A contrary ruling would close the federal courts to citizens of different states if the defendants, though living within a mile of each other and even in the same city, happen to live in different judicial districts. The general theory underlying section 740, Rev. St., has, to some extent, been recognized by congress in subsequent legislation where judicial districts have been divided. In each of these instances, so far as the court has examined them, there is a provision to the effect that "if there are two or more defendants residing in different divisions of the district, such suits may be brought in either division." 21 Stat. 63, 155, 175; 27 Stat. 72. The situation is fairly stated by the language of the supreme court above quoted. There is, perhaps, "some doubt" whether section 740 is still in force, but it is thought that the doubt should be resolved against the theory of repeal by implication.

The act of 1888 makes no provision for cases where the plaintiff is a citizen of one state and the defendants are citizens of another state but reside in different districts. The last clause of section 740 provides for these cases, and if retained in the body of the law the federal courts will hold a class of causes which, under the constitution and the general theory of legislation since, appears to be within the scope of their jurisdiction. The court is of the opinion that the clause in question may with consistency be retained, that it is not in conflict with the law of 1888, and, therefore, that its repeal should not be declared. The plea is overruled. The defendant may answer within 20 days.

DURANGO LAND & COAL CO. v. EVANS et al.¹

(Circuit Court of Appeals, Eighth Circuit. April 12, 1897.)

No. 854.

1. PUBLIC LANDS—BILL ATTACKING DECISION OF LAND DEPARTMENT.

It is not sufficient, in a bill which seeks to show that a decision of the land department was procured by fraud and imposition, to allege that an affidavit was filed in a land office containing false allegations as to facts in issue in the proceeding in which the decision was made, but, in order that the complainant in such a bill may have a re-examination of such issues, it must be alleged and proved that such false testimony has affected the decision, and led to a result that otherwise would not have been reached; it must be shown that some trick, artifice, or deceit was practiced, preventing a full and fair trial in the land department, or preventing the officers thereof from considering the issues, and reaching a proper decision.

2. SAME—PLEADING.

A bill which seeks to attack a decision of the land department, on the ground that the officers thereof have misconstrued or misapplied the law, must set out the evidence, and state what the department found the material facts to be, in such a manner that the court can separate the department's findings of fact from its conclusions of law; and unless the findings of fact are disclosed, or enough undisputed facts are disclosed to make it plain that error of law was committed, and the complainant was thereby deprived of its rights, such a bill cannot be sustained.

3. SAME—CONTEST IN LAND OFFICE—NOTICE.

It is not necessary that notice of a contest before the land department between claimants under conflicting entries of public land should be given to the predecessors in interest of such claimants, who have parted with all their title, when the present claimants of the land are notified, and take part in the proceedings.

Appeal from the Circuit Court of the United States for the District of Colorado.

This was a bill filed by the Durango Land & Coal Company, the appellant, in the circuit court of the United States for the district of Colorado, against Roger C. Evans, Reese G. Carlisle, John Tetard, Sprigg Shackelford, and Frank Adams, the appellees, to restrain them from prosecuting any suits at law against the appellant, with respect to certain coal lands which were alleged to be in the possession of the appellant; and to restrain them as well from making any conveyance, either by way of sale or mortgage, affecting the title to said lands. The bill further prayed that the appellees, who held the legal title to said lands under a patent theretofore issued by the United States, might be adjudged to hold the same in trust for the appellant, and that they might be compelled to transfer all their right, title, and interest in said lands to the appellant. The grounds upon which such relief was asked were thus stated in the complaint: It was averred, in substance, that on December 1, 1881, Byron McMaster made a cash entry of the lands in controversy, the same being situated in Gunnison county, Colo., by paying to the receiver of the land office of the United States, at Leadville, Colo., the price demanded therefor, as fixed by the laws of the United States; that, on or about said last named day, the usual duplicate final receipt for the money so paid was issued by said receiver to the said McMaster; that on or about December 26, 1882, said receiver's receipt was duly recorded in the official records of Gunnison county, Colo.; that on or about December 26, 1881, William A. Bell, as trustee, purchased the lands in controversy from said McMaster for value, and received a warranty deed therefor, without notice of any adverse claims thereto; that on or about January 1, 1882, said Bell leased said lands for the term of 99 years to the Colorado Coal & Iron Company, a corporation of Colorado; that said lessee entered into possession of said lands under said lease, opened and developed coal mines thereon, and expended in improvements about \$250,000; that ever since said date the Colorado

¹ Rehearing denied May 24, 1897.

Coal & Iron Company, or its transferee, the Colorado Fuel & Iron Company, or the complainant, the Durango Land & Coal Company, had been, and then were, in the open, actual, notorious, and continuous possession of said lands, and had been engaged during said period in mining and extracting coal therefrom; that during all of said period the complainant, or its predecessors in interest, had paid all taxes and assessments levied thereon; and that on or about the 8th day of January, 1885, the lands in controversy were duly conveyed by the aforesaid William A. Bell to the complainant, the Durango Land & Coal Company, which had purchased the same for value and in good faith, in reliance upon the title thus acquired by it from said Bell, under and by virtue of the aforesaid entry made by the said Byron McMaster.

The bill of complaint contained the following additional averments, stating the same in *hæc verba*: "(6) And your orator, further complaining of the said defendants, says that on or about, to wit, the 27th day of June, 1892, and nearly ten years after the said entry of and payment for said lands by the said McMaster, and after the said improvements had been made as aforesaid thereon, said defendant Roger O. Evans, fraudulently and wrongfully claiming, or pretending to claim, some interest in said lands adverse to the title of your orator, filed in the local land office of the United States at Leadville, in said state of Colorado, an affidavit to the effect that he (the said Evans) had, at some time previous thereto, filed a coal declaratory statement on said lands, and, among other things, alleged therein, upon information and belief, that said entry of the said McMaster was not made for his own use and benefit, and he (the said Evans) made application therein to enter said lands himself. But your orator alleges that at some time prior to the entry of said lands by the said McMaster, and on or about, to wit, the 21st day of October, 1880, the said Evans filed in the United States land office at Leadville, in said state of Colorado, a paper purporting to be a coal declaratory statement, in which he (the said Evans) stated, among other things, that he had discovered and developed coal mines on said lands, and had taken possession of said lands, which statements, your orator alleges, were willfully and knowingly false and untrue, in this, to wit: that he, (the said Evans) never discovered any coal thereon, and never took possession of said lands or any part thereof, and never made any improvements of any kind or description thereon; and therefore your orator says that the said pretended entry and filing of the said Evans were fraudulent and void, and that he (the said Evans) acquired no rights thereby. And your orator further alleges that the said Evans, after filing the said pretended coal declaratory statement, wholly and completely abandoned the said lands and all claims thereto, and absolutely failed to make or attempt to make any final proof of payment therefor within the time, and as required by the coal land laws of the United States, although he was duly notified by the said land office to appear and show cause why his said pretended filing should not be canceled. (7) And your orator alleges that on or about the 27th day of June, 1892, the said defendants, who, during all the time aforesaid, resided near said lands in controversy, and had personal observation and knowledge, at the time they transpired, of all facts hereinbefore stated relating to the said lands, and to the said entry of the said McMaster, and to the purchase of the said lands by the said Bell and your orator, and of the lease and of the operations and improvements carried on and made as aforesaid, conspired and confederated together, for speculative purposes and in bad faith, to deceive the land department of the United States, and to unlawfully and fraudulently obtain from the United States a pretended title to said lands, and to defraud your orator and said lessee of their rights therein, and to unlawfully and fraudulently obtain the benefit of the improvements so made as aforesaid, and to extort from them large sums of money; and, so conspiring and confederating together for said purposes, they, the said defendants, made, or procured to be made, and presented to and filed in the said United States land office, certain statements, applications, and affidavits, alleging, among other things, that said Evans had expended money in developing coal mines on said lands, and that he was at that time in actual possession of said lands, and that he made the entry for his own use and benefit, and not directly or indirectly for the use and benefit of any other party; whereas, in truth and in fact, * * * the said Evans had never opened or developed any coal mine or mines on said lands, and never discovered any coal thereon, and he was not

then, nor had he ever been, in the actual or other possession of said lands or any part thereof; and that he (the said Evans) did not make said entry for his own use or benefit. But your orator alleges that, on the contrary, the only coal ever discovered on said lands, or any part thereof, was discovered by your orator, its grantor, or said lessee or transferee; and that the only coal mines ever developed or existing or opened on said lands, or any part thereof, were opened, developed, and worked by your orator, or its grantor or lessee or transferee, as aforesaid; and that said Evans made said pretended entry for the joint use and benefit of himself and the other defendants herein, and under and in pursuance of a prior agreement made by and between them, to the effect that said lands and all pretended claims against your orator and said lessee or transferee should, upon entry and patent, be divided between them. And your orator is informed and believes, and so alleges, that said defendants, and each and every of them, were at said time, and are now, disqualified to enter the said coal lands, or any other coal lands, by reason of the fact that they and each of them had previously exhausted their right in that respect. (8) And your orator further alleges that, deceived, misled, and imposed upon by the said false and fraudulent statements, applications, and affidavits of the said parties as aforesaid, and without notice either to the said McMaster, or to the said Bell, or to the said lessee or transferee, and without any appearance on behalf of them or any of them therein, the said land department of the United States, contrary to law, and in violation of the statutes of the United States in such case made and provided, proceeded, or pretended to proceed, to a so-called 'hearing' or 'contest' to determine the respective rights of the said McMaster's and Evans' entry; that such proceedings were thereupon had in said pretended contest or hearing that the United States land department canceled, or pretended to cancel, the said entry of the said McMaster, and did, on or about the 31st day of December, 1894, allow, or attempt to allow, the said entry of the said Evans, and thereafter, and on or about the 28th day of February, A. D. 1895, issued to him a patent for said lands, or a portion thereof. And your orator alleges that the said action, finding, and decision of the United States land department were contrary to law, and without authority of law, and were in violation of the statutes of the United States and of the rights of your orator, its grantor and lessee, among other things, in this, to wit: that by reason of the acts and things done and performed by the said McMaster, his grantee, and the said lessee and transferee, as hereinbefore set forth, the said entry of the said McMaster should have been allowed, and a patent of the United States should have been issued to him by the said land department, and the said pretended entry of the said Evans should have been disallowed and canceled; that there was no evidence before the said land department at said hearing or contest showing that the said entry of the said McMaster was unlawful or invalid in any respect; and that there was no evidence in said pretended contest upon which the said pretended entry of the said Evans should or could legally have been allowed; that no notice of said pretended hearing or contest was ever given the said McMaster, or the said Bell, or said lessee, the Colorado Coal & Iron Company, or its transferee, the Colorado Fuel & Iron Company, and that neither they nor any of them appeared or were represented at said hearing or contest; that your orator, its grantor, and said lessee or transferee have been in continuous, notorious, and open possession of the said lands from about the — day of November, 1881, up to and until about the 27th day of June, 1892, without any notice or knowledge of any adverse or other claim to said lands, or any portion thereof, on the part of the said defendants, or any of them; and that during said time, and long subsequent thereto, and up to a very recent date, your orator, its grantor, or said lessee or transferee, have made the said improvements and have paid the said taxes on said lands as aforesaid, — all of which was well known to the said defendants, and all of which facts were entirely disregarded by the said United States land department in said pretended hearing or contest; that neither the said Evans nor any of the other defendants ever discovered any coal on said lands, nor did they, or any of them, at any time take possession of the said lands, or any part thereof, nor did they, or any of them, ever at any time make, or attempt to make, any improvements of any nature on said lands, or any part thereof; that the said Evans did not make said pretended entry for his sole use and benefit, but the same was made

or attempted to be made for the joint use and benefit of all defendants herein, in pursuance of the prior agreement between them, and for the purpose of defrauding the United States government, and for the purpose of depriving your orator and said lessee of their rights in said premises, in violation of the statutes of the United States; that the said Evans had, at the time of his said pretended entry, exhausted all his rights, powers, and privileges to enter or take up coal lands under the laws of the United States; that the said Evans absolutely and completely abandoned any and all right, title, and claim which he might have had in or to said lands long prior to his said pretended entry, and absolutely failed to make final proof and payment for said lands within the time prescribed by the statutes of the United States in such case made and provided, and failed and omitted in his said pretended coal declaratory statement to show or claim that he had discovered any coal on said lands, or that he had opened a mine thereon, or that he had taken possession thereof; and that he (the said Evans) absolutely abandoned the said pretended filing on said lands long prior to his said pretended entry; and that after said abandonment the land department of the United States erroneously, and in violation of the statutes of the United States in such case made and provided, allowed him to renew the same, and to appear and be heard at said alleged contest or hearing, all of which facts were entirely disregarded and ignored by the said land department of the United States in said contest or hearing, wherein and whereby the said McMaster's entry was disallowed, and which facts, if properly considered, and the laws of the United States applicable thereto properly and legally construed by the said United States land department, would have resulted in the cancellation of the said pretended entry of the said Evans, and the allowance of the said McMaster's entry, and the issuance of a patent to him. Wherefore your orator says that for the reasons hereinbefore set forth, and for other and divers matters, facts, and things occurring in and at said pretended hearing or contest, the said land department erred, and violated the laws of the United States in such case made and provided, and more particularly the said act of congress above mentioned, in allowing the said Evans' entry, and in issuing said patent to him."

The bill further averred, in substance, that, since the issuance of said patent to the said Evans, he had conveyed to his co-defendants Carlisle, Tetard, and Shackelford a certain interest in the lands in controversy; that the defendant Adams claimed, or pretended to claim, some interest in or lien upon said lands under and by virtue of a mortgage executed by Evans; and that the said defendants were asserting and claiming a title to said lands under the entry of Evans, and were denying the validity of the title asserted by the complainant, which depended upon the validity of the entry made by said McMaster. The defendants filed a general demurrer to said bill, which, upon a hearing thereof, was sustained, and the bill was thereupon dismissed. The case comes to this court on appeal from the order sustaining said demurrer, and dismissing the bill of complaint.

Lucius M. Cuthbert and David C. Beaman (Henry T. Rogers and D. B. Ellis with them on the brief), for appellant.

John R. Smith and Sprigg Shackelford (S. D. Crump with them on the brief), for appellees.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The bill shows affirmatively that on October 21, 1880, Roger C. Evans filed a declaratory statement against the coal lands in controversy, under the provisions of sections 2347, 2348, and 2349 of the Revised Statutes of the United States; that Byron McMaster was permitted to make a subsequent cash entry of the same lands

on December 1, 1881; and that, in view of the conflicting claims thus created, a contest was inaugurated before the land department of the United States, which resulted in the cancellation of the entry made by McMaster, and in the issuance of a patent to Roger C. Evans. The allegations in the bill respecting these proceedings in the land department are very vague and unsatisfactory. The bill simply advises us that Evans filed an affidavit in the local land office at Leadville on June 27, 1892, charging that the entry by McMaster was not made for his own use, and that he (Evans) subsequently obtained a patent for the land in controversy. The further course of the proceeding before the land department, after the affidavit was filed, is not described with any detail or certainty, and but for a casual allusion, made in the brief of counsel for the appellant, to a decision rendered by the secretary of the interior, we should be in doubt whether the contest ever reached the secretary, or was terminated by the decision of some inferior officer of the land department. Enough appears, however, to justify us in presuming, as against the complainant company, that a contest was duly inaugurated by Evans against said company; that it had due notice of Evans' claims, and opportunity to defend; that it did defend; that the contest ran its course in the prescribed way through the department until it reached the secretary of the interior; and that a patent was ultimately awarded to Evans. Viewed in this aspect, the case at bar is one in which the complainant seeks to set aside and impeach the judgment of the land department; and the doctrine is too well settled to admit of any controversy that the decisions of that tribunal upon questions properly pending before it can only be annulled when such fraud or imposition is shown to have been practiced as prevented the unsuccessful party in a contest from fully presenting his case, or the officers composing the tribunal from fully considering it, or when such officers have themselves been guilty of fraudulent conduct, or when it is made to appear that, upon the case as established before the land department, the law applicable thereto was misconstrued or misapplied. If fraud is charged as a ground for annulling a decision of the land department, it is not enough that false testimony or forged documents have been employed; but it must be made to appear that such false testimony has affected the decision, and led to a result which otherwise would not have been reached. And inasmuch as the findings of the land department on questions of fact are conclusive, when the charge is that the land department has erred in the decision of a mixed question of law and fact, what the facts were, as laid before and found by the department, must be shown, so as to enable the court to see clearly that the law has been misconstrued.

These propositions have been so frequently stated and applied that it is hardly necessary to repeat them. *Lee v. Johnson*, 116 U. S. 48, 50, 6 Sup. Ct. 249; *Quinby v. Conlan*, 104 U. S. 420, 426; *Marquez v. Frisbie*, 101 U. S. 473, 476; *Vance v. Burbank*, 101 U. S. 514, 519; *Smelting Co. v. Kemp*, 104 U. S. 636, 640; *Moore v. Robbins*, 96 U. S. 530; *Shepley v. Cowan*, 91 U. S. 330, 340; *Johnson v. Towsley*, 13 Wall. 72; *Sanford v. Sanford*, 139 U. S. 642, 11

Sup. Ct. 666. Tested by these rules, we think the allegations of the bill were insufficient to warrant the relief prayed for, and that the demurrer thereto was properly sustained. Inasmuch as no patent had been issued when the contest was inaugurated, the land department had power to cancel the entry of McMaster, and to determine which of the two entrymen had the superior right to the land. The questions adjudicated, therefore, were within the jurisdiction of the land department, and its decision cannot be assailed for want of power to hear and decide the case. *Mortgage Co. v. Hopper*, 29 U. S. App. 12, 12 C. C. A. 293, and 64 Fed. 553, and cases there cited. Turning, then, to the allegations of the bill which attempt to show that the decision of the land department was procured by fraud and imposition, it will be observed that the only fraudulent acts alleged are that certain affidavits were filed in the land office by Evans and his associates, alleging that Evans had expended money in developing coal mines on the land in controversy; that he was in actual possession of the lands at the time; that he made his alleged entry for his own use; and that all of such statements contained in the affidavits were false. Aside from a general allegation of conspiracy among the defendants to fraudulently and unlawfully obtain a patent for the lands in dispute, the foregoing are the only specific fraudulent acts which the bill charges or describes; but, obviously, the issues tendered by these affidavits were the very issues which the land department was appointed to try and determine, and they were each issues of fact, concerning which the finding of the land department is final and conclusive, unless such finding was induced by fraud. In the contest pending before the department, the complainant company had an opportunity to show, as it now contends, that all the aforesaid statements were false; and, within the doctrine above stated, it was its duty to have made such showing before the land department, and it will not be excused for failing to do so unless it alleges and proves that some trick, artifice, or deceit was practiced, which prevented it from obtaining a full and fair trial of the issues, or which prevented the officers of the land department from considering the same, and reaching a proper decision. It must be apparent, we think, from a careful reading of the complaint, that no such fraud is alleged, and that, if the circuit court had entered upon a hearing of the issues presented by the bill, it would simply have retried the very case which was tried by the land department.

The question whether the bill discloses that, upon the case as presented to the officers of the land department, those officers misconstrued or misapplied the law, remains to be noticed. A fundamental defect in the bill in this respect is that it fails to set out the evidence which was laid before the land department, or to state what the department found the material facts to be, in such a manner that the court can separate the department's findings of fact from its conclusions of law, and see clearly wherein a mistake of law has been made. It is alleged in one paragraph of the bill "that there was no evidence before the said land department at said hearing or contest showing that the said entry of the said McMaster was

unlawful or invalid in any respect, and that there was no evidence in said pretended contest upon which the said pretended entry of the said Evans should or could legally have been allowed." These allegations, however, merely state the opinion of the pleader with reference to the evidence which was laid before the department, and for that reason they are merely conclusions of law. To enable a court to decide whether the conclusions so stated are right or wrong, all the testimony with respect to which the aforesaid opinion is expressed should have been set out, inasmuch as the question whether there is any evidence tending to establish a given fact is a question of law, which can only be determined after all the testimony has been considered and examined.

Our attention is also directed to other allegations of the bill, which charge, in substance, that, at the time of his entry on the lands in controversy, Evans had exhausted his power to take up coal lands under the laws of the United States; that he completely abandoned all his right, title, and interest to the lands long prior to his pretended entry; and that he failed to show in his declaratory statement that he had discovered any coal on said lands, or had opened a mine thereon. These allegations are made without any apparent reference to the contest before the land department, or to the evidence with respect to such allegations which may have been laid before the department in the course of the contest, or to the findings of the department with respect thereto. The allegations are made precisely as they might be if the issues tendered were open to consideration in the case at bar, entirely unaffected by the findings and decision of the land department. This theory is erroneous. The contest having been tried and determined before a special tribunal constituted for that purpose, its judgment can only be overturned for errors of law, by showing that it misconstrued or misapplied the law applicable to the case made before the land department, and the bill of complaint does not advise us what evidence was produced before the department relative to Evans' qualifications to enter coal lands, or relative to his acts of abandonment. This court cannot say that the law was misconstrued by the officers of the land department, unless their findings upon questions of fact are disclosed, or enough undisputed facts are disclosed, which were proven before the department, to make it plain that an error of law was committed, and that the complainant company was thereby deprived of its rights. *Marquez v. Frisbie*, 101 U. S. 473, 476; *Sanford v. Sanford*, 139 U. S. 642, 647, 11 Sup. Ct. 666. No decision by the land department would have any weight, or afford any protection to a successful litigant in that department, if, without any statement of what the facts were as presented to the department, the whole controversy could be opened in the courts by general allegations, such as are found in the present bill, that the successful litigant had exhausted his right to enter land, or was otherwise disqualified, or had abandoned his entry. These are matters which were properly cognizable before the land department when the contest was pending. The presumption is that all such questions were brought to the attention of the department, and were duly considered and properly decided. The

burden was on the complainant, therefore, when it sought to reopen the controversy for errors of law, to show what the facts were before the land department to which the law was applied. We are forced to conclude that, by the averments of the present bill, this burden was not successfully discharged.

It is insisted, however, that the bill states a cause of action, and sufficiently shows an error of law, such as invalidates the decision of the land department, within the ruling made in the case of *Sanford v. Sanford*, supra. This position, we think, is untenable. In the case referred to, which was a suit to enjoin an action of ejectment brought by the holder of a patent, the proceedings before the land department in which the patent had been obtained showed beyond controversy that the patentee had been allowed to file a second declaratory statement against certain land, which was not embraced in his first pre-emption claim, while he continued to hold and occupy the land that he had originally entered. The court held that the filing of such second pre-emption claim was expressly prohibited by section 2261 of the Revised Statutes of the United States, and that it clearly appeared that the land department had misconstrued the law, and deprived the plaintiff of his rights, by permitting such second filing to be made, and in issuing a patent thereon. It was on this ground alone that relief was afforded to the plaintiff against the action of the land department. We fail to see that the decision in question lends any support to the complaint which was filed in the case at bar.

It is finally contended that the action of the land department in canceling the McMaster entry, and in granting the patent to Evans, was void, because the bill shows that no notice of the contest which was inaugurated by Evans was given either to McMaster, or Bell, or to Bell's lessee. It is worthy of comment that the bill contains no direct averment that the complainant company had notice of the contest, but, in view of its failure to allege that no such notice was given, it must be presumed that it was duly notified of the proceedings in question; that it took an active part therein; that it had full opportunity to assert before the land department all the defenses against the Evans entry which it now makes; and that it was eventually defeated. Under these circumstances, we are of opinion that the action of the land department in canceling the McMaster entry is binding upon the complainant, unless such action is successfully assailed for fraud or mistake of law, notwithstanding the fact that its predecessors in interest, who had parted with all of their title to the land in dispute, were not notified of the pending controversy. It results from these views that the demurrer to the bill was properly sustained, and the decree of the circuit court is therefore affirmed.

EVANS et al. v. DURANGO LAND & COAL CO. et al.¹
 (Circuit Court of Appeals, Eighth Circuit. April 12, 1897.)

No. 850.

1. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

A suit in which the complaint sets up an entry of public land by the plaintiff and the subsequent issue of a patent, and seeks to establish an interest in the land during the interval, by an application of the doctrine of relation, is a case of federal cognizance, since the determination of the applicability of such doctrine to the case requires the construction of federal statutes and a consideration of the effect of acts thereunder. *Romie v. Casanova*, 91 U. S. 379, distinguished.

2. SAME—TRESPASS.

A complaint charging a continuing trespass, and demanding a lump sum as damages, states but a single cause of action, though the title under which the plaintiff claimed was different at different periods of the time covered by the trespass; and, if the adjudication of one such title involves a federal question, the case is one of federal cognizance, though no such question is involved in the other title.

3. PARTIES—SUIT BY ASSIGNOR AND ASSIGNEE.

The rule that a debtor cannot be sued for a part of an entire demand does not prevent the maintenance of a suit by the assignee of a part of such a demand and his assignor, holding the remainder, to recover the whole demand.

4. TRESPASS—PLEADING.

Under the Code of Procedure of Colorado, a complaint in an action for the wrongful removal of coal from certain land, need not allege that the plaintiff was in possession at the time of the alleged trespass.

5. SAME—LAND PATENTS—TRESPASS.

A patent for public land will not be held to take effect, by virtue of the doctrine of relation, as of the date of the initial step taken by the patentee, to obtain a title to the land, where it appears from the allegations of the complaint filed by the patentee that the rights by him acquired by such initial step were lost by his lack of diligence, and the effect of such an application of the doctrine of relation would be to render a party accountable for a large quantity of coal mined on the land, who had made a cash entry of the land after the patentee's right to the land had apparently been abandoned, and who had opened and developed mines at large expense, and had worked them for several years, with the knowledge of the patentee. *Sanborn*, Circuit Judge, dissenting, on the ground that the patentee had an interest from the taking of the first step, which ripened into a title, and consequently that the doctrine of relation did apply.

In Error to the Circuit Court of the United States for the District of Colorado.

This was a suit at law brought in the district court of Gunnison county, Colo., by Roger C. Evans, R. G. Carlisle, John Tetard, and Sprigg Shackelford, the plaintiffs in error, against the Durango Land & Coal Company, John A. Porter, William A. Bell, James H. Barlow, and William J. Palmer, the defendants in error, to recover the value of certain coal alleged to have been mined and removed from certain lands situated in Gunnison county, Colo. The suit presents another phase of the controversy which was considered in the case of *Coal Co. v. Evans*, 80 Fed. 425. In the trial court the case was tried and decided on demurrer to the complaint, which was in the following form: "Plaintiffs, complaining of the defendants, allege: First. That Roger C. Evans, one of the plaintiffs herein, who was at the time a citizen of the United States, and in every respect duly qualified so to do, filed in the United States land office, at Leadville, Colo., on October 2, 1880, his certain coal declaratory statement, number 44, claiming the east half of the northwest quarter of section ten, and the north half of the northeast quarter of section four, all in township fourteen south, of range eighty-six west of the sixth principal meridian, under the

¹ Rehearing denied May 24, 1897.

provisions of the statutes of the United States relating to the sale and disposition of the coal lands of the United States. That on the 7th day of October, 1880, the said declaratory statement was suspended by order of the commissioner of the general land office of the United States, and that the right of said Evans to acquire further title to said lands was suspended and held in abeyance by the United States until such time when the necessary and proper instructions should have been issued by the said commissioner. That on the 26th day of November, 1881, and during the time when the rights of plaintiff Roger O. Evans were suspended as aforesaid, one Byron McMaster made, executed, and delivered to defendant William A. Bell, as trustee, a warranty deed for the lands above described. That the said defendant Bell took the said conveyance from the said McMaster, for and in the interest of himself and the defendants Porter, Palmer, Barlow, and others. That thereafter, and during the suspension of the rights of plaintiff Evans, as aforesaid, to wit, on the 1st day of December, 1881, the said Byron McMaster made a pretended entry of the said lands in the United States land office at Leadville, Colo. That the said pretended entry was made while the said lands in section four were withdrawn from sale by the United States, and without notice to plaintiff Evans. That, while said pretended entry purported to be made for the sole use and benefit of the said Byron McMaster, it was made for the use and benefit of defendants Bell, Porter, Palmer, Barlow, and others, who were interested with defendant Bell in the transaction. That said pretended entry was fraudulent and void, by reason of the facts stated aforesaid. That thereafter the necessary and proper instructions relating to the sale and disposition of the said lands were issued by the commissioner of the general land office of the United States, and plaintiff Roger C. Evans was notified that he must appear at the United States land office at Gunnison, Colo., and make his final proof, enter and pay for said lands; and that within due time from the date and service of said notice, to wit, on the 27th day of June, 1892, plaintiff Roger C. Evans appeared at the United States land office at Gunnison, Colo., made his final proof for the said land, and offered to pay for and enter the said land; and that the register and receiver of the said land office refused to accept the money tendered in payment for said land, as by a rule of the interior department of the United States they were required to do, on account of the erroneous and fraudulent entry of the said McMaster, and referred the matter of the rights of claimants for the said lands to the commissioner of the general land office of the United States; and that thereupon plaintiff Roger C. Evans made his affidavit of contest against the claim of said McMaster, William A. Bell, and the Durango Land & Coal Company, and charged that the said claim of the said parties was based upon the fraudulent entry of McMaster. That said entry was made for the use and benefit of William A. Bell, the Durango Land & Coal Company, and others. That it was made without notice to plaintiff Evans that said entry was not made for the use and benefit of said McMaster, and was fraudulent and void; and prayed that the entry of said McMaster be canceled, and that he (the said Roger C. Evans) be allowed to enter the said lands. That upon the filing of said affidavit, and by reason of the charges made therein against the entry of said McMaster, the commissioner of the general land office of the United States ordered that there should be held at the United States land office at Gunnison, Colo., a contest and hearing to determine the rights of the claimants of the said land. That said order for contest was issued on the 17th day of September, 1892, and that upon the 27th day of September, 1892, the register and receiver of the United States land office at Gunnison, Colo., issued their notice of the hearing of said contest, and fixed the date for said hearing for November 15, 1892. That the defendant Bell deeded the said lands to the defendant the Durango Land & Coal Company on the 8th day of January, 1885, and before the institution of said contest. That the notice of said contest was directed to and duly served on the said Byron McMaster, William A. Bell, and the Durango Land & Coal Company, and they and each of them were required and commanded to appear on the 15th of November, 1892, at the said land office, and offer their proofs to sustain their claim to the said land."

The complaint further showed, in substance, the following facts: That the contest so as aforesaid inaugurated was duly heard by the register and receiver of said land office; that said officer decided the contest on January 18, 1893,

after all the proofs were in, and after the argument of counsel, said officer holding that, as the entry by said McMaster was made presumably for the use and benefit of the Durango Land & Coal Company, the same was fraudulent and void, and should be canceled; that an appeal from such decision was subsequently taken to the commissioner of the general land office by the Durango Land & Coal Company, and to the secretary of the interior, and that the decision aforesaid was affirmed by each of said officers; that, in pursuance of such decision, the entry of McMaster was canceled, and the said Evans was thereupon allowed to enter the lands; that said Evans, in pursuance of such decision, accordingly entered and paid for the lands on December 31, 1894, receiving the usual receiver's receipt in duplicate for the money so paid; that on February 28, 1895, a patent was issued by the United States to the said Evans for the east half of the northwest quarter of section ten, in township fourteen south, of range eighty-six west; that on March 20, 1895, Evans sold and conveyed to the plaintiff Sprigg Shackelford an undivided two-thirds interest in the lands so entered by him, and a two-thirds interest in any claim that he (the said Evans) might have against the defendants herein, on account of the extraction of coal from said lands; that, at the same date, the plaintiff Shackelford sold and conveyed to the plaintiffs R. G. Carlisle and John Tetard an undivided one-third interest in the land and claim which he had thus acquired from said Evans; that between October 2, 1880, and March 20, 1895, the plaintiff Evans was the owner of and entitled to the exclusive use and occupation of the aforesaid east half of the northwest quarter of section ten, in township fourteen south, of range eighty-six west, situated in Gunnison county, Colo., and that from March 20, 1895, all of said plaintiffs had been the owners of said land, and entitled to the exclusive use and occupation of the same; that between January 8, 1885, and August 26, 1895, the defendants jointly, by their agents and employes, wrongfully entered into and upon said lands last described, and into a vein of coal under the surface of said land, and wrongfully mined and extracted therefrom 1,445,000 tons of coal, and converted the same to their own use. In view of the premises, plaintiffs demanded judgment against the defendants for the sum of \$1,445,000.

The defendants below entered their appearance to the suit, and in due time filed a petition and bond for the removal of the cause to the circuit court of the United States for the district of Colorado. In the latter court a motion to remand the case to the state court was made and overruled. The defendants then filed a demurrer to the aforesaid complaint, which demurrer was sustained, and a final judgment was entered, dismissing the suit at the plaintiffs' cost. The plaintiffs sued out a writ of error, assigning as grounds for reversal that the motion to remand the case should have been sustained, and that the demurrer should have been overruled.

John R. Smith and Sprigg Shackelford (S. D. Crump with them on the brief), for plaintiffs in error.

Lucius M. Cuthbert and David C. Beaman (Henry T. Rogers and Daniel B. Ellis were with them on the brief), for defendants in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The motion to remand the case to the state court appears to have been properly overruled. If the plaintiffs had contented themselves, as they might have done, with the simple averment that they were the owners of the land in controversy, and that the defendants had wrongfully entered upon said lands, and unlawfully removed coal therefrom, to the plaintiffs' damage in a certain sum, it is doubtless true that the complaint would not have disclosed a federal question, and, under repeated decisions, the venue could not have been changed

to the federal court. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654; *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34; *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 482, 15 Sup. Ct. 192; *Kansas v. Atchison, T. & S. F. Ry. Co.*, 77 Fed. 339. But the complaint was not so drawn. It was carefully framed for the purpose of showing that, by filing his so-termed "coal declaratory statement" on October 2, 1880, the plaintiff Evans acquired such an interest in the lands in controversy that when a patent therefor was issued on February 28, 1895, he became entitled to recover the value of all coal which had been mined and removed from the land without his consent between the dates last aforesaid. Inasmuch as the plaintiffs demanded judgment for coal removed long prior to December 31, 1894, when Evans was permitted to enter and pay for the lands, and during a period while the defendants were evidently in the possession of the same under the uncanceled entry of McMaster, the question is presented by the complaint whether the doctrine of relation, which is invoked, entitled the plaintiff Evans, after he had received a patent, to demand compensation for all trespasses committed on the land subsequent to the filing of his declaratory statement. It is true that the doctrine of relation is a doctrine of the common law, but the fact remains that it cannot be applied in the present case without considering, in the first instance, the nature and extent of the interest in the land which Evans acquired by filing his declaratory statement, nor without determining how far his rights under such declaratory statement were affected by the alleged order of suspension made by the commissioner of the general land office on October 7, 1880, nor without considering what were the rights of the parties with respect to the lands while the alleged contest between them was pending and undetermined in the general land office. These are all questions which involve an examination and construction of the laws of the United States before the doctrine of relation, on which the plaintiffs rely, can be intelligently applied. The case therefore bears no analogy to a class of cases in which it is held that a suit is not one of federal cognizance, because the title to certain land which is in controversy originally emanated from the United States, provided that title is not in dispute, but the litigation affecting the land relates to other matters. *Romie v. Casanova*, 91 U. S. 379. In the case at bar, it appears, we think, from the face of the complaint, that the claim preferred by the plaintiffs cannot be adjudicated without construing certain federal statutes, and considering the effect of certain proceedings in the land office which have been taken thereunder. It follows, therefore, that the case is one of federal cognizance, and that the motion to remand it was properly denied. *St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. R. Co.*, 32 U. S. App. 372, 15 C. C. A. 167, and 68 Fed. 2.

Passing to the question whether the complaint states a cause of action, it is to be observed that it charges a continuous trespass committed by the defendants, which commenced January 8, 1885, when the land was conveyed to the Durango Land & Coal Company, and ended on August 26, 1895. The alleged trespass covers a period of about eight months from and after December 31, 1894, when, as the

complaint shows, Evans was allowed to enter and pay for the coal lands in controversy, and received a receiver's receipt therefor. No reason is perceived, therefore, why the complaint did not show a good cause of action as to the coal mined and removed subsequent to the latter date, whatever may be the view ultimately entertained as to the plaintiffs' right to recover for the coal mined and removed prior thereto. It is suggested, however, that the circuit court of the United States for the district of Colorado had no jurisdiction of the cause of action for trespasses committed subsequent to December 31, 1894, and that so much of the complaint as charges trespasses after that date may be ignored. This suggestion appears to be based on the assumption that the trespasses last mentioned were separate and distinct from those committed prior to December 31, 1894, and that an action to recover damages therefor involved the consideration of no federal question. In other words, it seems to be taken for granted that the complaint stated two causes of action, one of Federal cognizance, and another that was exclusively cognizable by the local or state courts. We think that this assumption is untenable. The complaint, as we view it, states but a single cause of action for a continuous trespass of some years' duration. It contains but one count, and the damage claimed is a lump sum for the injury done to the land during the entire period that it is alleged to have been wrongfully occupied by the defendants. It is doubtless true that so much of the plaintiff's claim as is founded upon trespasses committed prior to December 31, 1894, is subject to certain defenses, which cannot be as well made against the claim for trespasses committed subsequent to that date; but the fact that different defenses may be pleaded to parts of an entire claim does not establish that the claim itself is made up of different and independent causes of action. *Pirie v. Tvedt*, 115 U. S. 41, 5 Sup. Ct. 1034, 1161; *Railroad Co. v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735; *Barth v. Coler*, 19 U. S. App. 646, 649, 9 C. C. A. 81, and 60 Fed. 466. Even if it happens, therefore, that the plaintiffs will only be able to show a right to recover for such coal as was mined and removed subsequent to the entry of December 31, 1894, yet that result will not deprive the federal court of its right to enter a judgment for the value of coal so mined and removed. The cause of action stated in the complaint is clearly single and indivisible, and the plaintiffs have so stated their cause of action as to show that an adjudication upon their claim as presented necessarily involves the construction of federal statutes. It results from these facts that the trial court, by the proceedings for removal, lawfully acquired jurisdiction of the entire case; that is to say, the right to enter a judgment for any portion of the demand which the plaintiffs showed themselves entitled to recover, and that jurisdiction could not be affected by subsequent events. If, for any reason, the plaintiffs fail to recover for the injury done to the land prior to December 31, 1894, such failure will no more impair their right to recover for injuries, if any, done subsequently, than would a failure to prove that they had sustained the entire amount of damage laid in the complaint, or a failure to prove that the damages exceeded \$2,000. *St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. R. Co.*, supra.

It is further urged that the demurrer was properly sustained, because the complaint shows that the plaintiff Evans had assigned an interest in the cause of action sued upon to his co-plaintiff Shackelford, and that the latter had, in like manner, sold and assigned a part of his interest to the plaintiffs Carlisle and Tetard. This contention is without merit. While it is true that the law does not permit a debtor to be sued for a part of an entire demand which has been assigned by his creditor to a third party, yet the doctrine in question does not prevent an assignment of a part of a demand, provided the assignor and the assignee join in a suit to enforce the entire claim. The rule which is invoked by the defendants rests upon the ground that a debtor ought not to be annoyed by several suits brought by different parties to collect parts of a claim or debt, which might have been enforced by the creditor in a single suit. The reason upon which the rule against splitting a cause of action rests has no application to a case like the one at bar, where all the persons who have acquired an interest in the demand join in a single action to enforce it. It is a matter of no concern to a debtor whether his creditor assigns an interest in the debt to third parties, provided no more than one suit is brought to collect it.

A further contention that the complaint, as a whole, is insufficient, because it fails to allege that the plaintiffs below were in possession of the land in controversy at the date of the alleged trespass, is, in our opinion, equally without merit. The action was brought in a state where the Code of Procedure has been adopted, and the various forms of action known to the common law have been abolished. The owner of property, whether in or out of possession, is entitled to recover for all injuries done to it by a wrongdoer. At common law, if he was in possession when the injury was done, he might obtain redress therefor in an action of trespass *quare clausum fregit*, whereas, if he was out of possession, he was compelled to bring an action on the case. These common-law forms of action having been abolished by the Code, a cause of action is sufficiently disclosed if the fact of ownership in the plaintiff, and the fact that an injury has been done to the land without the permission of the owner, are stated in ordinary and concise language. *Fitzpatrick v. Gebhart*, 7 Kan. 35, 42, 43. Tested by this rule, the complaint is sufficient.

This brings us to the question of chief interest and importance which arises in the case, namely, whether the complaint shows a right of recovery in the plaintiffs for the coal mined and removed from the land in controversy prior to December 31, 1894, when Evans entered the land, and paid the purchase money. It may be conceded that a patent for public land has, on several occasions, been held to take effect as of the date of the initial step taken by the patentee, under the laws of the United States, to obtain a title to the land. *Landes v. Brant*, 10 How. 348, 372, 373; *Lynch v. Bernal*, 9 Wall. 315, 325; *St. Onge v. Day*, 11 Colo. 368, 18 Pac. 278; *Shepley v. Cowan*, 91 U. S. 330, 337; *Cothrin v. Faber*, 68 Cal. 39, 4 Pac. 940, and 8 Pac. 599; *Chavez v. Chavez De Sanchez* (N. M.) 32 Pac. 137, 145. Nevertheless, there appears to be no hard and fast rule giving a patent effect by relation as of a date anterior to the time when an entry is fully con-

summed by the payment of the purchase money, or by the doing of some other equivalent act, such as the surrender of a land warrant or the selection of land to supply an ascertained deficiency in a land grant. It is generally agreed that, when such acts are performed, the equitable title becomes complete, subject, of course, to the right of the land department to cancel the entry, or the selection, prior to the issuance of the patent, for good and sufficient cause shown, why the entry or selection should not have been allowed. The doctrine of relation is a legal fiction, which was invented and is applied solely for the protection of persons who, without fault of their own, would otherwise sustain an injury. Being of equitable origin, and designed to prevent fraud and injustice, it is a doctrine which is never applied when it would have a contrary effect. *Gibson v. Chouteau*, 13 Wall. 92, 101; *Reynolds v. Plymouth Co.*, 55 Iowa, 90, 93, 7 N. W. 468; *Calder v. Keegan*, 30 Wis. 126; *Musser v. McRae*, 44 Minn. 343, 46 N. W. 673; *Hussman v. Durham*, 165 U. S. 144, 17 Sup. Ct. 253. In the case last cited (*Hussman v. Durham*) the supreme court said:

"A title by relation extends no further backwards than to the inception of the equitable right. * * * In other words, the United States does not part with its rights until it has actually received payment, and if, by mistake, inadvertence, or fraud, a certificate of location, which is equivalent to a receipt, is issued, when in fact no consideration has been received, no equitable title is passed thereby; and a conveyance of the legal title does not operate by relation back of the time when the actual consideration is paid."

In that case the court accordingly declined to give a patent effect by relation as of the date when the initial step was taken to acquire a title to certain public land by the location of a land warrant, where the result of giving it such effect would have been to subject the land to the claims of the holder of a tax title, although he had paid taxes which were assessed when the land was apparently subject to taxation, and had afterwards expended money in improving it.

In the light of these principles the complaint must be examined. The plaintiffs found their right to recover for coal mined and removed prior to December 31, 1894, on the allegation that Evans filed a coal declaratory statement on October 2, 1880. The filing of this statement, assuming the facts stated therein to be true, gave Evans, in the language of the statute, "a preference right of entry," nothing more and nothing less. Section 2348, Rev. St. U. S. Manifestly, it did not create such a complete equitable title as is acquired when public land is entered and paid for. To have made his equitable title complete, Evans should have proved his rights and paid for the land within one year after October 2, 1880. In default of so doing, the statute (section 2350, Rev. St. U. S.) declared that the land filed against should be subject to entry by "any other qualified applicant." The complaint shows affirmatively that this was not done; that no payment was made by Evans until December 31, 1894; and that, after the year limited for making payment had expired, Byron McMaster was permitted by the officers of the land department to enter the land, on the theory, no doubt, that Evans' preference right of entry had been forfeited. The only reason stated in the complaint why the entry of McMaster was eventually canceled by the officers of

the land department is that they found and decided that the entry was not made for his own benefit, but presumably for the benefit of the Durango Land & Coal Company. It is not alleged in the complaint that the McMaster entry was canceled because the plaintiff Evans had previously filed a declaratory statement, and obtained a preference right of entry, or that such preference right of entry in the judgment of the land department in any manner affected the validity of the McMaster entry. We must presume, therefore, that, but for the fact that McMaster did not enter the land for his own benefit, such entry would have prevailed over the preference right of entry originally secured by Evans, and that the land would have been patented to the defendant, on the ground that such preference right had either been lost or abandoned. In this aspect of the case, it follows that Evans' right to the land had its origin in the cash entry which he was allowed to make on December 31, 1894, after the McMaster entry was canceled, and that his patent ought not to be given effect by relation as of an earlier date, because whatever right he had theretofore acquired had been lost.

We have not overlooked the averment contained in the complaint, to the effect that the declaratory statement filed by Evans was suspended by order of the commissioner of the general land office "until such time when the necessary and proper instructions should have been issued by the said commissioner"; but, in our judgment, that allegation is not sufficient to show that the failure of Evans, for a period of 12 years, to make his proof and payment, was due to the neglect of the officers of the land department in preparing the necessary instructions under which such steps could be taken. The complaint does not show, by direct averment or necessary intendment, that from October 2, 1880, until June 27, 1892, the land department failed or refused to promulgate instructions under which Evans could have prosecuted his claim and perfected his entry; and, in the absence of such an averment, we will not presume that his rights were held in abeyance for such an unusual length of time, and that he was for 12 years deprived of the power to prove up his claim, and pay for the land, without fault of his own, and solely through the neglect of the officers of the land department. Inasmuch as the plaintiffs invoke the equitable doctrine of relation for the purpose of recovering the value of coal which the defendant company has taken out of the land in controversy, doubtless at great labor and expense, and during a series of years, they ought to show, by proper averments, why Evans remained silent and inactive for such a long period after his declaratory statement was filed, and they should also show that his apparent failure to comply with the law and to exercise due diligence was excusable. Without some further allegations showing how it happened that no action was taken by Evans towards perfecting his claim between October 2, 1880, and June 27, 1892, although for a greater part of that time the defendant company was in possession of the land, and mining coal thereon, the inference is clear that he must have been guilty of gross laches in prosecuting his claim, and in asserting his rights; and such laches on his part would seem to be a sufficient reason why his patent should not be given effect by relation as

of the date when he filed his declaratory statement. It may be that facts can be shown which will excuse Evans' apparent want of diligence in perfecting his title, but we are constrained to hold that the present complaint does not contain such a showing, nor any averments which would justify us in holding that his patent should be given effect by relation as of a date anterior to December 31, 1894. Under the averments of the complaint, as heretofore stated, there would seem to be a right to recover for such coal as the defendant company may have mined and removed from the land subsequent to the latter date, and for that reason we think that the demurrer to the complaint should have been overruled. The judgment of the circuit court is accordingly reversed, and the case is remanded for a new trial.

SANBORN, Circuit Judge (concurring). I concur in the result in this case, but I am unable to agree to the views expressed in the opinion relative to the application of the doctrine of relation. As I read the complaint in this action, it shows that a competent quasi-judicial tribunal decided, in a case of which it had jurisdiction, that the defendants in error and those under whom they claimed never had any right or title to the land from which they wrongfully removed the coal in controversy, and that the plaintiffs in error, or one of them, Roger C. Evans, had during all the time after 1880 a right to the possession and use, and a preference right to enter the land, which eventually matured into a title. It does not appear to me that there is any occasion to abrogate or evade the settled doctrine of relation, in order to take from those who, according to the unassailable judgment of the land department, had a right to this land and its products, and to give to those who never had any such right the coal which the latter wrongfully took from it, and which may have constituted its chief value.

TEMPLE et al. v. GLASGOW et al.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1897.)

No. 176.

1. CORPORATIONS — APPOINTMENT OF RECEIVERS — JURISDICTION — WAIVER OF OBJECTIONS.

An objection to the jurisdiction of the court to appoint receivers for any other property of a corporation than that upon which the complaining creditors claim a lien should be taken in limine, and is waived when not raised until after a decree authorizing receivers to sell all the corporate property.

2. RECEIVERS—TIME OF APPOINTMENT—JUDGMENT LIENS.

Judgments against a corporation, obtained between the entry of an order appointing receivers therefor and the approval of the receivers' bonds, create no lien on the property subject to the receivership. 73 Fed. 709, affirmed.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

On September 17, 1892, the Connecticut River Banking Company, a corporation of Connecticut, filed its bill of complaint in the circuit court of the United States for the Western district of Virginia against the Rockbridge Company,

a corporation of Virginia, and against the Manhattan Trust Company, a corporation of New York, and F. T. Glasgow, a citizen of Virginia, trustees, alleging that it held, as collateral security for a debt due to it by the Rockbridge Company, certain past-due and unpaid first mortgage (series A) bonds of the said Rockbridge Company, secured by a deed of trust from said Rockbridge Company to the said Manhattan Trust Company and F. T. Glasgow, trustees; that, of said first mortgage (series A) bonds, there were outstanding, in all, about \$120,000 or \$130,000, of which no part of the principal or interest had been paid, and that the said Rockbridge Company was largely indebted to persons other than said mortgage bondholders, and was insolvent and unable to pay its debts, and that suits to a considerable amount had already been instituted against it, and other suits were threatened; that said company owned large and valuable properties, real and personal, in the county of Rockbridge, but was unable to realize funds to meet its defaulted engagements, and its officers and managers were unable to do anything to relieve it from its embarrassments; and that the interests of all parties concerned required that the company should go into liquidation, and its property and assets be placed in the hands of a receiver, to avoid being wasted by suits, and so that full justice might be done to all parties. The prayer was that the Rockbridge Company and the said mortgage trustees be required to answer, and that an injunction be granted restraining the Rockbridge Company from all further acts as a corporation, and for the appointment of a receiver of the property and assets of the company, in order that the same might be administered under the direction and control of the court, and that the debts might be collected, and the property sold, and the proceeds appropriated, under the direction of the court, to the payment of the company's debts according to their priorities; that all necessary accounts might be taken; and that the claims of all parties who should come in might be ascertained and adjudicated; and for general relief. Subpoenas were issued, and the Rockbridge Company and Glasgow were returned summoned to the October rule day, 1892, and the Manhattan Trust Company to the November rule day, 1892. The matter of the appointment of a receiver was, upon notice, set for hearing on October 17, and postponed to November 10, 1892, and on that day it was continued to the next regular term.

On December 6, 1893, one H. O. Parsons filed his petition in said suit, alleging, in substance, that in his own right, and as president of the Natural Bridge Forest Company, he was the owner of \$17,500 of the first mortgage bonds of said Rockbridge Company, similar to those described in the bill, and that all of said mortgage bonds were past due and unpaid. And thereupon he concurred in the averments and the prayers in complainant's bill, alleging as additional grounds for the appointment of a receiver that the personality of the defendant company under its management at that time was being rapidly wasted. On December 21, 1893, J. O. Burdett, receiver, filed a petition stating that he was the holder of \$5,800 of said mortgage bonds, which were a lien upon the property described in the mortgage filed with the bill, and alleging that unless a receiver was appointed the assets of the defendant company would go to waste, and judgments would be obtained against it by different creditors. He joined in the prayer of the original bill, and asked, in addition, that "the property of said company embraced in the mortgage aforementioned be subjected to the lien of said mortgage, and be divided amongst the creditors secured therein, and, if your petitioner's debt should not be fully satisfied thereby, that he be allowed to share in the proceeds, pro rata, of any property not embraced in said mortgage, along with the unsecured creditors." On February 26, 1894, a similar petition was filed by the Glasgow Manufacturing Company, setting forth at great length an open account due it by the defendant Rockbridge Company, explaining how a large part of said account had been paid from the proceeds of certain mechanics' liens, and stating that the remainder thereof was secured by the hypothecation of \$14,200 of said mortgage bonds. It was again stated that the defendant company owned valuable real and personal property not conveyed by said mortgage; that it was insolvent; that actions were pending against it which would soon go to judgment, and, unless some action was taken, the plaintiffs in said actions would acquire liens on the property "not embraced in said mortgage, giving them priority over cred-

itors who have not instituted actions at law." The appointment of a receiver was again prayed, and certain affidavits were filed with the petition in support of the allegations therein made.

Thereafter, upon notice to the defendants, the motion for the appointment of a receiver was renewed on February 26, 1894, and on that day a decree was entered, which, after reciting that it appeared to the court that the appointment of a receiver was necessary, decreed as follows: "It is adjudged, ordered, and decreed that J. Lewis Bumgardner and F. T. Glasgow be, and are hereby, appointed as receivers for said the Rockbridge Company, and that they shall, as soon as practicable, take possession, and that the officers and agents of the said company be directed to give them possession, of all the property, books, papers, and assets of the said company, of all nature and description. And the said receivers shall, as soon as practicable, make an inventory of the property and effects of the said company, and shall report the same to this court, with such suggestions and recommendations as they shall deem best, with a view to the liquidation of the indebtedness of the said company. And that said receivers are authorized to employ such agents, clerical, expert, and other assistance as they may deem proper, in order that the property of the company may be protected, the inventory above directed made, the books of the company examined and written up, if necessary, and such other work done as may become necessary in the discharge of their duty. And said receivers are directed to collect all debts due the said company, by suit or otherwise,--not incurring the expense of suit, however, on claims known to be insolvent, but only on such claims as they, in their judgment, may deem it best for the interests of the creditors of the company to institute suit upon; and they also shall have power to compromise claims on such terms as they both may agree upon. That the officers and agents of the said company are hereby enjoined and restrained from exercising any rights or control over the property, assets, books, and papers of the said company, and from interfering in any manner whatever with the control and management of the receivers over and with the same. And all persons who are, or claim to be, creditors of the said company, are hereby enjoined and restrained from instituting any suit or suits against the said company; and, in case any such suit or suits has or have been heretofore instituted against the said company, the further prosecution of the same is or are hereby enjoined and restrained. And it is further adjudged, ordered, and decreed that George E. Sipe, of Harrisonburg, Va., be, and he is hereby, appointed as a special master commissioner of this court for this purpose, whose duty it shall be, as soon as practicable, to take, state, and settle (1) an account of the property and assets of the Rockbridge Company; (2) an account of the debts and liabilities of the Rockbridge Company, and the order of their priorities; (3) any other matter which he may deem pertinent, or which any party in interest may require to be specially stated. But before executing the said account the said special master commissioner shall first advertise the times and places of his primary appointments once a week for four successive weeks in some newspaper published in the town of Harrisonburg, Virginia, and also in some newspaper published in the town of Lexington, Virginia, which said publication shall be deemed equivalent to personal service of notice on all parties in interest. And before said J. Lewis Bumgardner and F. T. Glasgow, receivers, shall be authorized to act under this decree, they shall each execute and file before the clerk of this court their bonds, with approved personal security, and to be approved by this court, in the penalty of ten thousand dollars, each separately, payable to the United States of America, and conditioned for the faithful discharge of his duty under this and all future orders and decrees of the court in this cause."

In pursuance of this decree, one of the receivers thereby appointed filed his bond, with sureties, on the 26th day of February, the day of his appointment, and the other receiver filed a similar bond on the 1st day of March following; but, as appears from the record, neither bond was approved by the court until March 2d. When the decree was entered, actions at law in favor of the appellants against said Rockbridge Company were pending in the circuit court of Rockbridge county, Va., and matured for a term of said court commencing on the 1st day of March, 1894. At this time the appellants were not parties to this suit, and on said 1st day of March, 1894, judgments were entered in said

actions at law in favor of the appellants. The special master, who was directed to state an account of the debts and liabilities of the Rockbridge Company, showing the order of their priorities, on June 3, 1895, filed his report. He reported certain judgments entered prior to the filing of the bill of complaint as liens upon all the property not covered by the mortgage, but as to the judgments of the appellants which were recovered at the March term, 1894, which commenced on March 1, 1894, and which, by Code Va. 1887, §§ 3287, 3576, dated back, and took effect as of the first day of the term, he reported that those judgments were not a lien on the property of the defendant corporation not included in the mortgage. The appellants excepted to this report. The case came on again to be heard on July 22, 1895, and the court ratified certain adjustments of mechanics' lien claims and other lien claims, which had been reported, and decreed a foreclosure sale of the mortgaged property, authorized and decreed a sale also of all the property not embraced in the mortgage, and authorized a sale of the lands in subdivisions and parcels. On December 12, 1895, the court overruled the appellants' exceptions, and confirmed the special master's report, and from that order this appeal is taken.

R. W. Winborne and S. H. Letcher, for appellants.
Robt. Catlett, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and MORRIS, District Judge.

MORRIS, District Judge (after stating the facts as above). The contention of the appellants that their judgments against the Rockbridge Company, which bear date as of March 1, 1894, are entitled to priority as liens on the company's real estate not included in the mortgage, is based, in the first place, upon the alleged want of jurisdiction in the court to appoint a receiver of any of the company's property, except that upon which the complainants, by virtue of their mortgage bonds, had a lien. It is undoubtedly true, and has been decided in many cases, that general creditors of either an individual or a corporation who have no judgment or other liens upon the debtor's property have no standing in equity to interfere with the debtor's possession of his property. This rule, and the exceptions to it, are fully discussed and explained in *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127; and the effect of failure to bring such an objection seasonably to the attention of the court is thus stated on page 380, 150 U. S., and page 128, 14 Sup. Ct.:

"It is urged, however, that this court has sustained the validity of proceedings and decrees in suits of this nature in which it appeared that the plaintiffs had not exhausted their remedies at law; and the cases of *Sage v. Railroad Co.*, 125 U. S. 361, 8 Sup. Ct. 887, and *Mellen v. Iron Works*, 131 U. S. 352, 9 Sup. Ct. 781, are cited as illustrations. But, passing by other matters disclosed by the facts of those cases, it will be noticed that in neither of them was the objection made at the outset, and when action on the part of the court was invoked. Defenses existing in equity suits may be waived, just as they may in law actions; and, when waived, the cases stand as though the objection never existed. Given a suit in which there is jurisdiction of the parties, in a matter within the general scope of the jurisdiction of courts of equity, and a decree rendered will be binding, although it may be apparent that defenses existed which, if presented, would have resulted in a decree of dismissal. Take the present case as an illustration. Suppose the corporation and other defendants had made no defense, and, without expressly consenting, had made no objection to the appointment of a receiver, and the subsequent distribution of the assets of the corporation among its creditors; it cannot be doubted that a final decree providing for a settlement of the affairs of the corporation and

a distribution among creditors could not have been challenged on the ground of a want of jurisdiction in the court, and that notwithstanding it appeared upon the face of the bill that the plaintiffs were simple contract creditors, because the administration of the assets of an insolvent corporation is within the function of a court of equity, and, the parties being before the court, it has power to proceed with such administration. If there was a defense existing to the bills as framed,—an objection to the right of these plaintiffs to proceed on the ground that their legal remedies had not been exhausted,—it was a defense and objection which must be made in limine, and does not of itself oust the court of jurisdiction. This doctrine has been recognized, not merely in the cases cited, but also in those of *Reynes v. Dumont*, 130 U. S. 354, 9 Sup. Ct. 486; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594; *Brown v. Iron Co.*, 134 U. S. 530, 10 Sup. Ct. 604. None of these cases question the proposition that, if the objection is seasonably presented, it will be effective."

In the present case it is true that the complainants had a standing in court for equitable relief only because they had a specific lien on part of the company's property by virtue of their being holders of its bonds secured by mortgage on that property, and that, as to the other property of the company, they were simple contract creditors. In their bill of complaint and petitions and affidavits, they further alleged that all of the company's property was neglected and going to waste, that the company was hopelessly insolvent and unable to carry out the purposes for which it was organized, and that its personal property had disappeared. The bill was filed in September, 1892, but the prayer for the appointment of a receiver was not acted upon until February, 1894. No one in the meantime filed any objection, and additional petitions were from time to time filed by other bondholders, urging the court to appoint a receiver. The receivers, having been appointed by the order of February 26, 1894, took possession of all the company's property, and directed notice to be given to all creditors to file their claims, and the court proceeded to administer all the company's property according to the prayer of the bill; that is to say, to convert it into money to be distributed ratably among all the creditors, according to their respective legal priorities. By decree of June 3, 1895, the receivers were authorized to sell all the property in the manner most conducive to the interest of all parties concerned. So far as the record discloses, no one has ever objected to the jurisdiction of the court to pass any one of these decrees or orders. The exception of the appellants does not deny the jurisdiction of the court, but complains that in the distribution of the assets their judgments are not given priority, and allowed as a lien on the property not embraced in the mortgage. It seems to us, therefore, that the case stated by the bill being within the general scope of equity jurisdiction, and the action of the court in dealing with it being within the usual exercise of its equity powers, no argument or contention can now be based upon the want of jurisdiction, the point not having been called to the attention of the court below either in the exception or the assignments of error. *Brown v. Iron Co.*, 134 U. S. 530, 10 Sup. Ct. 604.

The other contention of the appellants is that their judgments, having been entered at the March term, 1894, became liens upon

the real estate of the company not embraced in the mortgage, just as if no receiver had been appointed, because the bond of one of the receivers was not filed until March 1st, and the bond of neither was approved until March 2d. If this was a case in which the rights of the parties depended upon the question of who first obtained actual possession of the property, we should feel that there was force in the appellants' contention. In *Frayser v. Railroad Co.*, 81 Va. 388, relied upon by the appellants, the question of who had the better right was, in substance, a question of possession. It was a case of foreclosure of mortgage of a railroad, in which a receiver was appointed to take possession of all the property, moneys, books, etc., of the railroad company. A creditor had obtained judgment before the filing of the bill, and after the order appointing the receivers, but before they filed their bond, which was a prerequisite to their entering upon the performance of their duties, the judgment creditor had execution issued, and put it in the hands of the sheriff, which, under the statute of Virginia, gave him a lien upon all the personal property of the debtor, although not levied on nor capable of being levied on. Pending the qualification of the receivers, the court had ordered that the company should deposit the money in its treasury in a designated bank, to the credit of the cause. This money was derived from the earnings of the road prior to the time the bill was filed. The mortgagees had no right to any of the earnings prior to taking actual possession, and all earnings prior to taking possession on their behalf belonged to the company, and were liable to be taken by its creditors upon execution. It was held that the receivers were not, in any event, entitled to the earnings of the road accrued before the bill was filed. And in *Edwards v. Edwards* (1876) 2 Ch. Div. 291, cited by counsel for appellants, the question was whether the receivers had first obtained possession. It was a case of a bill to enforce a security, and for a receiver, filed by the holder of an unrecorded bill of sale. Under the act of parliament, unless the holder of the bill of sale had taken possession, or it had been recorded, it was null and void, as against executions, if the property remained in the possession of the party making the bill of sale. A creditor of the maker of the bill of sale had obtained a judgment before the filing of the bill, and, after the date of the order appointing the receiver, but before he had qualified himself to take possession by giving bond, the creditor levied his execution. It was held on appeal that it was the plain meaning of the order that the receiver was appointed conditionally upon his giving security, and before that he could not take possession; that both parties stood on their legal rights, and the judgment creditor had the better right, for the holder of the bill of sale had neither recorded it, nor had he taken possession. In *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, it was held that physical possession of the vessels in dispute was the test, solely because the admiralty court was not a court of concurrent jurisdiction with the state court, but, in matters of admiralty cognizance, had sole and exclusive jurisdiction, and withheld from seizing property sub-

ject to maritime liens only when in the actual physical possession of the officers of another court, and then only to avoid unseemly conflicts. In the case in hand, the property on which the judgment lien is claimed is real estate, of which neither the receiver nor the judgment creditor needed to take actual possession; and the decree appointing the receiver, dated February 26, 1894, by its terms took from the defendant corporation all its assets, and was accompanied by an injunction which restrained the officers and agents of the company from exercising any control over the property, assets, or books of the company, or from interfering in any manner with the control of the receivers, and enjoined all persons claiming to be creditors from instituting any suits, and from further prosecuting any suits theretofore instituted. The effect of a general receivership of a corporation, accompanied by such an injunction depriving it of the means of contesting suits instituted against it, has generally, and, we think, properly, been held to preclude creditors from prosecuting claims to judgment without leave of the court. The corporation is left in a situation which makes it inequitable that suits should be allowed to be prosecuted against it. 5 *Thomp. Corp.* § 6897. The injunction, by reason of section 720 of the Revised Statutes, forbidding injunctions to stay proceedings in a state court, could not prevent the appellants from prosecuting their suits and obtaining these judgments which were by default, but the circuit court can determine the effect which the judgments shall have as a lien upon property in its custody. Generally the better rule would seem to be that, when the court has jurisdiction, the order appointing a general receiver for the purpose of liquidation is an adjudication which operates as a sequestration of the property of the corporation, and especially is this so when it is plain that such is the intention and scope of the order; and in such cases to hold that the rights of parties are affected by the accident of whether the receiver is able on the instant to proffer his bond for approval is illogical. *High, Rec.* § 151; *Beach, Rec.* §§ 217, 623; *Maynard v. Bond*, 67 Mo. 315. The receiver is but the hand of the court itself. If the receiver appointed does not qualify, another is appointed. If he dies, his successor stands in his shoes. His appointment is only a convenient instrument in effecting the relief intended. *McNulta v. Lochridge*, 141 U. S. 327-331, 12 Sup. Ct. 11.

The sole question before us is the effect of the judgments under the proceedings in this case. The bill was not only to foreclose a mortgage, but was, as well, a general creditors' bill for the general liquidation of the company. There was no appeal from the order directing the receiver to take the property not embraced in the mortgage, nor from the injunctions prohibiting the prosecution of suits, nor from the decree directing the sale of all the property of the corporation, so that all those adjudications stand; and the appellants maintain that, notwithstanding those decrees are in force, there was error in denying to them a lien by virtue of their judgments. As the judgments were entered after the appointment of the receivers and the issuing of the injunction, we do not think it is a material fact that they were entered before

the receivers' bonds were perfected by approval. *Maynard v. Bond*, 67 Mo. 315. To hold that because there was property included in the scope of the bill, and affected by the receivership, which was not embraced in the mortgage, as to which creditors could obtain liens by judgments after the appointment of the receivers, would be to open the door to all judgments entered before the actual sale. We think the better rule is that the appellants having had no judgments at the date of the appointment of the receivers, but being simple contract creditors, they were represented in the suit by the defendant corporation, and their judgments were obtained *pendente lite*. *Stout v. Lye*, 103 U. S. 66. After obtaining their judgments they might, by leave, have come into the suit, and contended for such modification of the orders and decrees as they could show themselves entitled to, but they did not. They accepted what the court had done to protect the property of the corporation and administer its assets, and came in on the footing of creditors on whose behalf the bill was filed. They excepted to nothing, except that their claims were not allowed as liens by reason of their judgments. That is the one point we consider to be before us, and on that point we are of the opinion that the judgment was entered after the property was in *custodia legis*, and too late to obtain a lien. The decree appealed from is affirmed.

COWEN et al. v. ADAMS et al.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1897.)

No. 367.

EQUITY PLEADING—DECISION—CONSISTENCY WITH PLEADING.

In a suit by the assignees of a legacy to cancel a receipt of payment thereof given by the legatee to the executors, the bill alleged the making of the will, the death of the testator, the assignment of the legacy to complainants, and the giving of the receipt to the administrators by the legatee, without any payment in fact of the legacy either to him or the assignees. The bill further alleged that the receipt was given in pursuance of a combination between the legatee and the executors to defraud complainants. The executors denied any fraudulent combination, and the court found, on the evidence, that there was in fact no such combination, but held that the receipt was invalid, because obtained by the executors without payment of the legacy. *Held*, that there was no substantial inconsistency between this decision and the allegations of the bill.

On Petition for Rehearing. For report of prior decision, see 24 C. C. A. 198, 78 Fed. 536.

Before LURTON, Circuit Judge, SEVERENS, District Judge, and HAMMOND, J.

SEVERENS, District Judge. The defendants, Thomas M. Adams and E. C. Means, as administrators with the will annexed, have filed a petition for a rehearing of this case, upon the following grounds:

"First. Because the settlement of October 16, 1890, is decreed to be set aside upon grounds not alleged in the bill, and which were therefore not discussed by counsel for the petitioners at the argument.

"Second. Because, upon the question whether the notes of William Means are forgiven by the fifth clause of the will, there is a clear distinction, overlooked by the court, between the note of November 22, 1888, for \$45,000, and the other notes covered by the settlement.

"Third. The petitioners believe, and are so advised by their counsel, that a consideration of arguments which, for the reason aforesaid, were not presented at the hearing, will lead this honorable court to a decision in their favor."

In the statement of the grounds and arguments appended to the petition, and in support thereof, counsel, in addition to the suggestion of reasons relevant to the particular ground first stated, on which a rehearing is asked, go into a discussion of other matters involved in the merits of the case, which have already been considered by the court, and passed upon in the opinion hitherto filed. We do not deem it necessary to reconsider those matters, including the supposed distinction between the note of November 22, 1888, for \$45,000, and the other notes covered by the settlement, and shall therefore attend only to the special matter alleged in the petition, which is substantially this: whether the conclusion which we reached ought to stand, in view of the allegations contained in the pleadings. The ground of complaint is that the settlement of October 16, 1890, between the administrators and William Means, is alleged in the bill to have been made upon a fraudulent combination with William Means for the purpose of defeating the rights of the plaintiffs, and not that it was a fraud upon him, as the court appears to have found it to be, and upon which latter view it is said the conclusion of the court rests; and thereupon it is contended that the decision is inconsistent with the allegations of the bill. We do not think this suggestion of inconsistency rests upon any solid ground. The material facts upon which the complainants' case was founded, and upon the proof of which their right to relief was made out, were these: The making of the will, the death of the testator, the assignment of William Means' legacy to the complainants, and the giving of the receipt to the administrators by William Means without payment of the legacy, either to him or his assignees. These facts the bill avers. All the rest was defensive, and the burden of allegation and proof that the legacy had been paid or validly released was upon the defendants. This burden was assumed and the defensive allegations pleaded in the answer of the administrators. It is true, as stated, that the complainants alleged in their bill that the defendants entered into a fraudulent combination with William Means by which they attempted to secure his receipt for his legacy, in fraud of complainants, and that, in pursuance of said combination, William Means executed the receipt; but the defendants denied these allegations in their answer, and averred: "That the said receipt was not executed or delivered, in whole or in part, by reason or in pursuance of the pretended fraudulent agreement or combination in the bill set up, and that no such combination was ever made; and they deny each and every allegation in the bill in respect thereof." And throughout they have strenuously maintained this aver-

ment. In the briefs filed and at the argument, counsel maintained that there was no such combination. This they probably felt bound to do in order to resist the effect of the alleged assignment of his legacy by William Means to his family, and the decree of the Greene county court of common pleas. This court did not find that there was any fraudulent combination between the administrators and William Means in making the settlement of October 16, 1890, to defeat the rights of the beneficiaries under the complainants' trust, and to that extent practically sustained the defendants' contention, but upon other grounds held that the complainants were entitled to recover the amount of the legacy. The grounds upon which the court proceeded were strenuously contested, and in the printed and oral arguments were fully and elaborately discussed. What the defendants now contend for is that the complainants, by an allegation in the bill which they deny the truth of, and which allegation is unproved, ought to be precluded from recovery upon other substantive and sufficient allegations of fact which the court has found to be established. We think it clear that this proposition cannot be maintained, and that, as no other new matter is submitted, the petition should be denied.

DICKERMAN v. NORTHERN TRUST CO. et al.

(Circuit Court of Appeals, Seventh Circuit. May 24, 1897.)

No. 844.

1. CORPORATIONS—PURCHASE OF PROPERTY BY ISSUES OF STOCK—OVERVALUATION.

When a corporation is organized to purchase several manufacturing plants from persons holding options upon them, the fact that the amounts in the stock of such corporation, at its par value, which are issued to the holders of such options, in payment therefor, are larger than the prices fixed on the plants in such options, is not evidence of overvaluation of the plants in the sale and in the issue of stock. 75 Fed. 936, affirmed.

2. MORTGAGE SECURING BONDS—FORECLOSURE.

In a suit for the foreclosure of a mortgage securing an issue of bonds, it is not necessary that the bonds should be produced before the court or a master before the entry of a decree of sale. 75 Fed. 936, affirmed.

3. EQUITY PRACTICE—INTERVENTIONS—ANSWERS AND CROSS-BILLS.

When persons who are not necessary or proper parties to a bill are given leave by the court, for the protection of an apparent right, to intervene and file an answer and cross bill, if the cross bill filed under such permission violates the rules applicable to such bills, and appears to be an abuse of the leave granted to file it, the court will withdraw its permission, and dismiss the bill, without putting the complainant to a demurrer.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This is a suit brought by the Northern Trust Company, a corporation organized under the laws of Illinois, and doing business at Chicago, and Ovid B. Jameson, a citizen of the state of Indiana, as trustees, against the Columbia Straw-Paper Company, a corporation organized under the laws of New Jersey, to foreclose a trust deed covering various paper-mill properties given by the Columbia Straw-Paper Company to the appellees, to secure the payment of 1,000 first mortgage gold-bearing bonds of the company for the sum of \$1,000 each, payable to the bearer or registered owner thereof in gold coin,

and bearing interest at 6 per cent. per annum from the 1st day of December, 1892, payable half yearly; the interest on the bonds being secured by coupons in the usual manner attached to the bonds. At the commencement of the suit the Columbia Straw-Paper Company was the only defendant. During the progress of the cause Harry W. Dickerman and other persons, minority holders of stock in the Columbia Straw-Paper Company, upon petition to the court, were allowed to come in and answer and to file a cross bill. Answers were filed setting up collusion and fraud on the part of the Columbia Straw-Paper Company and the controlling stockholders, and especially in overvaluing the various mill plants and properties upon which options were taken and which were transferred to that company in exchange for its capital stock; such Columbia Straw-Paper Company having been organized for the purpose of taking such conveyances, and thus consolidating the plants upon which options had been taken for that purpose. There were, it seems, some 70 of these paper-mill properties, situated in Illinois and other states. With the purpose of reducing expenses, and more economically carrying on the business, the idea was conceived by some of the owners of consolidating the various plants under one organization. To that end options were taken running for six months, and a new company, to be called the Columbia Straw-Paper Company, was organized with a capital stock of \$4,000,000, with preferred stock of \$1,000,000, to receive conveyances of the various plants from the person or persons taking the options, in exchange for the stock of the new company. The business, as it had been carried on by the separate mills, each with a full set of officers and managers, had not been profitable, and the purpose of the scheme was to reduce expenses by a consolidation of the various interests, and by the organization of a single management. More capital was also needed to carry on the business, and this was to be provided by the issuance by the new company of \$1,000,000 of gold-bearing bonds to be secured by a first mortgage upon the consolidated properties of the new company. The plan is fully set forth in the option contracts given by the mill owners. One hundred thousand dollars of the bonded indebtedness was to be retired annually. The mill owners were to be paid according to their options, partly in cash and partly in the common and preferred stock of the company. The money to pay for the mills, and provide the working capital to organize the new company and carry into effect all the details of the plan, including negotiations with mill owners and paying preliminary expenses, was to be furnished by the party taking the options. This party was to procure and convey to the company a good title to the property named in the options, and give the new company a working capital of \$200,000, and the company in return was to transfer to the party so taking the options all the stock and bonds of the company. This arrangement was perfected and carried out by written contract between the company and Emanuel Stein, contained in the record. Some or all of the options in the first instance were given to Philo D. Beard and Thomas T. Ramsdell, both of Buffalo, who transferred them to Stein. Stein, according to the contract, transferred all of the options to the company in exchange for its stock; but the stock called for by the options, and which was to go to the various companies who had given the options, was delivered by the company to the mill owners upon the order of Stein. All the other stock was delivered by the company to Stein, who converted the bonds, and from the proceeds made the cash payments for the mills and \$200,000 to the company. Some of the stock was used in paying for the mills as agreed, some was used in payment for assistance to promoters of the enterprise in obtaining options, and some to pay commissions on sale to third parties of bonds, to lawyers for services, and to pay traveling and incidental expenses. In disposing of the bonds it was found necessary to give the purchaser of each \$1,000 a bonus of \$200 in addition of the preferred stock, and \$400 in the common stock, of the company. All the bonds were sold in this way to any one who would buy them. The sum of \$200,000 of the proceeds was handed over by Stein to the company, and the balance used in paying for the plants. Of the \$1,000,000 preferred stock, \$629,000 went to the mill owners and \$200,000 to the purchasers of bonds. Of the common stock, \$1,258,000 went to the mill owners, and \$400,000 to purchasers of bonds. Some of the remainder went to Stein for services, and some was retransferred to the company under a modification

agreement between him and the company. In this way the company acquired title to 39 mill plants out of 70 then in existence in the district covering the new enterprise. As before stated, the appellants are minority stockholders in the Columbia Straw-Paper Company, having in the aggregate 785 of the 10,000 shares of the preferred stock of the company and 1,070 of the 30,000 shares of the common stock. The answer of appellants to the original bill for foreclosure admits that 1,000 bonds of the company were sold and paid for at par, \$1,000 for each bond, by the parties who purchased from Stein. This is also shown by the evidence. These are the bonds in suit, and to secure which the company gave its deed of trust for the various mill properties conveyed to it, which it was the purpose of the suit to foreclose. After the new enterprise was launched, the panic and hard times came on, business was interrupted and broken up, and the company unable to meet its obligations. Default was made in the payment of the principal and interest of the bonds. Indeed, no portion, either of principal or interest, has ever been paid. The proofs are quite voluminous, but perhaps the above statement will be sufficient for the purposes of this opinion. As stated, the Columbia Straw-Paper Company was the only defendant in the original bill to foreclose. Its answer virtually admitted the facts set out in the bill, and confessed its inability to pay. Subsequently Dickerman and the other stockholders who are here as appellants came in by petition and obtained leave to defend. The theory of their answer was that there was a fraudulent overvaluation of the property transferred to the company; that all the bondholders had acquired stock of the company without payment therefor, or that they were assignees of the bonds with notice of these facts; that they were still indebted to the company for the stock; and that the court should ascertain the amount of such indebtedness, and set off the same against the bonds. Substantially the same matters were set up by cross bill. The case was referred to Henry W. Bishop, master in chancery, to take the proofs and report to the court, which he did. By this report the master found all the issues in favor of the complainant and against the defendants; that the bonds had been made and delivered as alleged; that they were valid obligations against the company; that default had been made by the nonpayment of principal and interest; that the defendant company was insolvent and unable to pay its debts; that on or about January 22, 1895, an execution was duly sued out against the property of the company upon a judgment against the defendant by one James Flanagan, before George W. Underwood, justice of the peace, which still remained undischarged; and that by reason of the premises, and as provided in the deed of trust, the complainants had declared the principal and interest secured by the said 1,000 bonds, of the aggregate face value of \$1,000,000, to be immediately due and payable, and that they had been requested in writing by the owners of more than one-third of the bonds to enforce the provisions of the deed of trust and the security created thereby. The report further finds that the contention of the defendants, who are now the appellants, that the procurement of the Flanagan judgment was the result of collusion with the company, is not supported by the testimony. All the other issues were found in favor of the complainants. This report was filed on April 15, 1896, and two days after the opinion of the court was rendered, and a decree signed overruling the exceptions to and affirming the master's report, and ordering a foreclosure and sale in accordance with the prayer of the bill.

Otto Gresham and John S. Cooper, for appellant.

Charles A. Dupee, for appellees.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge (after stating the facts as above). Upon a careful perusal of the record and testimony, we find no error in the conclusions of law or fact, and think that the decree of the circuit court should be affirmed. The defendants seem to have failed wholly in making good the allegations contained in the answer. The

principal questions discussed, and on which the case turned in the court below, seemed to be: Whether there was any fraud or collusion practiced in the organization of the company and the issuing of the stock; whether stock was issued without consideration, and has not been paid for; whether there had been a fraudulent overvaluation of the property and different mill plants conveyed to the defendant company under the options taken by Stein, and, if so, whether those defendants, who are the appellants here, being simply stockholders in, and not creditors of, the company, were in a position to urge such matters in defense to defeat the foreclosure of the mortgage or deed of trust given by the company to the trustees to secure the \$1,000,000 of bonds, on sale of which the money was raised to put the new enterprise upon its feet. The main question is whether there is any liability on the part of the stockholders in defendant company which can be enforced in this proceeding or set up as a reason for defeating the foreclosure. We are of opinion that these contentions made by the defendants were properly overruled. The prime difficulty was in the lack of evidence to support the allegations of the answer. There was no evidence of any fraudulent overvaluation or of issuing stock without consideration. The consolidation of the plants and the organization of a new company was an experiment entered into for the supposed benefit of the various owners.

Assuming that the stock of the new company was of par value, and that the plants were worth only the prices fixed upon them in the several options, of course there would appear to be an overvaluation in the sale. But this is an assumption that would scarcely be warranted. Probably there was not much market value for the stock, especially the common and unpreferred stock. It was supposed that the new enterprise would make the plants more valuable, so that the value of any plant before the transfer would not be evidence of its value after the consolidation should be completed. Every one interested proceeded with his eyes open, and it was entirely competent to make such a contract as they might agree upon. There was no compulsion practiced and no evidence of fraud. The mill owners could set such valuation upon their plants as they chose, or as they could agree upon with those taking the options. The holders of options and the new company, in the absence of fraud, could do the same thing and make such bargain for the transfer as they saw fit. These owners wanted money. They wanted more capital. They wanted to lessen the expenses of conducting the business. The scheme by which this money was to be raised was to issue bonds upon a first mortgage security, and induce capitalists to buy them. The money was parted with on the faith of these bonds, which were negotiable, though even this is disputed by the counsel for appellants. The answer, however, to this contention is that an inspection of the bonds themselves shows them to be negotiable. But whether they were or not does not affect the right of complainants to a foreclosure. The company issued these bonds with full knowledge of what it was doing, and upon full consideration of the benefits to be derived to it and to the stockholders by such a proceeding. They were paid for at the face value. The company has had the money. Is there any good

reason why it should not pay? Are minority stockholders, who knew all about the proceeding, in any position to exclaim against the payment or against the proceeding to foreclose? It is a mere question whether the discontent of a few stockholders can defeat the foreclosure of a mortgage legally and properly given by the company, by the consent and understanding of all concerned, to induce capitalists to advance the money to set the enterprise of consolidation upon its feet and enable it to do business. Possibly Stein received more for the part he performed in obtaining options and promoting the new scheme than he was entitled to. Whether he received more than an adequate compensation for his labor and expenses would be a matter of opinion. However that may be, it is difficult to see how the rights of the bondholders to foreclose the trust deed can be affected by such a consideration. He received what the parties had agreed he should receive. There was no fraud and no collusion, as is alleged in the answer. All parties representing the different interests went into the enterprise with their eyes open. They all wanted the \$1,000,000 to set up the new concern, and there seems no very good reason why the company should not pay, or why the foreclosure should not obtain. There was no concealment or misrepresentation. The terms of the options, the value of the different properties, the conditions of payment, and all other material facts were open and accessible to the company and to each stockholder. As was said by the circuit judge in his opinion: "The Columbia Straw-Paper Company parted with its capital stock for what was agreed to be the value of that stock. The property which Stein contracted to give, and which he did give, or cause to be given, to the Columbia Straw-Paper Company, was what that company agreed to accept for its stock. In that transaction the Columbia Straw-Paper Company was in no way wronged. It can have no action to recover on the theory that the stock has not been paid for, nor can any discontented stockholder assert such right for the Columbia Straw-Paper Company as against any other stockholder." 75 Fed. 936. The suit is not prosecuted on behalf of creditors, and there is therefore no question here of the liability of stockholders. Not only was there no evidence introduced to impeach the valuation of the properties transferred to the company, but evidence was introduced by the appellees showing the fairness and justice of the valuation, and the finding of the master and the court upon these questions is fully sustained by the evidence. Even if there had been an overvaluation, that would not affect the result. No doubt, in an action by a creditor against a stockholder, a gross and obvious overvaluation of property conveyed to a corporation in consideration of an issue of stock would be strong evidence of fraud, as was held in *Coit v. Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. 231. But this is not an action by a creditor against a stockholder, nor is there an evidence of a gross and obvious overvaluation or any overvaluation at all.

Another contention made and decided in the court below was that the bonds should have been produced before the master. It was alleged in the original bill that "all of the 1,000 bonds, of \$1,000 each, with the coupons attached, were duly issued, negotiated, and sold,

and are now outstanding and valid obligations of the defendant Columbia Straw-Paper Company, and the same, with the coupons annexed thereto, have come into the possession of, and are now held by, a large number of persons who have become the owners thereof"; and this was admitted by the defendant company in their answer. The testimony for complainants shows that the bonds described in the mortgage were certified and issued by the defendant company; that the company had not paid any of them; that the interest coupons due January 1, 1895, have not been paid. The master found that all the issue of said 1,000 bonds was negotiated and sold, and is now outstanding, and is a valid obligation of the defendant company, and that they were due and unpaid. The court also so found and ordered a sale unless payment was made within a specified time. The trustees were not the owners of the bonds, or any part of them, but they were mortgagees in possession, and had power, under the trust deed, to enforce the lien by foreclosure and sale. In these cases, where bonds issued by railroads or other large corporations on a large scale, and held in trust by trustees, but really owned by persons in many parts of the civilized world, it has not been the practice, nor would it be practicable, to require the bonds to be produced before the court or master before a decree nisi is entered. The practice has uniformly been to enter a decree of sale without the production of the bonds. Of course they cannot be paid or share in the proceeds of sale until brought into court for payment and cancellation. In many cases years elapse after a decree is entered before all the bonds are brought in, the money lying in the registry of the court awaiting their presentation for payment, and in some cases all the bonds are never produced or paid. If the rule required all the bonds to be produced before the court or master before a decree for sale could be made, it would in many cases be a practical denial of justice. No such practice has ever obtained to our knowledge. The sale is made for the benefit of all properly concerned. The decree is not final as to the persons or debts entitled to share in the proceeds. When the time for distribution arrives, any creditor may challenge the title of the claimant of any bond presented. The course of proceeding in such cases is properly indicated in *Toler v. Railway Co.*, 67 Fed. 168; *Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 150, 11 Sup. Ct. 512.

Another contention of the appellants is that there is no evidence of a demand for the payment of interest. But no demand was necessary. It is apparent that the interest was due, and had not been paid, and, under the conditions prescribed in the trust deed, the trustees declared the principal and interest owing to be immediately due. The condition broken was that, if a distress, attachment, garnishment, or execution be respectively levied or sued out against the chattels or property of such company, and such company shall not forthwith remove or discharge or pay the same, the trustees shall have power to declare the principal and interest due. Upon this breach of condition the trustees had declared the principal and interest owing upon the bonds to be immediately payable. No other demand was necessary. The complainants' testimony also shows

that the interest coupons falling due June 1, 1894, December 1, 1894, and June 1, 1895, had not been paid, and the answer of the defendant company admitted that they had not been paid. It is also said there is no evidence that one-third of the bondholders requested in writing the trustees to declare the principal and interest due and payable, but there seems to be no lack of evidence in the record to support the finding in this respect.

It is also contended by appellants that the taking of the Flanagan judgment, and the issuing of execution thereon, was not sufficient ground on which to declare the principal and interest of the bonds due, because the judgment was obtained by collusion, and was not a sufficient ground under the provisions of the trust deed. We can see but little force in this objection. The defendant had defaulted in the payment of its interest due on the bonds. Flanagan was one of the bondholders residing in New York. He sent six coupons owned by him for collection, which, not being paid, were put into judgment by one Leffingwell acting for him. Execution was issued upon the judgment, which not being paid, the trustees declared the bonds due and payable. The company was insolvent and unable to pay, and made no resistance to the obtaining of the judgment and issuing of execution. But there is no evidence of collusion in the record. Nothing was done either by Flanagan or the company which they had not a right to do. The failure to discharge the judgment and execution was clearly a breach of the conditions of the trust deed which authorized the trustees to declare the entire debt due, and proceed to foreclosure. If the company could have kept up its interest, all this would have been avoided. But being insolvent, and wholly unable to pay its accruing interest, these objections seem somewhat of a technical character, in the light of these facts.

There are some other minor objections made to the decree which are contained in the brief of counsel, but which were not urged upon the oral argument. We have carefully considered them all, and think they should be overruled. There is but one more contention that we care to notice specifically, and that is this: That it was an error, for which the decree should be reversed, for the court to strike the appellants' cross bill from the files. But the answer to this objection is that the appellants were not made defendants, and only came in and were allowed to intervene by permission and order of the court. The cross bill was not an original proceeding on their part. Stockholders are not necessary parties in a bill against the corporation to foreclose a trust deed. They are only allowed to come in under leave of the court, where fraud on the part of the bondholders, trustees, or other parties has occurred which would affect the right of the trustees to foreclose. *Thomas v. Railroad Co.*, 109 U. S. 526, 3 Sup. Ct. 315. Appellants were not creditors, and constituted but a very small part of the stockholders. The court, upon petition, permitted them to become defendants, and put in an answer and cross bill, upon the supposition that their answer might show a state of facts which would defeat or qualify the right of foreclosure. The substance of the answer was, as before stated, that the bondholders had acquired their stock without paying for it, and were indebted

to the company for it, and that there was a fraudulent overvaluation of the property. The answer was filed on May 18, 1895, and the cross bill on the same day. The matters set up in the cross bill were the same, being substantially identical in averment and phraseology with those set up in the answer, and were clearly matters of defense. There was therefore no need of a cross bill, and to file such a one was an abuse of the leave given by the court. For these reasons the court was amply justified in withdrawing its permission and striking the cross bill from the files. This practice is recognized and fully sustained in *Forbes v. Railroad Co.*, 2 Woods, 323, Fed. Cas. No. 4,926. There was a motion to set aside an order allowing parties to intervene as defendants and to file an answer and cross bill. The interveners having, as the court thought, presented a prima facie case, orders were made in accordance with their request. The complainant moved to vacate the order, and the question was raised whether the applicants should have been allowed to intervene. The court says:

"It is questionable whether, in any case where suit is properly instituted against a corporation, a stockholder of that corporation can, even on a suggestion of fraud on the part of its officers, come in by way of intervention as a party to that suit and seek to defeat or control the proceedings. An original bill rather seems to be the proper mode of proceeding. And it is in the discretion of the court whether or not to permit the stockholder to become a party defendant in any case where he is not made such by the bill, and, as it is held to be an extreme remedy to be admitted by the court with hesitation and caution, I think I ought not to have allowed it in this case, and ought now to withdraw the order for such allowance. The orders for leave to intervene and file answers and cross bills will be vacated."

The case of *Betts v. Lewis*, 19 How. 72, relied upon by appellants, is not in point. That was an original bill filed in the district court for the Northern district of Alabama, having the powers of a circuit court, to charge a legacy on property alleged to have come to the hands of the respondents, and to be chargeable with its payment. After answer had been filed, and while exceptions to one of the answers were pending, the respondents moved to dismiss the bill for want of equity, and the court ordered it to be dismissed. This was making a motion to dismiss an original bill for want of equity to take the place of a demurrer, which if allowed the court might, and ordinarily would, grant an amendment to cure the defect, if it were curable. It was an original bill, which the complainants had a right to bring without any leave granted by the court. But the rule, as we have seen, is different in regard to cross bills which are filed under permission. That permission presupposes that the matter of the cross bill will be germane to the original bill, and such as could not be set up by answer. And if when the cross bill is filed it appears to violate all these rules, and to be an abuse of the leave granted by the court, the court will withdraw the permission and dismiss the cross bill, instead of putting the complainant to his demurrer. This practice seems to be entirely rational and just, and such as a court of equity will approve. The cross bill was not germane to the original bill, which was simply to foreclose a mortgage. It alleged a fraudulent overvaluation of property by the company and by directors and

stockholders; that the contract under which the bonds were issued was fraudulent and void; and that the bonds and mortgage were void,—all of which was matter of defense, and had been set up in the answer. It also alleged a liability on the part of the bondholders, or some of them, as stockholders, which if it existed at all could only be enforced at the instance of creditors, in a suit to which all stockholders were parties. This was not germane to a bill to foreclose a mortgage. If two answers setting up the same matter had been put in, no one would question that one of them should be struck out, and the labeling of one as a cross bill does not change the rule. A cross bill, being an auxiliary bill merely, must be a bill touching matters in question in the original bill. If its purpose is different from that of the original bill it is not a cross bill, even though the matters presented in it have a connection with the same general subject (*Crosse v. De Valle*, 1 Wall. 1); and a cross bill setting up no defense except what could be set up by answer will be dismissed (*Investment Corp. v. Marquam*, 62 Fed. 960). We are satisfied that the record discloses no error, and that the conclusions of fact and law found by the court below are fully sustained by the evidence. The decree of the circuit court is affirmed.

GODKIN v. COHN et al.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 307.

1. PUBLIC LANDS—MISTAKE IN LAND PATENT.

Where, by mistake arising from the erroneous numbering of lots upon a plat in a local land office, lot "No. 2" was described in entries and in patents as "No. 4," and "No. 4" was described as "No. 2," and these mistakes ran through successive conveyances of both lots, none of the purchasers being misled thereby as to the lot he was actually purchasing, but being merely mistaken as to its proper designation, the mistake may be corrected as against one who, with knowledge of the mistake, finally purchased lot "No. 4," having it conveyed to him as lot "No. 2," with the fraudulent purpose of claiming according to that description.

2. SAME.

A remote grantee of the original patentee of lot No. 2, erroneously described as lot "No. 4," may avail himself of the mistake, as each grantee should not be required to proceed by separate bill against his immediate grantor.

3. SAME—LACHES.

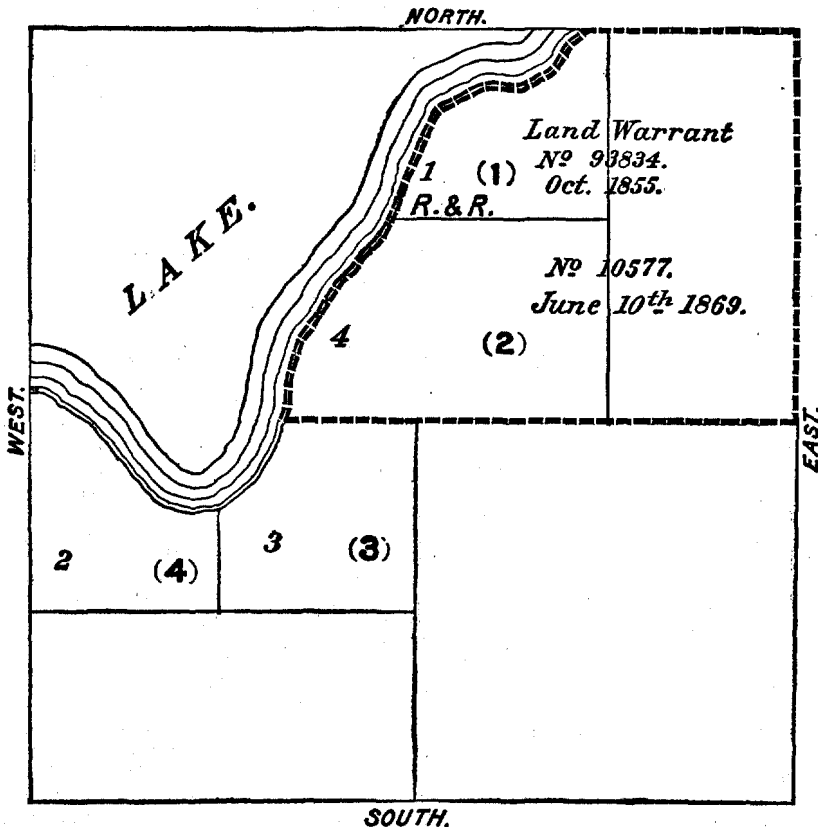
The fact that nearly 24 years elapsed after the original mistake before the filing of the bill to correct the error does not constitute laches, neither the defendant nor any of his grantors having been prejudiced by the delay, and there having been nothing to put plaintiff or his grantors on inquiry as to the mistake until the assertion of the adverse claim, after which plaintiff proceeded with diligence.

4. LIMITATION.

As it was not possible for the original patentee, under whom plaintiff claims, to assert his right as long as the legal title remained in the United States, the sovereign being exempt from suit, the limitation of 10 years prescribed by Rev. St. Wis. § 4221, did not begin to run until the conveyance of the legal title to the patentee under whom defendant claims.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

This is a bill in equity, filed in the court below by John Godkin, the appellant here, as complainant, which stated, in substance, the following facts: On June 10, 1896, Crosier Davidson, being the owner of military land warrant numbered 93,834, issued by the United States under the act of congress of March 3, 1895, applied at the United States land office at Stevens Point, in the state of Wisconsin, to locate in satisfaction of the warrant all that portion of section 12 in township 41 N., range 9 E., lying north of the east and west center line of the section, and east of the lake which indents the northern portion of the section (called for brevity the "northeast quarter" of the section, although the land covers all of that quarter section and some other land lying in the northwest quarter section between the northeast quarter section and the lake). The register and receiver, upon such application, caused to be written upon the plat of the lands in their office, and upon the lands so designated by Davidson, the following: "Land Warrant No. 93,834. Act 1855. R. and R. No. 10,577. June 10, 1869,"—and thereupon filed an application for such location, signed by Davidson, certified and attested by the register and receiver in the usual form of such applications, and asserting that the location was correct, and in accordance with law and instructions (referring to the instructions of the commissioner of the general land office issued May 3, 1855, which, among other things, contained the following: "Each warrant is to be distinctly and separately located upon a compact body of land"). The following is a plat of section 12:



The numbers referred to as "marked in red ink" are enclosed in parentheses; the red lines being indicated by dotted lines.

The numbers of the lots as noted upon the plat in the general land office are marked in red ink; as they appear upon the plat in the local land office in black ink. The land inclosed by the red lines is a compact body of land, upon which Davidson designed to locate under the land warrant, and the land which the register and receiver understood he had located under such warrant, and which they intended to describe in his application, and to certify as being located. These lands contained two full 40-acre lots, and, adjoining upon the west, two fractional lots, running westerly to the shore of the lake. The northerly fractional lot contained 35.50 acres and the southerly one 56.50 acres, according to the government survey. The whole of the land embraced within the red lines contained 172 acres, which, being 12 acres in excess of the quantity of land to which Davidson was entitled under the warrant, he was required to pay and did pay to the register and receiver, in cash, the government price for the excess of 12 acres, and took a receipt therefor. In the application made out by the receiver and signed by Davidson, the land was described as the "east $\frac{1}{2}$, northeast $\frac{1}{4}$, and lots one (1) and four (4) of section No. 12, in township forty-one (41) north, of range nine (9) east, in district of lands subject to sale at the land office at Stevens Point, Wisconsin, containing 172 acres." The southerly one of the two fractional lots was described in the application as "lot four," instead of by its correct number, "lot two," through clerical error by the register or receiver, or by some clerk in their service. The application was forwarded to the general land office, and upon July 1, 1870, a patent was duly issued by the United States, conveying to Crosier Davidson lots 1 and 4, and the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 12, in town 41 N., of range 9 E. The error in describing lot 2 as lot 4 arose from the error of the local land office in entering the location, and from mistakingly reporting the location and purchase as conveying lot 4 instead of lot 2. This patent has never been delivered to Davidson, or to those claiming under him, but still remains in possession of the government officers. The words, figures, and letters appearing upon the drawing are fac-similes of the original words, figures, and letters which the register and receiver caused to be written upon the government plat in their office at the time Davidson made his location; and such words, figures, and letters show that the lands embraced in the red lines were located under warrant No. 9,334, issued under act of 1855, and that the lands so located were intended to be described in the register and receiver's duplicate receipt No. 10,577, issued June 10, 1869. There is in section 12 a fractional lot 4, but it is not contiguous to or adjoining any lands in the N. E. $\frac{1}{4}$ of the section, but appears in the drawing in the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the section; contains only 31.30 acres of land according to the government survey, and is separated from the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and lot 1 of the section by two fractional lots; so that, if the land warrant had been located in fact as described in the application and patent, the location would cover but 147.20 instead of 172 acres, and the land warrant in such case would not have been located upon a compact body of land according to the instruction of the commissioner of the general land office. By an error of some clerk in the service of the United States, lot 2 was erroneously numbered upon the government plat furnished by the United States to the register and receiver, and by them kept in the land office at Stevens Point, by entering thereon the figure 4 as its number, and a like error was made in numbering lot 4 by entering thereon the figure 2, and that appears upon the plat still preserved in the local land office now located at Wausau. Davidson and wife conveyed to Parry, Ross, and Cockburn, August 3, 1871, by warranty deed with the usual covenants. March 22, 1872, Parry, by like deed, and for a valuable consideration, conveyed his interest to Cockburn and Ross; and on August 28, 1875, Cockburn, by a like warranty deed with the usual covenants, and for a valuable consideration, conveyed his interest to Ross. On September 29, 1892, Ross likewise conveyed to Benjamin Godkin and John Godkin, and on March 17, 1891, Benjamin Godkin, by like warranty deed with the usual covenants, and for a valuable consideration, conveyed to John Godkin, the complainant and appellant. All the grantors and grantees intended to describe in their several deeds the land applied for and intended to be entered by Davidson, and intended that the same should be conveyed by each of these deeds; but, misled by the error and mistake charged, and following the description given to the lands by the receiver

and register, described as lot 4 the southerly lot of the two lots west of the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, instead of describing it as lot 2. Assessors of the state of Wisconsin, whose duty it was to enter taxable real estate upon their assessment rolls in regular order as to lots and blocks, sections and parts of sections, up to and including the year 1877 (with the exception of the year 1876), assessed the property according to the description that appears in the deeds. In the year 1876 there was no lot 4 assessed as a part of the N. E. $\frac{1}{4}$ of section 12; but a lot 2 was assessed, which Ross, the then owner of the N. E. $\frac{1}{4}$, being misled by the error of the United States officers, did not recognize by that description as part of the N. E. $\frac{1}{4}$ of the section, and through mistake, and by being misled, failed to pay the taxes levied in that year. For the same reason taxes assessed upon a portion of the N. E. $\frac{1}{4}$ were unpaid in 1882; but Davidson and his grantees intended in good faith to pay the taxes in each year, and attempted so to do, and would so have done but for the fact that they did not recognize the entry of the lot in the assessment in the tax roll by any other description than lot 4. The defendant Cohn once claimed some title or interest in lot 2 under tax deed issued to one Gillett upon tax sales of lot 2 for the years 1875 and 1882, in which years the legal title to lot 2 was still vested in the United States. Cohn obtained from Gillett a conveyance of lot 2 on December 29, 1891, but the complainant avers upon information and belief that Cohn did not intend to rely thereon as a title to lot 2, but bases his claim upon certain other conveyances, now to be stated. On October 20, 1885, one Dunfield applied to the local land office to purchase from the United States a fractional lot in section 12, being the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of that section, the correct number of which lot is 4; but, Dunfield and the register and receiver believing that its number was 2, it was, through mistake, described as lot 2 in the entry, and purchase then made by Dunfield, and in the record of the register and receiver touching such entry and purchase, and in their report thereof to the government. The entry of Dunfield was noted upon the defective plat upon the N. W. $\frac{1}{4}$, which upon the plat bears the number 2 instead of the correct number, 4. Dunfield designed to purchase, and in fact paid for, 31.70 acres of land,—that being the number of acres charged against him by the register and receiver in the entry (which included other lands) as the acreage of the land erroneously described in the entry as lot 2; that amount being the correct area of lot 4 in the section according to the government survey. Thereafter, on July 30, 1886, a patent was issued by the government to Dunfield, conveying lot 2, which patent has never been delivered, but is still in possession of the government officers. Dunfield never claimed the ownership or title to any part of the N. E. $\frac{1}{4}$ of the section, but always claimed the ownership and title to the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the section. On November 24, 1885, he sold the land to one Thomas B. Scott, since deceased, conveying it by warranty deed, wherein he described the land both as lot 4 of section 12 and as the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of that section. After the death of Thomas B. Scott, Walter A. Scott, his devisee in trust, thinking the correct number of the lot to be lot 2, obtained a quitclaim deed of the same from Dunfield on February 1, 1888, the lot being therein described as "the northwest quarter of the southwest quarter of said section twelve (12)," and as lot 2 of that section. These conveyances were duly recorded in the proper office in the years 1886 and 1888. Walter A. Scott, trustee, by deed dated June 20, 1891, recorded July 1, 1891, conveyed to Thomas B. Scott, an heir of Thomas B. Scott, deceased. By deed June 29, 1891, recorded July 2, 1891, Thomas B. Scott conveyed to Walter A. Scott. By deed dated June 20, 1891, recorded July 6, 1891, Walter S. Scott conveyed to Cassie S. Cushing. By deed dated May 4, 1892, recorded May 17, 1892, Cassie S. Cushing conveyed to Walter A. Scott and Thomas B. Scott. In each and all of these conveyances the lot was described as the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the section, and as lot 2 of that section. Lot 2 of section 12, east of the lake, was a valuable piece of land. Up to the winter of 1892-93 its chief and almost entire value consisted in the pine timber growing thereon, which alone was of the value of \$17,000. Lot 4, being the lot in the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, and south of the lake, was also chiefly valuable for its pine timber, but was never worth, with the pine timber thereon, to exceed \$400. None of the grantees in the deeds described, deriving title from or under Dunfield, ever claimed any

right or ownership in any part of the N. E. $\frac{1}{4}$ of section 12, but they each and all believed and understood that the title derived by them from Dunfield was a title to the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of that section, and claimed title thereto.

The defendant Cohn, having ascertained the error which had been committed in the location by Davidson and entry by Dunfield, and that they had each obtained the title from the government to land which they had not purchased, and that they and their grantees, respectively, were ignorant of the fact, and that Dunfield, Thomas B. Scott, and those claiming under him did not know that lot 2 described in the entry of Dunfield and the patent thereon issued was in the N. E. $\frac{1}{4}$ of the section, but supposed and believed that lot 2 was the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the section, and intending and designing to make profit to himself out of such mistake and out of the continued ignorance of the parties claiming lots 2 and 4, respectively, negotiated with Walter A. Scott for the purchase of the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 12, and agreed upon a price to be paid therefor upon the basis of an estimate of the pine timber growing and standing thereon, which he procured to be made, and upon an estimate of the timber upon the same lot which Scott had in his possession, and which had been made or procured by Dunfield, or by some one claiming under him. Cohn drafted a deed from the two Scotts, grantees in the deed of May 4, 1892, to himself, in which deed he did not describe the lands actually purchased by him, but therein described the land as lot 2 in section 12; and the two Scotts, believing that they were conveying to him by that deed the lot which they claimed to own, namely, the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 12, executed and delivered to Cohn a deed on August 16, 1892, for the sum of \$400, which was about one-twentieth part of the actual value of the real lot 2. On November 10, 1892, Cohn conveyed to the defendant Finn an undivided one-half interest in the pine timber upon lot 2, warranting the title thereto, Finn agreeing to cut all the pine timber into merchantable saw logs, and remove the same from lot 2 during the logging season of 1892-93. The consideration of this deed was expressed to be \$2,135, the receipt of \$250 being acknowledged, Finn agreeing to give to Cohn his promissory notes for the balance of the consideration. Finn afterwards assigned to the defendant Sales some interest in the timber purchased by Cohn. Thereupon Finn and Sales entered upon lot 2, and began to cut timber thereon, and claimed ownership thereof; and, upon the complainant becoming informed of their claim of title, he was led to investigate the facts concerning the location of Davidson and the entry of Dunfield, and then for the first time ascertained the facts in regard to the errors and mistakes asserted. None of the grantors or grantees in the complainant's chain of title had any information or knowledge that the error had been committed in the location by Davidson, but each and all believed the location covered the N. E. $\frac{1}{4}$ of section 12, and the land described upon the plat as located by Davidson. Having become informed of the facts, he notified Finn and Sales of his equitable ownership in lot 2, and forbade the cutting or removing of any timber therefrom. Finn and Sales, however, persisted after this notification, and removed all the merchantable timber, to the value of \$17,000. Finn and Sales entered into negotiations with the defendant the Merrill Lumber Company for the sale to them of the logs and timber so cut and removed from lot 2, and, pending the negotiations, and before their conclusion, Godkin, the complainant, notified the Merrill Lumber Company of his title and ownership in the logs and timber, but, notwithstanding, the Merrill Lumber Company consummated the negotiations, and purchased the logs and timber, and now claims to own the same. The purchase was upon credit, and not for cash, except as to a small cash payment made thereon. All these parties charged, before the time of their respective purchases, knew of the errors and mistakes set forth in the location by Davidson and the entry by Dunfield, and of Davidson's intention that the location should cover lot 2, and of Dunfield's intention that his entry should cover lot 4. The interior department of the United States does not and will not correct any error of the government, or between the government and purchasers of land from it, unless application is made for the correction before a patent for the lands has been executed and recorded; and the complainant has now no remedy in the interior department for the correction of the errors and to obtain title to lot 2, and has no adequate remedy at law whereby he may obtain justice. He has applied to the interior department for correction of the

patents before they should be actually delivered, but his application was refused, and such correction now would not avail, as the timber, which constitutes almost the entire value, has been cut and removed as stated. The complainant offers to convey lot 4 to Cohn, or to such of his grantees as may be entitled to receive conveyance, as may be decreed by the court. The bill prays that it may be decreed that Cohn "took and holds the title to said lot two in section twelve, town forty-one, range nine, in trust for your orator, and that he and the other defendants be decreed to execute said trust by conveying said title to your orator, and by accounting to and paying your orator the value of said timber taken by him and them, together with interest thereon, and such other damages as your orator may be entitled to recover, together with the costs of this suit, and such other relief as your orator may be entitled to in this suit." The defendants demurred to the bill generally, and specifically upon the ground that the bill showed that the complainant had no interest in lot 2, and had no right of action or right to any relief against the defendants, or any of them, but the right of action, if any, is in Crosier Davidson, named in the bill; and also upon the ground that the right of action has been barred by lapse of time, and the laches and delay of the complainant and those under whom he claims, and that the action was not commenced within the time limited by law; that the complainant has an adequate remedy at law; and that the grantors of the complainant are necessary parties to the bill. Upon hearing, the court sustained the demurrer, and dismissed the bill, from which decree the complainant appealed to this court.

C. L. Collins, W. C. Silverthorn, H. A. Hurley, T. C. Ryan, and G. D. Jones, for appellant.

Neal Brown, L. A. Pradt, and H. C. Hetzel, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). Assuming, as we must, the truth of the allegations of fact stated in the bill, it is established that Davidson located under his warrant the 172 acres of land in the N. $\frac{1}{2}$ of section 12 embraced within the red lines of the plat. This is rendered certain by the entry of the register of the land office upon the plat. It is also clear that Dunfield in fact purchased the lot in the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the section, wrongly numbered 2, and not the lot located by Davidson, wrongly numbered 4. He paid upon the basis of the acreage contained in that lot, which was less in amount than the acreage contained in lot 2; and upon the plat his entry was noted by the government officials upon the lot in the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the section. Both mistakes in the entries and in the patents arose from the erroneous numbering of the respective lots upon the plat in the local land office. Dunfield conveyed, describing his lot as lying in the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the section, thus emphasizing the fact that he claimed lot 4, and not lot 2. It results that when lot 2 was so located by Davidson, the United States held the legal title thereto, as trustee for the benefit of Davidson, and upon conveyance of that title to another "the grantee with notice took it subject to the equitable claim of the first purchaser, who could compel its transfer to him. In all such cases a court of equity will convert the second purchaser into a trustee of the true owner and compel him to convey the legal title." *Cornelius v. Kessel*, 128 U. S. 456, 460, 9 Sup. Ct. 122. The government had received from Davidson the consideration for lot 2. It intended to sell, and the officers supposed they had sold, that lot to Davidson; and the latter intended to purchase, and supposed he had purchased, it. The

government was, therefore, bound in good morals and in law to grant the legal title to the property purchased (*U. S. v. Hughes*, 11 How. 552), and was clearly bound to correct the mistake occurring through the error of its officials. This correction could have been made under sections 2369-2372, Rev. St., upon proper application prior to the issuance of the patent to Dunfield; and doubtless, if such application had been made, the error would have been corrected.

Upon conveyance by the government of the lot so sold to Davidson, the purchaser with notice of Davidson's rights is charged as trustee of the true owner. So Dunfield, not intending to purchase lot 2, but receiving legal title thereto through the mistake of the officers of the government, is also chargeable as trustee for the true owner, as was Davidson chargeable by virtue of the patent to him of lot 4, as trustee for Dunfield. So likewise are Dunfield's grantees, who took title under similar mistake, supposing they were purchasing, and intending to purchase, lot 4, and not lot 2. Cohn knew of the mutual mistakes and designed to obtain an unjust advantage. He in fact purchased lot 4, but induced his grantor to convey a lot which he did not purchase. This was an imposition upon his grantor, who was innocent of any designed wrong, being only the victim of the mistake of the officers of the government; but Cohn cannot be regarded as an innocent purchaser, since he had notice of the errors of description.

Possibly a more difficult question touches the right of the grantees of Davidson to avail themselves of the mistake. Each of them supposed he was purchasing, and intended to purchase, and each grantor supposed he was selling, and intended to sell, lot 2. The several mistakes in description arose from the original error of the government officials in marking the plat. Davidson, then having the equitable title to lot 2, and supposing that he had the legal title thereto under its description as lot 4, undertook to convey his interest in all the property in section 12 which he had located under his land warrant; and by his deed, although by wrong description, conveyed his equitable interest therein, which, through like successive conveyances, passed to the appellant. We see no valid objection to sustaining the right of the appellant to have correction of an error that is common to both claims of title. A direct proceeding like the present would certainly avoid a multiplicity of actions. It would be, if the facts alleged are established, an unnecessary requirement that each grantee should proceed by separate bills against his immediate grantor, when the whole beneficial estate is vested in the appellant. It is not like the case of *Crocker v. Bellangee*, 6 Wis. 645, relied upon by the appellees. There the plaintiff's grantor had conveyed to the defendant, and, as was alleged, had been imposed upon and defrauded in the sale. Thereafter, without attempt at rescission, the grantor conveyed the same property to the plaintiff, who filed his bill to set aside his grantor's conveyance to Bellangee, seeking to avail himself of the fraud practiced on his grantor. It was held, and we think rightly so, that the fraudulent sale was voidable, not void, and then only at the election of the party defrauded; that the title, both legal and equitable, had passed by the conveyance to Bellangee, subject

to be defeated, if obtained by fraud, only by direct action of the party defrauded; and that the subsequent conveyance to Crocker by the grantor of Bellangee did not divest the title. To the like effect is *Graham v. Railroad Co.*, 102 U. S. 148. But here Davidson had the equitable title. The United States held the legal title in trust for him. It later conveyed the legal title through error, and Dunfield, the grantee, and those holding under him, took it with notice of the error, or under such circumstances that in equity they must be charged as trustees. Davidson conveyed his equitable title supposing he had the legal title. Although the original error of description runs through the entire chain of title, we must hold that the effect of the conveyances is in equity to vest the equitable title to lot 2 in the appellant. This conclusion is sustained by authority which we are not at liberty to disregard. Thus, in *May v. Adams*, 58 Vt. 74, 3 Atl. 187, two tenants in common divided their lands by deed of partition. There was a mutual mistake in the deed in that the language did not correctly describe the line agreed upon. The agreed line was recognized and understood by them to be the one described in the deed so long as they were the owners, and the parties to the suit purchased with like understanding, and recognized it for several years. It was held that the mistake was remediable in equity both between the original owners and their grantees. So, also, in *Widdicombe v. Childers*, 124 U. S. 404, 8 Sup. Ct. 517, Smith, the grantor of the defendant, purchased at the proper land office the southeast quarter of a section; but the register by mistake described it in the application as the southwest quarter, and the entry in the plat book showed the purchase and sale of the southeast quarter. The plaintiff, with full knowledge of these facts, afterwards located and obtained a patent for the southeast quarter. It was held that he was a purchaser in bad faith, and that his legal title, though good as against the United States, was subject to the superior equities of Smith and of those claiming under him. We are unable to distinguish between that case and the one in hand. The facts bear remarkable similarity. To like effect is *Hoyt v. Gooding*, 99 Mich. 71, 58 N. W. 41.

It is alleged that this bill should not be sustained, because of laches. The location by Davidson was made June 10, 1869. The suit was brought in the year 1893. The lands are known as "pine lands," and were for many years after the entry remote from railway communication. They doubtless were obtained, as most lands of similar character in the northern section of the state were purchased, with a view to the prospective increase in value of pine timber. It is true that nearly 24 years had elapsed prior to the filing of the bill to correct the error. But that is not controlling. There must be neglect in the enforcement of a right, and such negligence presupposes knowledge of one's right. So laches may be excused from ignorance of one's right or from the obscurity of the transaction. What is required is that one seeking the aid of equity should use reasonable diligence in his application for relief. Thus in *Galliher v. Cadwell*, 145 U. S. 368, 372, 12 Sup. Ct. 873, it is said that the decisions on the question of laches "proceed on the assumption that the party to

whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him now to assert them." And on page 373, 145 U. S., and page 874, 12 Sup. Ct., it is said that "laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced,—an inequity founded upon some change in the condition or relations of the property or the parties." In *Halstead v. Grinnan*, 152 U. S. 412, 416, 14 Sup. Ct. 641, it is observed:

"The length of time during which the party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defense, controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them."

See, also, *Alsop v. Riker*, 155 U. S. 448, 15 Sup. Ct. 162; *Gildersleeve v. Mining Co.*, 161 U. S. 573, 16 Sup. Ct. 663.

Applying these principles to the facts stated in the bill, we are unable to say that the appellant or any of his grantors is properly chargeable with laches. We can discover here no sleeping upon one's rights, or any negligence in ascertaining those rights. There was no assertion of claim to this lot 2 by any one other than Davidson's grantees until the month of August, 1892, when Cohn, with knowledge of the mistakes, designedly imposed upon his grantor, and obtained a legal title to the lot which he had not purchased, and which his grantor did not claim. That was the first assertion of an adverse claim to the property to which the appellant had equitable title. There was no actual invasion of the possession until December, 1892, and thereafter the appellant proceeded with diligence, both by notification to the parties and by suit, in the assertion of his rights. During the period between the location of the lands by Davidson and the assertion of title by Cohn there was nothing to put the parties upon inquiry with respect to the mistake. An investigation of the records of the land office at Stevens Point or Wausau would not have suggested an error; to the contrary, would have confirmed them in the belief that there was no error. It is true that an examination of the plat in the general land office at Washington would have disclosed the mistake, but, without anything to put them upon inquiry, and in the absence of any adverse claim to the property, we are not prepared to say that diligence required a journey to Washington, or communication with the general land office at Washington, to verify the correctness of the government plat in the land office at Stevens Point or Wausau. There was, therefore, no negligence in failing to apply for a correction of the error under sections 2369, 2372, Rev. St. Neither Davidson nor his grantee knew, or could reasonably be charged with knowledge, of the errors prior to the assertion of title by Cohn. Until then they had no knowledge of their rights, and

there was no sleeping upon their rights; nor has Dunfield or any of his grantees been prejudiced by the lapse of time.

It is also asserted that the appellant's right of action is barred by the statute of limitations of the state of Wisconsin. Subdivision 4, § 4221, Rev. St. Wis., classifies actions which must be commenced within 10 years, and the subdivision is as follows: "An action which, on or before the 28th day of February in the year 1857 was cognizable by the court of chancery, when no limitation is prescribed in this chapter." It is true that a suit to correct a mistake in a deed must be brought within 10 years, and that the term commences at the delivery of the defective deed. *Parker v. Kane*, 4 Wis. 1. But the statutes of Wisconsin also provide (section 4231):

"If, when the cause of action shall accrue against any person, he shall be out of this state, such action may be commenced within the terms herein respectively limited, after such person shall return to or remove to this state. But the foregoing provision shall not apply to any case where, at the time the cause of action shall accrue, neither the party against or in favor of whom the same shall accrue is a resident of this state; and if, after a cause of action shall have accrued against any person, he shall depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action."

This provision of law clearly indicates the intention of the legislature of the state with respect to the application of the statutes of limitations, that there must be a person who may be sued, and one upon whom process may be served. Thus section 4233 provides that the statute of limitations shall not operate against infants, insane persons, or a person imprisoned upon a criminal charge, during the time of such disability. From 1869, when the mistake occurred, and a cause of action arose in favor of Davidson, to October 20, 1885, when Dunfield made his entry, the legal title to lot 2 was in the United States, the equitable title being in Davidson. It was not possible for Davidson to assert his right during that period, for the sovereign is exempt from suit. Under such circumstances it would be most unjust to apply the statute of limitations. Such statutes do not bind the sovereign without its consent. They cannot bind the individual in the assertion of a right as against the sovereign exempt from suit. We cannot believe that the legislature of the state designed that it should have such an application. The suit was brought within 10 years after the conveyance of the legal title to Dunfield. We are of opinion that the court below erred in sustaining the demurrer to the bill, and that the decree dismissing the bill must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

FARMERS' LOAN & TRUST CO. v. IOWA WATER CO. et al.

(Circuit Court, S. D. Iowa, E. D. May 4, 1897.)

1. IRREGULAR DECREE—VACATION AFTER TERM—APPOINTMENT OF MASTER.

A final decree entered on the report of a special master, appointed in violation of 25 Stat. 437, forbidding the appointment of relatives of the judge within the degree of first cousin to offices in the court, etc., is not thereby rendered absolutely void, so that the court will have power to set it aside on motion at a subsequent term.

3. OFFICERS OF COURT—APPOINTMENT—RELATIVES OF JUDGE.

Quere, whether two men who marry sisters are so related by "affinity or consanguinity," within the meaning of 25 Stat. 437, that one of them, if he be a federal judge, may not appoint the other a special master to hear and report on an isolated case.

This was a suit in equity by the Farmers' Loan & Trust Company against the Iowa Water Company and others, in which the New England Waterworks Company, C. H. Venner, and others intervened. The cause was heard on a motion to vacate the final decree and certain antecedent orders.

H. Scott Howell, for the motion.

W. E. Blake, opposed.

THAYER, Circuit Judge. This is a motion to vacate an order of reference, made by the district judge for the Southern district of Iowa, to a special master on April 14, 1896; also to vacate a report of the master made and filed on November 7, 1896, and a final decree entered on said report on February 19, 1897. The term of court at which said decree was entered expired on April 12, 1897, and the motion to vacate the above orders and decree, and to clear the record, was not made and filed until April 21, 1897. The ground of the motion is that, because the district judge by whom the order of reference was made and the special master by him appointed married sisters, the order of reference was made in violation of the provisions of section 7 of the act of August 13, 1888 (25 Stat. 433, 437, c. 866), and that the master's report in pursuance of said order of reference, and all subsequent proceedings taken thereunder, including the final decree, were and are utterly void. The parties who are interested in the proceedings as interveners, to wit, the New England Waterworks Company and C. H. Venner, have appeared and interposed an objection to the motion; the objection being that, inasmuch as the term at which the final decree was entered had lapsed before the motion was filed, the court is without power, on a mere motion, to vacate the final decree and precedent orders. The rule is well settled that a court of law or equity has power at any time to vacate an order or decree which is utterly nugatory and void. *Ex parte Crenshaw*, 15 Pet. 119, 123; *Shelley v. Smith*, 50 Iowa, 543, 544; *Insurance Co. v. McCormick*, 20 Wis. 265. But a court, for obvious reasons, cannot exercise the same control after the lapse of the term, unless armed with such power by the provisions of some statute, over final judgments and decrees which are not void, but are simply erroneous or irregular. In the latter class of cases relief must be sought, after the lapse of the term, by writ of error or appeal, or by a bill of review or writ of error coram nobis. *Bronson v. Schulten*, 104 U. S. 410; *Sibbald v. U. S.*, 12 Pet. 488. A mere motion will not suffice. Whether relief can be granted on the present motion depends, therefore, on the decision of the question whether the order of reference and the final decree entered on the master's report are, as they are claimed to be, utterly void. The court is of the opinion that this question must be answered in the negative. It is not denied that the court by whom the case was tried had full jurisdiction

of the parties and of the subject-matter of the controversy. It is also clear that the judge of said court by whom the decree was entered was not personally disqualified to hear and determine the case, either by relationship to some of the parties or by having a personal interest in the litigation. Besides, the final decree of February 19, 1897, was the act of said judge done and performed after he had fully reviewed the testimony which was submitted to the master, and the master's findings, on exceptions duly taken to his report. It is to be further noted that the relationship, if any, existing between the judge and the master, was known to all the parties when the order of reference was made, and no exception was taken to the order of reference on that ground, nor was any exception taken to the master's report after it was filed, or to the final decree, on the ground that the master was not qualified to serve in that capacity.

Another consideration bearing upon the subject in hand must also be kept in mind. The statute above cited is as follows:

"No person related to any justice or judge of any court of the United States by affinity or consanguinity within the degree of first cousin, shall hereafter be appointed by such court or judge to, or employed by such court or judge in, any office or duty in any court of which said justice or judge may be a member."

It is obvious from an inspection of the foregoing statute that, in its relation to the case in hand, it presents the question whether two men who happen to marry sisters are so related "by affinity or consanguinity" that the one, if he happens to be a federal judge, may not appoint the other as a master to hear and report upon an isolated case. Without expressing a definite opinion upon this question, it is to be observed that it is by no means certain that the statute has any application to the case at bar. Counsel have termed the relationship between the district judge and the special master as that of brother-in-law, because they married sisters, but this is not correct, since the term "brother-in-law" is thus defined: "The brother of one's husband or wife; also one's sister's husband." Cent. Dict.; Webst. Dict. The phrase "related by consanguinity" means related by blood, a relationship which did not exist in the present case; while the phrase "related by affinity" is the relationship which is contracted by marriage between the husband and the blood relations of the wife or between the wife and the blood relations of the husband. Whart. Law Dict.; Enc. Dict. 1896. In the light of these definitions, it admits of grave doubt whether the relationship existing between the judge and the master is comprehended by the language of the statute. It is furthermore doubtful whether the appointment of a person to act as a referee or special master in a given case is an appointment to an office or duty in the court, within the purview of the statute. But, whatever may be the correct view with reference to the questions last suggested, it is only necessary to say, at present, that they are questions to be determined in the first instance by the judge upon whom the duty of appointing a master or a referee is devolved. When a court is called upon to choose a master or referee, such action necessarily involves a consideration and decision of the question whether the person proposed is qualified to

act in that capacity. The decision of that question is within the legitimate power of the judge, and is the exercise of a judicial function. It is difficult to perceive, therefore, how an error made in the decision of the question can have the effect of rendering all subsequent proceedings, based upon the action of the master, utterly nugatory and void, especially when, as in the present case, the judge himself was not disqualified to hear and decide the case, and the court over which he presided had acquired full jurisdiction of the parties and the subject-matter. It results from these views that the final decree and the precedent orders were not utterly void, and that the court is without power to disturb the decree on a mere motion. An order will accordingly be entered overruling the same.

LEHIGH VALLEY R. CO. v. KISZEL.

(Circuit Court of Appeals, Second Circuit. May 8, 1897.)

1. MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE BOILER.

Where an employé was injured by the explosion of a boiler 18 years old, and there was evidence that the usual duration of such boilers was from 18 to 22 years, *held*, that the question whether, if the boiler was defective, its condition should not have been known by defendant, was one for the jury.

2. SAME—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

Plaintiff, a common laborer, having some previous knowledge of the management of boilers, was injured by an explosion of an old boiler, while at work about it, in subordination to another employé having charge thereof. There was evidence that, shortly before the explosion, the boiler was found to be leaking badly, and that plaintiff remonstrated with the person in charge against keeping it in use, but was overruled by him. *Held*, that the court properly refused to charge that, if plaintiff knew of the danger, it was contributory negligence to remain in the vicinity without making efforts to draw the fire or reduce the pressure.

In Error to the Circuit Court of the United States for the Southern District of New York.

The action was brought by Stephen Kizsel to recover damages for personal injuries received by him while in the defendant's employ, by the explosion of one of its boilers upon its premises at Lost Creek, Pa., on the evening of July 28, 1894. The jury rendered a verdict of \$2,500 for the plaintiff. This writ of error was brought by the defendant.

Allan McCullough and Chas. W. Pierson, for plaintiff in error.

F. W. Catlin, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The complaint alleged that the accident solely resulted from the defendant's negligence in using a boiler that was, to its knowledge, defective and out of repair, and that the explosion occurred by reason of this defective condition. The answer, in addition to a general denial, alleged also, as defenses, that the accident was caused by the contributory negligence of the plaintiff, and by the negligence of one of his fellow servants.

The facts, as narrated by the plaintiff on the trial, are, in outline, as follows:

"On the day of the accident, plaintiff, who had been in the company's employ at Lost Creek for several years, working part of the time in the breaker, and part of the time in the boiler house, was assigned to work at the boiler house, to assist John Miller. Miller was fireman in charge, in the absence of James Egan, the head fireman, who was unwell that day. There were seven sets of boilers in this boiler house, three boilers to each set, making twenty-one boilers in all. The boilers rested at one end on a wall, and were hung at the other end on girders. When Kiszel began work, about 2 o'clock p. m. on the day of the accident, the fires were already lighted under eighteen boilers. The other three were cold, having been out of use for a week for repairs to the flues and surrounding masonry. A fire was put under these three boilers between 5 and 6 o'clock p. m., while he was at his supper."

About 7 o'clock he was told by Miller to watch these three boilers, and found that the water in the first boiler just caught the middle gauge, and was higher than that gauge in the second and third boilers. The first boiler was the one that exploded. At a quarter past 8, when he was looking under it, he saw that the water was "dropping down in the middle from the boiler." Miller was there at the time, and also looked at the boiler, and said, "Most of those boilers leaked." About five minutes before 9 o'clock, Miller, Shields, who was hoisting engineer, and Laubach, who was the pumpman, came to look at the boiler. Kiszel also looked in, and saw that it was leaking badly. It exploded at 9 o'clock, and Miller, Shields, and Laubach were killed. Nothing had been done to extinguish the fire or blow off steam or disconnect this set of boilers from the rest. The boiler in question was a plain cylinder boiler, made at the Hazelton shops. The Hazelton boilers are considered about the best make of boilers used in that region. It was regularly inspected every six months. The last inspection had been made on March 2, 1894, between four and five months before the accident. At that time the inspector went into the boiler with a lamp and his tools, and examined the boiler and the rivets, and reported the boiler good. It had been in active use and working well up to the time the fires were drawn for repairs to the masonry, about a week before the accident.

The defendant moved, at the close of the testimony, for the direction of a verdict in its favor, because no negligence or want of care on its part had been established, whereas the plaintiff had been guilty of contributory negligence, and because the negligence, if any, was that of Miller, a co-employé with the plaintiff. The denial of this motion is the subject of one or more of the assignments of error. The adequate difficulty which prevented the direction of a verdict was the state of the evidence upon the questions of fact. Kiszel was the only survivor who knew anything of the occurrences during the afternoon and evening before the explosion, and the inferences which could fairly be drawn from his testimony on the trial were against the safety of the boiler, and were not in favor of the negligence of Miller, who was admitted by his employers to have been a competent fireman. Kiszel, shortly after his injury, when he was in the hospital, had given a history of the accident, and had also testified before the coroner, and his statements on both those occasions bore with severity

upon the carelessness of Miller, but upon the trial the drift of his testimony was quite different. The prominent fact which he then sought to have inferred was the defective character of the boiler. He said that it was originally half an inch thick, and that on the bottom, where the break occurred, it had worn down to an eighth of an inch, and that the bottom was worn out. The other testimony adverse to its safety, and which called upon the defendant for the exercise of care in its examination, and in the maintenance of its soundness, was in regard to the usual duration of the life of a boiler, and upon this point the defendant's witnesses alone testified. One said, "I have known some of them [the Hazelton boilers] to last eighteen or twenty years." Another said that they lasted from 20 to 22 years. Another said, "I have known them to last twenty years." The exploded boiler was 18 years old. The opinion of the defendant's experts who subsequently investigated the subject was that the crack and the resulting explosion were due to the unequal expansion of the bottom and the top of the boiler, caused by too sudden and hot a fire when the boiler was cold and the masonry was still damp, and there was not enough water in the boiler. Upon this state of the evidence, especially in regard to the time when a boiler must be expected to wear out, the question of an unsoundness which ought to have been ascertained by the defendant's agents or representatives could not be taken from the jury. But it is said that the defendant had discharged its duty by the purchase of a boiler of the best material, from manufacturers of the best reputation, by semi-annual careful inspection of it, and by its previous freedom from indications of leaks, for the defendant is not a warrantor of the absolute safety of its machinery, and is not liable for the consequences of unknown defects which reasonable and accurate investigation, made at the time when due care requires that such investigation should be made, failed to discover. That statement of the law is not objectionable, but the question of a defendant's liability for the defects of old machinery turns upon the continued exercise of due care, for its duty to its employes is only discharged when "its agents whose business it is to supply such instrumentalities exercise due care, as well in their purchase originally as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employes." *Hough v. Railway Co.*, 100 U. S. 213. It was a question of moment in this case whether, if this boiler was defective, its condition, after 18 years of use, ought not to have been previously ascertained by the defendant. The difficulty which prevented the trial judge from taking the question of the defective condition of the boiler from the jury was also apparent in regard to the negligence of Miller. As the plaintiff presented Miller's conduct to the jury, he was apparently thoughtful, and not inattentive, but his conduct was heedless and willful, if the declaration of Kiszal before the coroner and in the hospital, and the inferences directly deducible from his story, were true. The question was one of the credibility to be given to the plaintiff as he appeared upon the stand, and the jury decided in his favor.

The defendant made divers requests to charge in regard to the

necessity that its negligence should be affirmatively shown, in regard to the infirmity of the plaintiff's case if the accident was due to Miller's negligence, and in regard to the extent of the obligation upon the defendant to furnish safe machinery. The various propositions upon these subjects, although they were technically correct, the trial judge did not charge in the form in which they were presented, but directed the attention of the jury in a less abstract way to the particular questions before them. He told the jury to return a verdict for the defendant if the boiler was a fairly safe one to be put at the work which it was called upon to do, but that if it was defective, and the persons in charge of the boilers knew it, then the plaintiff had made out his part of the case. The judge dwelt upon the importance of ascertaining whether the boiler was defective, by further charging that if it was a bad one, and was so understood by those in charge of it, and the defect injured the plaintiff, the fact that Miller was careless did not affect the case, because his negligence could not relieve the defendant's negligence. It is true that he did not charge in terms upon the question of their duty if they found the boiler to be sound, and that the accident occurred through Miller's negligence, because he had told them that, if the boiler was a fairly good one, to return a verdict for the defendant. Upon the subject of the plaintiff's conduct, the judge told the jury that if he, by his own carelessness, brought in any degree the injury upon himself, then he was not entitled to recover, and that if the injury was the result of the plaintiff's own fault, in whole or in part, to return a verdict for the defendant. The defendant requested the court to charge specifically that if the plaintiff discovered, before the accident, that the boiler was in an unsafe condition, and likely to explode unless the fire was withdrawn or the pressure reduced, it was contributory negligence to remain in the vicinity without making efforts to draw the fire and reduce the pressure. The trial judge did not make contributory negligence to depend entirely upon the fact of his remaining in attendance, and an absence of manual attempts to draw the fire, but he directed the attention of the jury to other facts in the case, an important one being that Kiszel was a mere subordinate, that Miller was in charge, and that the plaintiff was the one to obey, and not to dictate. It appears from the testimony that he was a common laborer, with some previous knowledge of a boiler and its appliances, and knew how to make, regulate, and check a fire, to watch the gauges, and to note the pressure of the steam. If his testimony upon the trial was worthy of credit, he had no occasion for alarm until about five minutes before 9, just before the explosion, when the three men, of apparent experience in steam boilers, came together to examine the leakage. If his statement in the hospital, and before the coroner, are to be relied upon, in whole or in part, he was in frequent controversy with Miller during the evening, in which he was expressing his apprehensions of danger, was remonstrating against Miller's course, and was steadily overruled. An instruction to the jury that, if he knew of the danger, it was contributory negligence to remain in the vicinity without making efforts to draw the fire or reduce the pressure,

would have been an instruction not pertinent to the facts, because, in connection with his assertions that he knew the danger, it was made manifest that he was unable to draw the fires or reduce the pressure against the will of Miller, who was, if the plaintiff's story immediately after the explosion was of material value, in actual oversight of the three boilers during the evening. Our study of the record leads to the conclusion that, if any mistakes were made upon the trial, they were not those of law, but were of fact, of which the jury were the judges. The judgment of the circuit court is affirmed, with costs.

WROUGHT-IRON RANGE CO. v. GRAHAM.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1897.)

No. 164.

1. WRITTEN CONTRACTS—PAROL EVIDENCE.

Even after an oral contract of sale has been consummated by delivery of the article and the payment of the price, the parties may, if they choose, sign a writing expressing their contract, and parol evidence will then be inadmissible to show that the oral contract differed therefrom.

2. EVIDENCE—RES GESTÆ.

In an action by the purchaser of a range against the seller to recover for the burning of his house through the alleged negligence of the seller's agent in putting up the range, evidence that the agent, in answer to suggestions that some insulation should be used where the pipes passed through the woodwork, had said that insulation was not necessary, because the range was so constructed that there was no danger, is admissible as part of the *res gestæ*, and to show that it was put up in that manner by defendant's agents, and not by direction of plaintiff.

3. NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

The acquiescence of the purchaser of a range in the action of the seller's agent in running the pipes through woodwork, without insulation, on being assured by the latter that, owing to the peculiar construction of the range, there was no danger, is not contributory negligence which will preclude a recovery for damages caused by a resulting fire.

4. PRINCIPAL AND AGENT—SCOPE OF AUTHORITY—INFERENCE BY JURY.

Where the seller of a range, who has agreed to deliver it, with the necessary piping, and set it up ready for use, sends it by an agent, who sets it up in a defective and dangerous manner, the jury are authorized to infer that in so doing he was acting within the scope of his agency.

5. REVIEW ON ERROR—PLEADINGS AND PROOFS—DAMAGES.

Under a complaint claiming damages for the negligent destruction by fire of a dwelling house and outhouse it is not reversible error to allow for the destruction of shade trees surrounding the dwelling, though such damage is not specially pleaded.

In Error to the Circuit Court of the United States for the Western District of North Carolina.

This writ of error brings to us for examination the exceptions reserved by the defendant in the court below to the rulings in a jury trial, the facts of which are sufficiently set forth in the following statement, taken from the brief of the counsel for the plaintiff in error:

"This was a civil action, brought by W. A. Graham, the defendant in error, to recover of the Wrought-Iron Range Company, plaintiff in error, the sum of \$5,000 damages, caused from the burning of his dwelling house and contents

and one outhouse on the 5th day of June, 1894, by fire, which fire, the said Graham alleged, was communicated from the range and piping sold him by the Wrought-Iron Range Company, plaintiff in error. It appeared in evidence on the trial of the case in the court below that on the 16th day of May, 1894, one Goetchins, the agent of the plaintiff in error, contracted to sell to the said Graham a range and piping at the price of \$68, and the said Graham agreed to take a range, and on that day executed his note for \$68. On the 21st day of May one Bell, another agent of the plaintiff in error, came to Graham's house with a range and piping, and the said Bell procured two carpenters to erect and place said range in position in the house, the piping being run straight up through a room over the kitchen, and through the roof of the house, without placing around the piping any terra cotta or other nonconductor of heat. The same night that the range was placed in position, and after it had been so placed, the said Graham signed a paper writing known in this case as 'Exhibit A,' which is in words and figures as follows:

"This agreement, made and entered into this 21st day of May, 1894, between the Wrought-Iron Range Company, of St. Louis, Mo., of the first part, and Maj. W. A. Graham of the second part, witnesseth: That the Wrought-Iron Range Company has this day delivered in good order to the parties of the second part one Home Comfort Range and ware, same as sample ordered from, for which the party of the second part executed their promissory note on the 16th day May, 1894, for the sum of \$68, payable to the Wrought-Iron Range Company without discount or offset, and due on the 1st day of October after date, with eight per cent. interest from date, if not paid when due and presented. Now, be it understood, that the Wrought-Iron Range Company warrant said range to bake, boil, and do all kinds of cooking in a good, workman-like manner, and agree to furnish free of charge any parts that may, with ordinary usage, get out of repair sufficiently to injure the working of said range during the period of twelve months from the date of this writing: provided, that the above note is paid when due and presented, and that the parties of the second part furnish such fire and fuel as is necessary to its perfect operation. It is further agreed that the range is not transferable until paid for, and that no receipt, discounts, or offset will be accepted against the above-mentioned note. This is the only agreement or stipulation recognized in the purchase and sale of said range, and no alteration of the above conditions or erasures by salesmen is authorized or will be recognized by the said company.

"[Signed in duplicate]

The Wrought-Iron Range Company.

"W. A. Graham.

"County of Lincoln, State of North Carolina.

"Witness: J. D. Bell."

"When the agent, Goetchins, contracted to sell the range and piping on the 16th day of May, it appeared in evidence that he stated to the said Graham that the piping was made of sheet steel, and that the range was constructed in such a manner that the heat from the fire went around the oven before going up the pipe, and that there would be no danger to Graham's house from fire if the piping was placed in immediate contact with the woodwork of the house, and there was no need of terra cotta or other nonconductor of heat; that the pipe would not get heated enough to burn a cotton string in ten years. There were other statements of like nature by the agent as to the qualities of the range, and the safety from fire in using it. The plaintiff in error duly objected to the admission in evidence of all the declarations of the agent, Goetchins, and of all his statements, upon the ground that, the contract having been subsequently reduced to writing, all the prior negotiations were merged in the writing, and it was not permissible to prove by parol evidence any statements, representations, or contract of the agent not embraced in the writing. The question as to the admissibility of this parol testimony is one of the main points in the case. The plaintiff in error further objected to any evidence that Bell had had the range placed in position upon the ground that there was no evidence of any agency on the part of Bell to erect the range and piping; that neither his acts nor declarations in reference to erecting the range could be shown in evidence; nor could the plaintiff in error be chargeable if the range and piping were placed in position negligently under the direction of Bell.

The admissibility of this evidence raises another question in the case. The defendant in error was permitted to testify that he lost by the fire shade trees to the value of \$500. This evidence was duly objected to by plaintiff in error upon the ground that it was not such damage as was claimed in the complaint. The complaint set forth the damage in article 7 of the first cause of action on page 14 of the printed record in these words: 'That on or about the 5th day of June, 1894, a dwelling house and the greater part of its contents, consisting of furniture, library, silverware, jewelry, wearing apparel, and other personal property, and also an outhouse, were consumed by fire,' etc.

"The complaint in the action contains three causes of action: (1) The cause of action for deceit and false representation,—that the agent falsely and fraudulently represented that the range and piping would not communicate fire to the plaintiff's dwelling house if the piping was placed in immediate contact with the woodwork. (2) The second cause of action was upon a warranty that the agent warranted that fire would not be communicated to the plaintiff's dwelling house if the range and piping were placed in immediate contact with the woodwork of the house. (3) The third cause of action was for negligence in that the agent at the time of the sale agreed to place the range and piping in position in the house so that there would be no danger of fire therefrom, and that the agent negligently failed to erect the range and piping so that there would be no danger from fire, etc.

"The plaintiff in error contended that there could be no recovery as to any of these three causes of action, because, in the first place, the evidence should be restricted to the paper writing known as 'Exhibit A,' and this contained no representations or contracts of the nature alleged in the complaint, and the contract, 'Exhibit A,' expressly showed that the plaintiff in error had not authorized its agent to make any other contract than that contained in the writing, and had not authorized its agent to erect the range and place it in position, and was, therefore, not responsible for any negligence. Even if these points were against the plaintiff in error, and even if parol evidence were admissible, yet it appeared from the whole case and the testimony of the said Graham himself that the agent contracted to sell a range made of wrought iron, and piping made of sheet steel, both well-known articles, and therefore no statement or representation of the agent as to these well-known articles could be allowed in law to be a cause of action for deceit, or even warranty; and that, although the range and piping were negligently placed in position by the agent of the plaintiff in error, yet it was negligence on the part of the defendant in error to use the range erected as it was, and he cannot be heard to say that he did not know the qualities of wrought iron and steel, and he cannot be heard to say that he relied upon the representations of the agent; that the question as to whether the fire built in a range made of wrought iron, and used with piping made of sheet steel, would get heated enough to burn the woodwork in immediate contact with the piping was a fact which the said Graham ought to have known; and, if he did not know it already, it was a fact which he could so easily have ascertained that his failure to know the fact or to ascertain it will effectually bar any recovery on his part in this action. The plaintiff in error further contended that at the time the alleged fraudulent representations were made no particular range was referred to, and that there could not be any deceit in an executory contract to deliver a range and piping of a certain kind at some time in the future. There is no evidence that there was any representation as to the qualities of the particular range and piping which were sold and delivered to the said Graham. The plaintiff in error asked for special instructions in its favor upon the issues submitted, and in this way has raised the point that on the whole evidence the said Graham is not entitled to recover in this action, and the plaintiff in error earnestly insists that in no aspect of this case is the defendant in error entitled to recover.

"Issues were settled in accordance with the practice in North Carolina, and submitted to the jury under each of the three causes of action as follows:

"Issues Tendered by Plaintiff. First Cause of Action.

"(1) Did the defendant, as alleged in the complaint, through its agent, represent to the plaintiff, with the purpose of inducing him to purchase and use

one of its ranges and piping, that the range and piping were so made and constructed as not to require any insulation of the pipe by terra cotta or other nonconductor of heat, to prevent setting fire to the house of plaintiff; and that, if the range and pipe were put up and used without such nonconductor, it would not ignite the plaintiff's house, and there would be no danger from fire? Answer. Yes. (2) Was said representation knowingly false? Answer. Yes. (3) Was plaintiff induced by said representation to purchase from defendant and use one of its ranges and piping without insulating the pipe by terra cotta or other nonconductor of heat, as alleged in the complaint? Answer. Yes. (4) Was plaintiff injured by reason of said false representation, as alleged in the complaint? Answer. Yes. (5) What are the plaintiff's damages? Answer. \$3,600.'

"Second Cause of Action. Issues.

"(1) Did defendant agree with and warrant to the plaintiff, as alleged in the complaint, through its agent, that the range and piping to be used therewith, which defendant sold to plaintiff, were so made and constructed as not to require any insulation of the pipe by terra cotta or other nonconductor of heat to prevent setting fire to the house of plaintiff, and that, if the range and pipe were put up and used without such nonconductor, it would not ignite the plaintiff's house, and there would be no danger from fire? Answer. Yes. (2) Was there a breach of said agreement and warranty by the defendant? Answer. Yes. (3) Was the plaintiff injured by said breach? Answer. Yes. (4) What are plaintiff's damages? Answer. \$3,600.'

"Third Cause of Action. Issues.

"(1) Was the plaintiff injured by the defendant's negligence, as alleged in the complaint? Answer. Yes. (2) (Objected to by plaintiff. Objection overruled. Exception.) Did the plaintiff, by his own negligence, contribute to his injury? Answer. No. (3) If plaintiff, by his own negligence, contributed to his injury, could defendant, notwithstanding the negligence of plaintiff, have prevented the injury by the exercise of care on its part? Answer. Yes. (4) What are plaintiff's damages? Answer. \$3,600. (5) Did the defendant, as a part of the contract of sale of the said range, and for the consideration of the price contracted to be paid therefor, agree with the plaintiff to deliver the said range, and to place the same in position in the plaintiff's house in such manner that there would be no danger of the plaintiff's house catching fire from said piping, and so that the plaintiff could use the same with perfect safety? Answer. Yes.'

"The jury having answered all the questions submitted in favor of the plaintiff, and in such cause of action having assessed the damages at \$3,600, judgment was entered for that amount."

Charles W. Tillett, for plaintiff in error.

David W. Robinson and Platt D. Walker, for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and MORRIS, District Judge.

MORRIS, District Judge. The defendant at the trial offered no evidence, but, when the plaintiff was asked to tell the jury under what circumstances he bought the cooking range and piping, and what was the contract made in reference thereto, the defendant's counsel produced the paper known in the case as "Exhibit A," which was signed by the plaintiff. The plaintiff then testified that he had signed the paper after he had bought the range and had given his note for it, and after the range had been delivered, put up, and a fire built in it. The plaintiff testified that Bell, who had brought the range, and put it up, had asked him to sign what he called a "receipt for the range," and, thinking it was a receipt, he signed it; that Bell professed to read it over, and gave plaintiff a duplicate of it, which he put away

among his papers without reading it. The defendant then objected to the plaintiff being allowed to testify as to the representations made by either Goetchins, who had first sold the range to the plaintiff, and obtained his note for it, or of Bell, who had brought the range and put it up, as to the range not heating the smoke pipe, and as to the absence of any risk of the pipe setting fire to any woodwork, although placed against it without any terra cotta or tin protection around it. The court overruled this objection, and in its instructions told the jury that the range had been purchased under a parol contract made between the plaintiff and Goetchins, the agent of the defendant; that the paper signed by the plaintiff did not supersede the previously executed parol contract of purchase; that it had only the force and effect of a receipt, and, having no contractual obligation, was capable of being explained by parol evidence; that it could not have relation back and be a substitute for the previously accepted parol contract. This instruction proceeded upon the ground that the plaintiff, at the first interview with Goetchins on the 15th, having agreed to purchase the range and piping, and having then given his promissory note, the sale was complete, and the terms of it settled, so that the paper signed by both the vendor and purchaser upon the delivery of the range and piping on the 21st could not change them. In this ruling we think there was error. The agreement of purchase on the 15th was made after inspecting a sample range which Goetchins had in one of the company's wagons. He was to send one like it, and have it put up. Until the range was put in place, it was not delivered, and the transaction was not complete. When such a transaction is complete, there is no rule of law which prevents the parties from both signing, if they choose to do so, a written paper which shall express the terms of the contract. It is true that neither is compelled to sign such a paper, and that neither may, without the consent of the other, impose any new terms; but, if they both do sign a paper with the intent that it shall express their contract, we are not aware of any rule of law which prevents such an agreement from having the same validity which it would have had if signed by both at some earlier stage of the transaction. *Worthington v. Bullitt*, 6 Md. 172; *Mills v. Matthews*, 7 Md. 315. When a written contract is so signed by both the parties to be bound, in the absence of clear and convincing proof of fraud or deception in procuring it to be signed it must be presumed to express the entire contract, and parol evidence of previous understandings of the parties is not admissible to vary its terms. It is to be borne in mind that the remedy which the plaintiff below was pursuing in his second cause of action was upon a supposed warranty in the contract of sale that the range and piping could be safely used without terra cotta or other nonconductor to separate the piping from the woodwork. To support this it was necessary to entirely ignore the written paper "Exhibit A," which does not contain any such warranty, and to rely entirely upon the parol statements given in evidence; and with regard to the first cause of action, which was for deceit in falsely representing that the range and piping was so constructed that it did not require any insulation for the smoke pipe, and thereby inducing the plaintiff to buy it to his damage, the false representations, like the

alleged warranty, the plaintiff was attempting to prove by parol testimony of what took place prior to the signing of the written agreement, so that, if the agreement was a valid contract, those representations were not admissible.

The third cause of action, however, rested upon matters not in any way covered by the written agreement, even assuming that it was signed under circumstances which made it the only binding contract. The third cause of action was for the alleged negligence of the defendant in so placing the range and piping in position that it set fire to the plaintiff's house, and caused the damage sued for. The plaintiff's testimony proved that Goetchins, after having induced the plaintiff to purchase one of defendant's ranges, and after obtaining plaintiff's note, payable to the order of the defendant, for the agreed price, went off, saying that he would send the promissory note to the defendant's superintendent at Lincolnton, and that a man would be sent to put the range up, and explained that because of the peculiar construction of defendant's make of range and piping no insulation would be required around the piping. On the 21st a man named Bell came with the range and the necessary piping, which was over 23 feet in length. He asked if he could get two carpenters to assist him in putting up the piping. He employed and paid them, and directed how the piping should be erected, and had it run up through the ceiling of the room over the kitchen and out through the roof, having the holes cut for the purpose. He assisted the carpenters, and furnished them the necessary tools from one of the company's wagons. Both the plaintiff and his son suggested to Bell that there should be some insulation around the pipe where it passed through the woodwork, but Bell insisted that the range and piping manufactured by the defendant were so constructed that insulation was not necessary, and that there was no danger. After the job was completed, Bell paid all of the attendant expenses, partly in money and part with scrip obligations of the defendant company, and obtained from the plaintiff the agreement produced by the defendant at the trial. To sustain this third cause of action it was necessary to prove that the defendant, through its agents, had undertaken to put the range in place with the necessary piping ready for use; that it had done so in its own way; and that the work was so negligently done that without any fault on plaintiff's part it had set fire to his house, and caused him damage. There was very full proof of all these facts, and, the jury having found in favor of the plaintiff on this third cause of action, we are required to consider whether any of the assignments of error applicable to it are sustainable.

First, as to the admission of the testimony of the statements by Goetchins and Bell with regard to the peculiar construction of the range manufactured by the defendant, which they were selling for the defendant, it appears to us there was no error, for the reason that as to this cause of action this evidence was not given to prove a warranty or deceitful representations different from those contained in the alleged agreement, but to show how and for what reason the defendant put up the range in the manner it did, and was admissible as part of the *res gestæ* connected with that act of the

defendant. The statements of defendant's agents that they were going to put up the range in a manner different from the ordinary manner, because that was the proper way to place a range of its peculiar construction, was pertinent, and admissible to prove, in connection with other facts, that it was put up in that peculiar manner by defendant's agent, and not by direction of the plaintiff; and it was left for the jury to say whether or not it was a dangerous and negligent manner, and whether the burning of the house resulted therefrom. We cannot see that any of the exceptions to the evidence are sustainable as applicable to the third cause of action and the issues framed in submitting it to the jury.

We next consider whether, as to this cause of action, any of the rulings in refusing the instructions asked by the defendant, which were excepted to, contain reversible error. It is to be noted that the appellant is not entitled to a reversal, because the court may not have fully instructed the jury on the subject of negligence. It can assign as error only the instructions which the court did give, or which, although requested by the defendant, it refused to give. The instructions requested by the defendant upon the issues raised by the third cause of action are contained in the 21st, 22d, 23d, 24th, 25th, 26th, 27th, and 33d assignments of error. All of these, except the 33d, are, in substance, that there was no evidence to support that cause of action; that the plaintiff was guilty of contributory negligence, and could not recover; that the danger from using the range and piping was an obvious one, and the plaintiff used it at his own risk; that the fact that the pipe became heated could have been ascertained by ordinary care; and that it was at plaintiff's own risk that he continued to use it, and his using it was the proximate cause of the loss. It does not appear to us that the court could have granted any of these instructions. The only evidence produced tended to show that the fire broke out in the roof adjoining the place where the defendant's agents had run the pipe through only about two weeks before. It does not appear from any testimony that the pipe was observably heated in any place where it could have been seen. There had been no pipe through the roof before, and the apprehension with which the plaintiff had at first regarded the proposal to put the pipe through the roof had been quieted by the statement of defendant's agent that the range and pipe were so constructed that a cotton string around the pipe would not burn in 10 years. The plaintiff testified that he knew nothing of the peculiar construction of defendant's range, and was not competent to judge of it. The defendant ought not to be heard to say that the plaintiff must be held guilty of contributory negligence merely because he used the range just as the defendant's agents put it up and assured him it was safe to use it. It was submitted to the jury to say whether the plaintiff, by his own negligence, contributed to his injury, and they answered that he did not. The defendant desired the court to go much further, and to instruct the jury that the danger was so obvious that the plaintiff, as a reasonably prudent man, ought not to have believed its agent's statements, and ought to have seen the danger. We see no ground for sus-

taining this contention. The range and piping were of defendant's own manufacture, and the plaintiff naturally enough was persuaded that defendant's agents knew its qualities best.

The thirty-third assignment of error is to the court's refusal to grant the sixteenth instruction asked by the defendant, viz.:

"That there is no evidence in this case that either Goetchins or Bell had authority to bind the defendant by a contract to erect and place the piping in position, nor is there any evidence that in erecting and placing the range and piping in position in plaintiff's dwelling the said Bell represented the defendant, and the said defendant is not, therefore, bound by the alleged contract to erect the range and piping, nor is the defendant responsible if the same was negligently erected by Bell, and under his direction."

The question is not whether Goetchins or Bell had authority to make a contract binding upon the defendant to erect and place the range and piping, but whether what they did do was within the scope of their authority and employment, and whether they did it while engaged in the defendant's business. The answer which the defendant filed admits that it offered to sell to the plaintiff one of its ranges to place in plaintiff's dwelling house, to be used for cooking purposes; and it admits that, through its agent, it delivered the range to the plaintiff at his dwelling house. It denies that any piping was placed in contact with the woodwork of said dwelling house by any agent of defendant. It admits that it was engaged in the manufacture and sale of cooking ranges, and that it sold one of its ranges for \$68 to the plaintiff. The answer is an admission that Goetchins was defendant's agent to sell the range and piping, and that Bell was its agent to deliver it with the piping. These agents unquestionably undertook to put it up in a manner suitable, as they claimed, to its peculiar construction; and there was evidence from which the jury was justified in finding that in so doing they were acting within the apparent scope of their employment. No evidence was introduced to contradict this, or in any way to affect the inferences which the jury might fairly make from the facts proved. The contention that when defendant's agents were making the sale and delivering the range and piping, and getting plaintiff's note and agreement, they were acting for the defendant, but that when they were placing the range and piping in position, and paying the carpenters, they were acting for themselves, is a contention that requires affirmative proof to support it, and is by no means a presumption of law. In *Mechem on Agency* (section 734), the law on this subject is well summarized:

"In determining the principal's liability for the agent's negligence, the important inquiry is not whether the agent was authorized to do, or to omit to do, the act, the doing or not doing of which constitutes the negligence complained of, or whether the act was done or omitted in violation of the principal's instructions, but whether the act was done or omitted by the agent while engaged in the business of his principal. As is well said by a learned judge: 'In most cases where the master has been held liable for the negligence of his servant, not only was there an absence of authority to commit the wrong, but it was committed in violation of the duty which the servant owed the master. The principal is bound by a contract made in his name by his agent only when the agent has actual or apparent authority to make it, but the liability of a master for the tort of his servant does not depend primarily upon the possession of an authority to commit it. The question is not solved by comparing

the act with the authority. It is sufficient to make the master responsible civiliter if the wrongful act of the servant was committed in the business of the master, and within the scope of his employment; and this although the servant, in doing it, departed from the instructions of his master. The rule is founded upon public policy and convenience. Every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed. The omission of such care is the omission of the principal, and for the injury resulting therefrom to others the principal is justly held liable. If he employs incompetent or untrustworthy servants, it is his fault; and whether the injury to third persons is caused by the negligence or positive misfeasance of the agent, the maxim respondeat superior applies, provided only that the agent was acting at the time for the principal, and within the scope of the business intrusted to him.' *Higgins v. Turnpike Co.*, 46 N. Y. 23. So, too, it is immaterial that the act was committed without the principal's knowledge, or that it was the result of the agent's misapprehension or misapplication of his principal's instructions, and was an act which the principal never intended should be done; if, in fact, it was done by the agent in the course of his employment, and not in the willful departure from it, the principal is liable."

In *Mackay v. Bank*, L. R. 5 P. C. 394, it was declared to be settled law that the principal is liable for a fraud as well as for other wrongs committed by an agent without express command in the course of the agent's service, and for the principal's benefit.

It is urged on behalf of the range company that, although the court may have been right in refusing the instructions it asked with respect to the issues under the third cause of action, it was error for the court not to have charged the jury for their guidance in considering that issue. To justify a recovery for the plaintiff on the issue of negligence, the only facts necessary to be found were the negligence, the fact that it was committed by the agent in the business of the range company and within the scope of his employment, and the fact that injury had resulted to the plaintiff from the negligence, unmixed with any fault on the part of the plaintiff. As to these facts, the evidence was all one way. The undisputed testimony may almost be said to have required the jury to find for the plaintiff, and, in our judgment, no injury resulted to the defendant from the omission to more specifically charge the jury on these points.

It is also urged that there was error in admitting evidence to be given of the value of the trees shading the house, and which added to its beauty, value, and comfort, and in the court's instruction to the jury that they might allow for such as were destroyed by the fire. The plaintiff, in his complaint, claimed damages for the loss of his dwelling house and contents and an outhouse near by. It does not seem to us that the destruction of the shade trees surrounding a dwelling house in the country is an item of damage so distinct from the burning of the house itself that it is reversible error to allow such an item to be proved without alleging it as a special damage. It would rather appear to be a damage which naturally and reasonably results from the burning of the house itself under such circumstances.

Upon consideration, we are satisfied that, although there was error in the rulings upon the questions whether or not the printed contract contained the whole contract of sale, so as to exclude parol

proof of a warranty or of false representations, yet that there was evidence to support the plaintiff's right to recover upon the ground of negligence, and that question was rightly submitted to the jury. It was an independent issue put to the jury in accordance with the North Carolina practice. The finding was fully justified by the evidence, and was sufficient to support the verdict. The judgment of the court below is affirmed.

KNICKERBOCKER ICE CO. v. FINN.

(Circuit Court of Appeals, Second Circuit. May 3, 1897.)

1. MASTER AND SERVANT—NEGLIGENCE—VICIOUS HORSE.

That a horse by whose kicking an employé was injured had, on two previous occasions, of which the employer's superintendent was informed, kicked viciously and dangerously without provocation, is sufficient to require submission to the jury of the question whether the horse had a propensity to kick, rendering him unsafe.

2. SAME—CONTRIBUTORY NEGLIGENCE—VIOLATION OF OBSOLETE RULES.

An employer cannot set up, as a valid defense against the consequences of his own negligence, the employé's violation of a rule which the employer had knowingly permitted to be practically abandoned.

Error to the Circuit Court of the United States for the Southern District of New York.

William Finn, the plaintiff in the court below, an employé of the Knickerbocker Ice Company, recovered in the circuit court for the Southern district of New York a verdict for \$7,500, in an action against said company for damages caused by the kick of a horse of the defendant, which inflicted so severe an injury as to compel the amputation of the plaintiff's leg.

John M. Gardner, for plaintiff.

Charles C. Nadal, for defendant.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. The defendant, at the close of the entire testimony, moved for a direction of a verdict in its favor, upon the ground that there was no proof of negligence on the part of the defendant; that there was no evidence that the horse was a vicious animal, or that it had any propensity to kick, of which the plaintiff should have been notified; and that the plaintiff was guilty of contributory negligence. The court denied the motion, to which the defendant excepted. The plaintiff was "a helper" in the employment of the ice company; that is, he helped or assisted the driver of one of the ice wagons in the delivery of ice upon his route. He also drove while the driver was delivering ice. On the occasion of the accident, he was driving and occupied the usual seat, which placed his legs very near to the heels of the horses. The horse which broke Finn's leg was an "extra" horse, and was occasionally used. There was no question in the case in regard to the liability of the company if it had furnished one of its drivers, without warning, a vicious horse, which the company knew or ought

to have known was vicious, while the driver did not know and was under no obligation to know the animal's evil habit. The points upon which the defendant principally relies are: First, that there was no proof that the horse had a propensity to kick without provocation; and, second, that there was no proof that the defendant's foreman had knowledge of such a propensity, or that he had any knowledge which he should have communicated to Finn.

The testimony on the part of the plaintiff was to the effect that on two separate occasions, shortly before the accident, this horse, viciously and without provocation, kicked in a very dangerous manner; that on one occasion, after having repeatedly kicked, he was returned to the stable, and the superintendent, upon being informed of the reason for the return, furnished another horse; and that on the other occasion an employé told the superintendent of the horse's bad conduct. The testimony in regard to the horse's vicious propensity and the company's knowledge of it is confined to these two instances, but, if the testimony for the plaintiff is to be believed, the kicking was very willful, and without adequate cause. The company assigned a cause which is consistent with his good character. The court charged the jury that there was no substantial evidence that the horse was a generally vicious horse, and that the question was whether he had the propensity, rendering him unsafe, sometimes to kick, without cause or provocation, and whether the superintendent had reasonable cause to believe that the horse was an unsafe horse to be sent out with the plaintiff and his driver. There was sufficient evidence to compel a submission of these questions to the jury.

The defendant's remaining point is that the plaintiff was, in driving the horse, disobeying a rule of the defendant, and was therefore guilty of contributory negligence. The defendant had a rule, on paper, which Finn knew, and which prohibited any employé, except the drivers themselves, from driving the horses. There was ample evidence that this rule was, and was known by the company to be, a dead letter. The defendant insisted that the plaintiff ought not to recover, because, at the time he was hurt, he was acting in violation of this rule.

The court charged as follows:

"If there was a rule of that character in force, and the plaintiff was violating it at the time he received this injury, he is not entitled to recover; but if you come to the conclusion that, although there was such a printed regulation, it was not enforced, it was a dead letter, that everybody connected with the company knew that the helpers were expected on occasions to drive the defendant's horses, and that the plaintiff was injured while driving upon one of these occasions, then the rule is no defense."

To the correctness of this charge, both in morals and in law, there can be no valid objection. An employer cannot be permitted to set up, as a valid defense against the consequences of his own negligence, the employé's violation of a rule which the employer had knowingly permitted to be practically abandoned. *Railroad Co. v. Nickels*, 1 C. C. A. 625, 50 Fed. 718. The judgment of the circuit court is affirmed, with costs.

HENRY v. PITTSBURGH CLAY MANUF'G CO.

(Circuit Court of Appeals, Third Circuit. April 14, 1897.)

No. 10, March Term, 1897.

1. WILLS—CONSTRUCTION—LIFE ESTATE.

Testator devised lands to his son, "to have and to hold * * * during the life of my son, * * * and the lifetime of his wife, * * * to have and to hold the same and enjoy all the benefits or profits in any wise accruing from said land during their natural lives," and, at the death of his son and his wife, the land to be sold, and the proceeds equally divided among their children. *Held*, that the son took only a life estate, notwithstanding that a small charge was made upon the land in favor of his mother.

2. FEDERAL COURTS—EFFECT OF STATE DECISIONS.

A decision by a state supreme court that, under a state statute, a sheriff's sale of certain land passed no title, is binding on the federal courts.

3. STATUTE OF FRAUDS—PAROL CONTRACT FOR LAND—PART PERFORMANCE.

An alleged parol contract, whereby a father authorized his son to go upon a certain tract of land, and occupy and improve the same, with the understanding that it would be his "sometime," is so indefinite as not to be taken out of the statute by a part performance on the part of the son by living upon the land and making improvements.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Ellis N. Bigger, for plaintiff in error.

William B. Cuthbertson, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and BUTLER, District Judge.

BUTLER, District Judge. The parties having dispensed with a jury, the court found the following facts:

"(1) William McClellan, the common source of title, was seised in fee of the land in question at the time of his death, and by his will, which was duly probated, devised the land in question as follows:

"I give and bequeath unto my son Francis McClellan a lot or piece of land situated on the west of my farm and bounded by a partition fence between the farm that I now live upon, on the east, and by lands of Wm. Kennedy and Jas. A. Barrett, be the same more or less, being the same piece of land occupied by him, and upon which he had made improvements upon buildings, etc., to have and to hold the said piece or tract of land so situated and described during the life of my son Francis and the lifetime of his wife, Jane, to have and to hold the same and enjoy all the benefits or profits in any wise accruing from said land during their natural lives, and at the death of my son Francis and his wife, Jane, the said piece or parcel of said land is to be sold, and the amount it is to be sold for, be the same more or less, to be equally divided amongst all the children of my son Francis and his wife, Jane, share and share alike."

"(2) In November, 1882, the said Francis McClellan and Jane, his wife, with seven of their nine children, joined in a bond and mortgage upon said premises to the Beaver Valley Building & Loan Association for \$1,200. Two of the children executing said instruments were minors. Default having been made on May 16, 1887, judgment was entered on said bond by virtue of a warrant of attorney, a writ of fieri facias issued thereon, the property levied upon and on June 4, 1887, sold to J. A. Barrett for \$1,230, and a sheriff's deed thereafter was duly acknowledged and delivered to him, and the purchase money paid.

"(3) That subsequently thereto, T. M. Henry, the vendor of the present plain-

tiff, and the vendee of said Barrett, brought an action of ejectment in the court of common pleas of Beaver county against Frank McClellan and Jane McClellan his wife, to recover possession of said premises. That said case resulted in a compulsory nonsuit being entered against said T. M. Henry, which nonsuit the court refused to take off, and upon appeal by the said Henry to the supreme court of Pennsylvania, the judgment of the lower court was affirmed. That in said case the question raised was the same as in the present case, viz., the effect of the sheriff's sale to divest the life estate, and was passed upon.

"(4) That subsequently thereto the holder of the life estate and those in remainder uniting in praying a sale, the land in question was sold by a trustee acting under the order of the orphans' court of Beaver county. The said T. M. Henry appeared in said court as claimant for part of the proceeds of the sale of said lands by virtue of his ownership of the title or right alleged to have passed by said sheriff's sale. That the orphans' court decided against the validity of said sheriff's sale and against the alleged right of Mr. Henry to participate in the proceeds of the orphans' court sale, and upon appeal by him to the supreme court of Pennsylvania, the decree of the orphans' court was affirmed.

"(5) That subsequently thereto the rights of J. A. Barrett and T. M. Henry under the said sheriff's deed passed by assignment to Francis Henry, a citizen of Minnesota, who brought the present suit."

On this finding of facts, the court entered judgment for the defendant; whereupon the plaintiff brought the case here, and filed the following assignment of errors:

"First. The court erred in opinion in this case in finding for the defendants and in ordering judgment to be entered in their favor.

"Second. The court erred in not finding for the plaintiff and giving judgment in his favor.

"Third. The court erred in finding that in the ejectment in the court of common pleas of Beaver county, brought by T. M. Henry against Francis McClellan and wife, the question raised was the same as in the present case, viz.: the effect of the sheriff's sale to divest the life estate, and was passed upon. In that action it was assumed for the purpose of getting possession of the land, that the title of the defendants was a life estate, the question of the nature of the defendants' title was not raised and was not a question at issue; all of which appears by the plaintiff's paper book on appeal to the supreme court of Pennsylvania, in that case, which is in evidence by agreement in the present case; the question here raised is the nature of Francis McClellan's title, whether by gift, parol, contract, or devise, which if a fee simple, has passed to the present plaintiff, and also the question of the validity of the plaintiff's tax title derived from H. S. McConnel.

"Fourth. The court erred in finding that the orphans' court of Beaver county, in distributing the proceeds of the trustee's sale among the supposed remaindermen under Wm. McClellan's will, or their assigns, decided against the validity of the sheriff's sale. The question of the nature of T. M. Henry's title was not at issue in that distribution proceeding, nor on appeal thereof, where it was assumed, for the purpose of attempting that method of relief, that the land was converted under the will, and that the remainder interests were personalty; as appeared by appellant's paper book in that case now in evidence by agreement. The scope of the orphans' court decision, and that of the supreme court affirming, was merely as to the invalidity of the sheriff's sale to pass the supposed equitable interests in remainder, and was not an adjudication of the matters now in question, and the court erred in not so finding.

"Fifth. The court erred in finding that the question involved in this case has already been passed upon by the supreme court of Pennsylvania.

"Sixth. The court erred in not finding that the statement of the supreme court of Pennsylvania, that the will created a life estate is not decisive of that fact or of this case as the construction of the will was not distinctly before the said court, and as there was no evidence of a parol, gift, or contract, or of a title by tax sale as there is in the present case.

"Seventh. The court erred in not finding that the plaintiff in this action is not

bound by the judgment in the ejectment in Beaver county, as he is entitled to two such possessory actions and to a rehearing of both fact and law bearing on his right.

"Eighth. The court erred in not finding that the plaintiff is not bound by the judgment of ejectment in Beaver county for the reason that the parties to this action are different.

"Ninth. The court erred in not finding that the plaintiff is not bound by the judgment of ejectment in Beaver county for the reason that the plaintiff in that case had no tax title such as the present plaintiff has, as hereafter set forth.

"Tenth. The court erred in not finding that the plaintiff was entitled to a verdict and judgment by reason of his tax title as set forth in the following statement of the evidence, admitted by agreement at the trial. (See the stenographic report of the evidence among the papers on file, also exhibits, etc., and deposition of Frank McClellan.)"

It is unnecessary to consider these assignments separately. They raise the following questions: First, what estate did Francis McClellan take under his father's will? Second, what was the effect of the sheriff's sale of Francis' estate? Third, what was the effect of the understanding between Francis and his father, under which he entered upon and improved the land? Fourth, has the plaintiff title under the tax sale?

As respects the first, we think it quite clear that Francis took a life estate, only. The language of the devise aptly describes such an estate, and cannot fairly be construed to describe any other. The small charge on Francis in favor of his mother, is unimportant. Such charges may be entitled to weight in the construction of devises where the terms are uncertain, but not otherwise. This question was before the supreme court of Pennsylvania in *Henry v. McClellan*, 146 Pa. St. 34 [23 Atl. 385], and the devise was there held to convey a life estate. While the decision is not binding on us, under the circumstances, it is entitled to great weight, and would probably control our minds if they were in doubt. The question, however, does not seem to admit of doubt.

As respects the second question, the answer to which turns on the effect of the act of January 24, 1849, our judgment is against the plaintiff. The construction of this act, and its effect on sheriff's sales of land, were also before the supreme court of Pennsylvania in *Henry v. McClellan*, and the conclusion there announced is binding on us. In the absence of this decision however, we would hold that the sheriff's sale of Francis' life estate, in disregard of the statute, passed no title.

The third question above stated, alone, was seriously pressed on the argument. The only evidence on which it rests is found in the deposition of Francis McClellan, and is as follows:

"I first moved on the land in dispute in the year 1862. I made some, but not many, improvements that year. I went into the army that year. I afterwards cleared part of the land, built this log house or cabin, planted an orchard, built fences, but no other building. Father told me to go on the land and build a house, and the land would be mine some day. Acting on this promise, I made these improvements. I was married, and had a family at this time. The cabin was built before I went into the army, in 1862. My father's promise was never reduced to writing. John Glass, a justice of the peace, wrote my father's will."

Re-direct: "I never claimed the land in dispute except as tenant for life under my father's will."

This evidence is insufficient to establish a contract. While the law requires contracts for the sale of land to be reduced to writing, a parol contract, clear and distinct in all its essential terms, and in pursuance of which possession has been taken and held, and the consideration paid, will be enforced. *McGibbeny v. Burmaster*, 53 Pa. St. 332; *Edwards v. Morgan*, 100 Pa. St. 336. Here, however, the alleged contract is indefinite and uncertain as respects one, at least, of the essential terms. Francis is to have the land "sometime"; not when he enters upon it, or at any definite period thereafter. When would his title vest? Then again it is entirely clear that Francis did not enter and hold as owner, under this alleged contract. As his deposition declares, he "never claimed the land except as tenant for life under the will." The mortgage executed by him contains the same declaration; and the subsequent proceeding in the orphans' court, in which the land was sold on his petition under the will, was a very emphatic declaration to the same effect. It seems quite plain that neither he nor his father attributed to the understanding referred to, the consequences of a contract of sale. They contemplated that he should occupy and improve the property, applying its proceeds to the support of his family, and that the father would further provide for him respecting it by will. The fact that his father did so provide, and that he accepted the provision, never asserting or suggesting any other title, is, we think, conclusive evidence of this.

As respects the fourth question, also, our judgment is against the plaintiff. If the land had not been actually redeemed, as the evidence, in our judgment, shows it was, Francis' offer to redeem, which is clearly proved, would defeat the tax title set up.

The judgment is therefore affirmed.

LAKE ERIE & W. R. CO. v. CRAIG.

(Circuit Court of Appeals, Sixth Circuit. May 4, 1897.)

No. 467.

1. MASTER AND SERVANT—PERSONAL INJURY—DISREGARD OF RULES—EVIDENCE.

Where an injury to a railroad employé is alleged to be due to a violation of a rule of the company, evidence that the employés habitually disregarded the rule, with the knowledge of the superintendent, is admissible to show abrogation thereof, without showing previous nonobservance under conditions similar to those which existed at the time of the accident.

2. SAME—CONTRIBUTORY NEGLIGENCE.

A railroad employé cannot recover for personal injuries resulting from going between moving cars to uncouple them, in violation of a subsisting rule of the company.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

J. B. Cockrum and W. H. H. Miller, for plaintiff in error.

D. J. Cahle and W. L. Parmenter, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

CLARK, District Judge. This case was before this court at a former term on writ of error to the circuit court of the United States for the Western division of the Northern district of Ohio, brought to review a judgment in favor of defendant in error for \$12,000. The judgment was reversed, and a new trial ordered. The case was again brought to trial in the court below, and resulted in a judgment in favor of defendant in error, Craig, for \$11,000, to review which the present writ of error is prosecuted. In the opinion of the court on the former hearing, the facts were stated by Judge Taft as follows:

"Craig was the conductor or foreman of a night switching crew in the yards of the railway company at Lima, Ohio. He had been in the employ of the company for nearly three years prior to the accident in various capacities, chiefly as brakeman upon a freight train. His service as conductor or foreman of the switching crew in the yards of Lima began on the 16th day of December, 1892, and the accident upon which this action is founded occurred on the 23d of the same month. The switching crew, which consisted of Craig himself, two switchmen, the engineer and the fireman of the locomotive, had completed their work about 4 o'clock in the morning, had washed themselves, and were waiting until 6 o'clock should arrive, when their duties would end. They received an order to switch two cars, one to one train and one to another, which, coming at this late hour, put them in bad humor. The two cars to be switched were attached to the front end of the engine, and the engine was backed north on the main track in the Lima yard, to what was called the 'switch,' into the B track. There was a slight grade from the center of the yard down to the switch. The grade from the switch north on the main track was also downward, though upon this point there was a conflict of evidence. As the train backed down on the main track beyond the switch, Craig stepped off on the east side of the main track about opposite the switch point, and waited until the train had passed beyond the switch. One of his switchmen turned the switch, and then Craig gave the swift signal to kick the car hard up the B switch. The engineer obeyed the signal, and pushed the cars up the B switch. Craig stepped in between the first and second cars as they went by him to pull out the coupling pin. He succeeded in doing this, but fell and was run over. His legs were so mangled that both had to be amputated. He was found lying under the firebox of the engine. The contention for the plaintiff in error was that Craig had caught his foot in a frog which was unblocked in violation of the statute of Ohio of March 23, 1888 (85 Ohio Laws, 105), and that this was the cause of the accident. The evidence was very conflicting as to whether the frog was blocked or not. There was some conflict of evidence also as to the speed of the train at the time when Craig entered between the cars. Craig himself said that the speed was from three to four or five miles an hour; other witnesses said that the speed was from four to five miles an hour. The engineer testified that Craig had given him a swift signal,—that is, a signal for a hard kick,—and that the speed was about ten miles an hour. His fireman, however, thought that it was about five miles an hour. The night was cold and the ground was frozen. The roadbed about the switch was usually moist when not frozen. There was some snow on the ground. It was quite dark. A rule of the company forbade brakemen and switchmen to enter between cars in motion to uncouple them. This rule was upon the time card furnished by the company to Craig. It was in evidence that the rule was generally not observed in the Lima yard, and that the violations of the rule were known to the division superintendent and the yard master. The division superintendent admitted upon the stand that the rule was not always observed, but stated that he had cautioned the men against entering between the cars when they were moving too rapidly, and advised them against their taking such risks. It was also in evidence that it was the general custom on

railroads to uncouple cars in this way." 37 U. S. App. 656, 657, 19 C. C. A. 631, and 73 Fed. 642.

The facts disclosed in the record of the case as now brought up are substantially the same, with one important exception now to be stated. On the trial which resulted in the judgment now under review, the circuit court, on objection by plaintiff in error, excluded all evidence showing, or tending to show, that the rule which forbade brakemen and switchmen to go between the cars in motion to uncouple them was habitually disregarded with the knowledge of the division superintendent of the railroad company and the yard master. The rule in question is No. 112, on time card 29, and is as follows:

"112. Every employé is required by these rules and regulations to exercise the utmost caution to avoid injury to himself or to his fellows, especially in the switching or other movement of trains; jumping on or off of trains or engines in motion, entering between the cars while in motion to uncouple them, and all similar imprudences are forbidden."

The circuit judge, in sustaining the objection to evidence of a custom to disregard the rule, gave as a reason for doing so that such evidence did not show that the acts of uncoupling known to defendant's officers were the same or similar to the manner of uncoupling done by the defendant in error at the time of the accident. The circuit judge said that it would certainly not be sufficient to show that the servants of the company were allowed to uncouple cars at a rate of speed not exceeding one or two miles an hour in daytime with the ground dry and the surroundings favorable. Such facts, it was said, would neither justify the court nor the jury in finding that there was an intention not to require the rule to be observed in the nighttime, when the ground was frozen, covered with snow, and where frogs and switches were located, and the danger, in view of these circumstances, much greater. This ruling was made during the examination of defendant in error, Craig, himself, and we may give so much of his examination as related to this point at the time the objection was sustained. It is as follows:

"Q. You may state if Mr. Bell, prior to the time you were injured, was about the yards to your knowledge, at any time while the men were engaged in switching cars and cutting off cars and in coupling cars. A. Well, I don't know as I ever seen him around there after night, but I saw him there in the daytime. Q. Was he there at any time while the men were so engaged? A. Yes, sir. Q. Did Mr. Bell see the manner in which the cars were cut off and switched? (Objected to as not having anything to do with the case at this time.) The Court: I will let him answer this question, and see what the next question will be. This particular question is: 'Did Mr. Bell see the manner in which the cars were cut off and switched?' I think he may answer that question. Mr. Cockrum: That is, these particular cars? The Court: Yes; if that question refers to Mr. Bell seeing the manner in which cars were cut off at other times, I will sustain the objection. Mr. Cable: Q. Do you know how cars were cut off and switched in the yards of the Lake Erie & Western Railroad Company at Lima, Ohio, prior to the time you were injured, with reference to the manner in which the work was done,—that is, on December 23, 1892, and prior? (Objected to. Objection sustained, to which ruling the plaintiff then and there excepted.)"

The witness was subsequently asked to state whether there was any difference in the manner in which the cars were cut off and switching done in the nighttime and daytime, and objection to the

question was sustained. The witness was then asked if he knew the manner in which the switching was done in the yard in the daytime, to which the witness answered that he did. In regard to what ther followed we will allow the record to speak for itself:

"Q. Now state the manner in which the cutting off of cars and switching was done in the yard in the daytime, at and prior to the time you were injured. (Objected to.) The Court: If you will incorporate right in there, and meet the issues fairly and squarely, as to whether or not brakemen and switchmen went in there when the cars were in motion, it will present the matter more directly to the court. I will sustain the objection to this question as it stands. I think you should sustain the objection to this question as to the particular custom. Mr. Cable: I will ask you to state what was the manner in which cars were cut off and switched in the Lima yards of the Lake Erie & Western Railroad Company at and prior to the time you were injured, with reference to brakemen or switchmen going between the cars while they were in motion, to pull the pin, while they were moving at a rate of speed of an ordinary walk, or three or four miles an hour. (Objected to.) Mr. Cable: We offer and expect to prove by the testimony of this witness that the manner of doing switching and cutting off of cars in the Lima yards of the defendant company at and prior to Craig's injury was by uncoupling the cars in motion, going at a rate of speed of from two to three, four, and five miles per hour, the men going between the cars while so in motion to pull the coupling pin; that the manner of doing the work of switching and cutting or uncoupling cars in the Lima yards of the defendant company at and prior to Craig's injury was the customary and usual method of doing like work on all the railroads in the United States; that the work of switching and cutting or uncoupling cars in the Lima yards of the defendant company at and prior to the time of Craig's injury was done in the same manner at night as in the daytime, and in winter as in summer; that the manner of switching and cutting or uncoupling cars in said Lima yards at and prior to the time of Craig's injury was well known to O. W. Bell, who at the time of said injury to Craig, and for more than one year prior thereto, was the division superintendent of the defendant, having control of the line of railway of the defendant extending from Tipton, Ind., to Sandusky, Ohio, and including said Lima yards, at which latter point said Bell's office was situated; and that such manner of switching and cutting or uncoupling cars in defendant's said Lima yards at and prior to Craig's injury was also well known to John Conners, the night yardmaster of defendant in said yards. (Objection sustained, and plaintiff excepts.)"

Defendant in error further offered to make the same proof by other witnesses examined, but this, too, on objection, was ruled out. It appears from what has been said that the circuit judge entertained the opinion that evidence was not admissible as showing, or tending to show, that the company had habitually disregarded the rule, unless this could be done by proof which established that the rule was not observed under circumstances similar to those existing at the time this particular accident occurred. And this was the basis of the court's action in excluding the evidence. This is made quite clear in remarks made by the judge, which we have referred to. As we have concluded that one of the objections taken in the assignment of errors requires a reversal of the judgment, we deem it proper to notice the action of the court in excluding the evidence referred to on account of its importance as a question likely to occur on a new trial. We have carefully considered the reasons assigned by the circuit judge for excluding this evidence, and we are unable to concur in his conclusion. We are very clear that the evidence offered was competent, as tending to show an abandonment of the rule which had been promulgated on paper, and that the defendant

in error had the right to go to the jury upon the question of the rule having been abrogated. The view of the circuit judge that abrogation of the rule could not be inferred by the jury, unless the evidence tended to show nonobservance of the rule under circumstances similar to those existing at the time of the accident, is not supported by any authority to which we have been referred, and is certainly at variance with sound reason. In the very nature of the case, abrogation of the rule could be established only by evidence of the custom of handling the cars in this particular yard, and at times previous to that of the accident in question. If the proof offered made out a habit of disregarding the rule under circumstances which rendered the danger less than it would be at the particular time and place in question, this was a consideration which went to the effect of the evidence, and not to its admissibility. It must be observed that the only substantial, permanent difference that could exist in the circumstances would be that between day and night. Otherwise the conditions of the work would be necessarily quite similar. In addition to the darkness of the night, the learned circuit judge attached apparently much importance to the fact that the ground was covered with ice and snow; but the condition of ice and snow would at almost any particular time be the same in daytime as at night. The circuit judge, passing on the question, assumed that the rate of speed at the time this particular accident occurred was about five miles an hour, and that the custom which it was proposed to establish of disregarding the rule would show a rate of speed of one or two miles an hour. Upon what authority the circuit judge could make this assumption we are unable to see. The difference in a rate of speed of two miles an hour and one of five miles would be a mere difference in the degree of danger attending the act of uncoupling the cars while in motion. The language of this rule is not doubtful, and requires no interpretation. The rule in terms is equally applicable to the case of uncoupling at a two and five mile rate of speed. And the reason for the rule was to prevent a well-known danger attending an act of this kind while the cars are moving at any rate of speed. The view that the servant may violate the rule, and cast the consequences upon the master, because the danger, although always present, varies with the rate of speed, is clearly unsound. To so hold would be not to enforce, but to nullify, the rule. Furthermore, such a ruling remits the case, in respect of both law and fact, to the question of negligence generally, just as if there were no such rule. So the rule promulgated by its terms makes no distinction between night and day as to the manner of handling the cars. The witness Craig stated that he was aware of the manner in which the cars were handled in daytime as well as at night. If the company in daytime allowed its rule to be disregarded, and the danger incurred of coupling and uncoupling while the cars were in motion, and permitted this to be done habitually, it was such evidence as tended to establish an abandonment of the rule, and should have been admitted, and the question of its effect submitted to the jury. The difference in the condition between day and night might have influenced the jury to find as a fact that a

custom, if it existed, to disregard the rule in the day work, did not extend to the night work; although experience might teach the jury that a habit of disregarding wise discipline is not apt to stop at any well-marked limit, the danger differing in degree merely. In ruling out this evidence we think the court was in error. *Railroad Co. v. Nickels*, 4 U. S. App. 382, 1 C. C. A. 630, and 50 Fed. 722, was a case much like this in all substantial respects as to the time and manner of the accident, as well as the character of the evidence submitted, as tending to show that the rule relied on in that case was not really in force. The court said:

"To hold that this defendant company could make this rule on paper, call it to plaintiff's attention, and give him written notice that he must obey it and be bound by it on one day, and know and acquiesce without complaint or objection in the complete disregard of it by the plaintiff and all its other employees associated with him on every day he was in its service, and then escape liability to him for an injury caused by its own breach of duty towards the plaintiff because he disregarded this rule, would be neither good morals nor good law. Actions are often more effective than words, and it will not do to say that neither the plaintiff nor the jury was authorized to believe, from the long-continued acquiescence of the defendant in the disregard of this rule, that it had been abandoned, and it was not in force. The evidence of such abandonment was competent and ample, and the ruling and charge of the court below on this subject were right. *Barry v. Railroad Co.*, 98 Mo. 62, 11 S. W. 308; *Smith v. Railroad Co.*, 18 Fed. 304; *Schaub v. Railroad Co.*, 106 Mo. 74, 16 S. W. 924."

In the view thus expressed we concur. To the same effect, see, also, *Coppins v. Railroad Co.*, 122 N. Y. 557, 25 N. E. 915; *White v. Railway Co.*, 72 Miss. 13, 16 South. 248; *Eastman v. Railway Co.*, 101 Mich. 597, 60 N. W. 309; *Railroad v. Reagan*, 96 Tenn. 128, 33 S. W. 1050. The testimony thus excluded had been admitted, and was in the record which came to this court on the former writ of error, and upon that record Judge Taft, speaking for the court, observed:

"It is also urged in support of the charge below that there was no evidence to sustain the contention that the plaintiff's going in between the cars was negligence. There was a rule of the company which forbade it. It was in evidence that this rule had been more or less disregarded, and that the division superintendent was aware of it. He himself stated that he had warned the switchman against taking the risk of going in between the cars when they were moving too rapidly. If this was all the evidence, the court might have held that the rule had been abrogated, though ordinarily, when the rule is formally adopted, its abandonment by matter in pais is a question for the jury."

The trial judge instructed the jury in regard to rule 112 as follows:

"Now, a good deal has been said about the rules of the company. The defendant has pleaded here that according to rule 112 the plaintiff was not allowed to pass in between moving cars, to uncouple them. Testimony has been offered here by the defendant tending to show that the plaintiff had a copy of these rules, and his receipt was produced, wherein he pledged himself to study them and be governed by them. I say to you, as I said to you in passing upon the evidence during the trial of the case, that under the facts in this case it is not vital for you to determine whether or not he knew of rule 112 and violated it or not; because the law interposes and says that the employee of a railroad company is bound to do his work in the least perilous manner possible, consistent with his own safety and the best interests of the company. Now, if the plaintiff did attempt to go in there to do this uncoupling, when the cars were moving at a rapid and dangerous rate of speed, I say to you that he took the risk, and is guilty of contributory negligence under the law, regardless of the rules of the company. If he did not contribute to and was not the

cause of the injury, the simple violation of this rule, which did not involve negligence, would not relieve the company from responsibility. He might violate the rule itself, strictly construed, and not be negligent; that is, the rule providing that no one should pass in between cars while in motion. He might violate that rule by stepping in between cars when going at the rate of two miles an hour, under such circumstances that it would be a violation of the rule and yet not be negligence."

To this portion of the charge the defendant at the time duly accepted, and now assigns error. The court then refused defendant's request to charge as follows:

"I also request the court to charge the jury that if Craig violated the rules, and their observance would have prevented the injury, or if he had observed the rules the injury would not have occurred, then he is not entitled to recover."

The plaintiff in error had introduced evidence to show that at the time the defendant in error accepted employment he, in proper form, acknowledged receipt of time card and rules No. 29, and agreed to carefully study and abide by these rules and to fully conform to their requirements. It was also proved by the division superintendent, Bell, that this same time card with the rules was in effect at the time of Craig's injury. All evidence tending to show that this rule was not really in force having been excluded, we are left no choice but to treat the case as disclosed by the present record. Practically, then, the undisputed evidence shows that the rule referred to was in due force, and that Craig was at the time under specific contract obligation to conform to the requirements of the rule. If the evidence be regarded as only tending to establish these facts, the question raised by the assignment of error on this portion of the court's instructions would be the same; for whether the evidence be treated as undisputed, or only as tending to establish the existence of the rule in full force at the time, the plaintiff in error was entitled to have the case go to the jury under proper instructions as to the effect of the rule in case the jury should find in accordance with the contention of the plaintiff in error in regard to the rule. Whether or not the defendant's request, in the form in which it is made, is a strictly accurate statement of the law applicable to the violation of a rule of the company by a servant, and whether, therefore, considered apart from the charge of the court upon the same point, it would support an assignment of error on the court's refusal to give this instruction, we need not, for the purpose of this case, stop to inquire. It will not admit of question that the refusal of the court to charge as requested, together with the affirmative instruction given upon this point, rendered the rule completely nugatory, and eliminated it from the case, so far as any practical effect might be concerned. Whatever may have been the opinion of the court, it can hardly be doubted that the jury were left to understand that the rule, if really in full force, had practically no effect on the case, and that the case was to be determined by the general law applicable. On examination of the paragraph, it will be noted that the jury was instructed that it was not vital whether the servant knew of and violated the rule; that the law interposed, and that if the servant did not contribute to and was not the cause of the in-

jury a violation of the rule which did not involve negligence would not relieve the company from responsibility; that he might violate the rule strictly construed, and not be negligent; and that stepping between the cars when going at the rate of two miles an hour would not be negligence. It may be well, in considering the separate parts of the entire paragraph, to refer to certain rules, now well settled and no longer the subject of question. It is, for example, recognized that a duty rests upon a railroad company, in the operation of a complex and dangerous business, to make rules and regulations for the government of its servants and employes. *Railroad Co. v. Camp*, 31 U. S. App. 213, 13 C. C. A. 233, and 65 Fed. 952; *Railway Co. v. Dye*, 16 C. C. A. 604, 70 Fed. 24; *Wood, Mast. & Serv.* § 403; 3 *Wood, Ry. Law*, § 382; *Reagan v. Railway Co.*, 93 Mo. 348, 6 S. W. 371.

And, a company being under a duty to make reasonable rules, it needs hardly to be said that there no longer exists any question of its right and power to do so; and that a servant accepting employment with knowledge of such rules, and especially when his attention is directed thereto, is under obligation to fully conform to such rules when and so long as they are really maintained in force, and that a servant or employe failing or refusing to observe such rules takes upon himself the risk of the consequences of such disobedience, and is, as matter of law, guilty of negligence which defeats his right to hold the master liable for an injury of which such negligence is the proximate cause. *Russell v. Railroad Co.*, 47 Fed. 204; *Brooks v. Railroad Co.*, 47 Fed. 687; *Railroad Co. v. Reesman*, 19 U. S. App. 596, 9 C. C. A. 20, and 60 Fed. 370; *Railway Co. v. Dye*, 16 C. C. A. 604, 70 Fed. 24; *Railroad Co. v. Finley*, 25 U. S. App. 16, 12 C. C. A. 595, and 63 Fed. 228; *Gleason v. Railway Co.*, 19 C. C. A. 636, 73 Fed. 647, and 43 U. S. App. 101; *Railway Co. v. Wilson*, 88 Tenn. 316, 12 S. W. 720; *Railroad v. Reagan*, 96 Tenn. 128, 33 S. W. 1050.

If negligence of the servant in violating a reasonable rule is either the sole proximate cause of an injury, or if without being the sole proximate cause the servant's negligence concur with that of the master in producing the injury, the master is exonerated from liability, and the servant is without remedy. *Railway Co. v. Hoedling's Adm'r*, 10 U. S. App. 422, 3 C. C. A. 429, and 53 Fed. 61; *Railroad Co. v. Howe*, 6 U. S. App. 172, 3 C. C. A. 121, and 52 Fed. 362.

The doctrine that the master operating a complicated and dangerous business may and must make reasonable rules for the guidance and safety of the employes, that the employe must yield obedience, and takes upon himself the consequences of disobedience, is a doctrine that is eminently wise, and founded upon the highest considerations of justice and humanity. The master's right to protect himself from heavy pecuniary liability in the operation of a large business is most important. His duty, by suitable regulations, such as are suggested by experience, to protect as far as may be the servant from risk of injury to himself as well as injury from a fellow servant, for which the master is not pecuniarily liable, and for which there is practically no remedy, is a duty justly imposed by law. And the still higher considerations of the preservation of human life, and the

prevention of serious physical maiming and disability with the attendant suffering and the impairment of usefulness, furnish the fullest support and sanction to the doctrine. And the law knows no such incongruity as holding the master to the duty of making, with the right of making, without at the same time requiring from the servant full conformity to the regulations. Notwithstanding that these views are now no longer open to question, the circuit judge, in the paragraph referred to, instructed the jury in effect that the contract conferred no right and imposed no obligation beyond or different from the law applicable to the case in the absence of any contract. It was declared not important whether the servant knew rule 112 and violated it. In the third sentence it is fully implied that the servant might violate the rule without such violation involving negligence. The jury was further told that the rule might be violated, and the servant not be negligent, provided he stepped in between the cars when moving at a rate of two miles an hour. The instruction was erroneous in each one of these particulars. To say that it was not vital whether the servant knew of and violated the rule was contrary to the well-settled law as declared in the cases referred to. The rule in its terms forbids the servant to go between the cars for the purpose of uncoupling them when moving at any rate of speed, and the statement, as well as the implication, that the servant might violate the rule without being negligent, provided the rate of speed was not rapid, was clearly to abrogate the rule, and substitute the judgment of the servant therefor, as was said by the supreme court of Iowa in *Deeds v. Railroad Co.*, 74 Iowa, 154, 37 N. W. 124. We have said that apparently the instructions of the learned judge proceeded upon the theory that the contract, if in force, did not make the case different from what it would be if treated as controlled by the law in the absence of any contract. If such was the view entertained, there was error in this. In the ordinary case of this character, the questions of negligence and contributory negligence, as known to the common law, are questions of fact for the jury. In such a case, whether the servant's mode of performing his duties is negligent, as well as whether such negligence is the proximate cause of the injury, are both questions of fact to be submitted to the jury under all the circumstances of the particular case; whereas, in a case like this, with a rule in force, the violation of the rule by the servant is as matter of law negligence, as has often been declared, and the only question left open and to be submitted to the jury, as one of fact, is whether or not such negligence was the proximate cause of the injury, or concurred with the negligence of the master in producing the injury. Applying this general rule to the case in hand, the evidence that rule 112 was in force is undisputed, as this record comes to us, and the jury should have been instructed that its violation by the defendant in error was, as matter of law, negligence; and that if such negligence was the sole proximate cause of the injury, or concurred with that of the master as the proximate cause of the injury, the plaintiff in error was without remedy. What was said in the former opinion of this court in this case will be applicable and fully sufficient for any question that may arise on

another trial in regard to the proximate cause of the injury, and we refer to that case without repeating what is there said.

In regard to the other errors assigned, we do not think that they are well taken, or that they require any discussion. For the errors indicated the judgment is reversed, and the case remanded, with a direction to set aside the verdict and order a new trial.

FIDELITY & CASUALTY CO. OF NEW YORK v. WILLEY et al.

(Circuit Court of Appeals, Third Circuit. April 12, 1897.)

No. 23, March Term, 1897.

INSURANCE—PREPAYMENT OF PREMIUM—CHARGE TO AGENT—RENEWAL RECEIPTS.

A provision in an accident policy that the same shall not take effect unless the premium is paid prior to an accident is waived, on a renewal of the policy, when, according to the usual course of dealing between the insurance company and its agent, the company transmits the renewal receipt to the agent, and charges him with the amount of the premium, and the agent then delivers it to the insured without exacting prepayment. 77 Fed. 961, affirmed.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

De Lagnée Berier, for plaintiff in error.

George E. Shaw, for defendants in error.

Before DALLAS, Circuit Judge, and BUTLER and BUFFINGTON, District Judges.

BUTLER, District Judge. The suit is on a policy of insurance issued by the plaintiff in error to James Getty, Jr., insuring him against accident, for one year. Just before the expiration of this period the company forwarded a renewal receipt to its agent and charged him with the premium. He delivered the receipt to Getty, and thus extended the policy, on the latter's promise to pay at a future time. It was the habit of the company thus to forward policies and renewal receipts and charge premiums, to its agents, and it was the practice of this agent, Mr. Scott, to deliver policies and receipts without exacting prepayment of premiums due, where he had confidence in the assured. He had so dealt with Getty previously. The policy in suit contains the usual provision that it "shall not take effect unless the premium is paid previous to any accident under which claim is made"; and further that its terms cannot be waived or modified by an agent without the approval by the president or secretary of the company.

At the close of the testimony the company requested the court to charge as follows:

"(1) That the insured, James Getty, Jr., by accepting and retaining the policy of insurance, without objection, assented to all its terms and conditions; more particularly (a) he assented and agreed that the policy should not take effect unless the premium should be paid previous to any accident under which claim

might be made; and (b) he agreed that the terms of this policy could not be waived by any agent of the insurance company, and that any modification of the policy should not be valid unless indorsed thereon by the president or one of its secretaries.

"(2) The insured, James Getty, Jr., had knowledge, either actual or presumptive, that the agent of the defendant company, Mr. Scott, had no power to waive or modify any condition of the policy, including that provision of the policy which required prepayment of the premium before an accident.

"(3) The defendant's agent, Mr. Scott, could not bind his principal, the defendant, by waiving payment of the renewal premium when Getty, the insured, knew that he had no power to make such waiver.

"(4) It is immaterial whether Mr. Scott was a general agent or a subagent of the defendant company, so far as his right to waive any condition of the policy was concerned.

"(5) Where the contract of insurance expressly provides by its terms, the particular manner in which a condition of the contract may be waived or modified, no other attempted waiver will be permitted to modify the contract.

"(6) The mere delivery of the renewal receipt did not give the policy force, because, by its terms, it was expressly stipulated between the parties that it should not take effect unless the premium should be paid previous to an accident. The failure to pay the premium simply suspended the policy until the premium should be paid.

"(7) The possession by the plaintiff of the renewal receipt is merely presumptive evidence that the premium was paid, and is not binding upon the company, unless the jury find that the money was actually paid."

The court declined to charge as requested, but instructed the jury, *inter alia*, that:

"If you find from the evidence that it was the usual course of dealing between the defendant company and Mr. Scott, its general agent, for the company to charge Mr. Scott, as its debtor, for the premiums on policies of insurance, and on renewal receipts transmitted to him for delivery, and that in this particular instance the company, when it transmitted the renewal receipt of June 7, 1895, charged Mr. Scott as its debtor with the premium of \$50, named in the receipt, then, for the purpose of this case, that premium must be regarded as paid to the company, as between the company and Mr. Getty, or his personal representatives, or cash payment thereof must be deemed to have been waived and the nonpayment of the premium by Getty to Scott under the circumstances would constitute no defense to this suit."

While the court so charged it nevertheless reserved the legal question raised by the points, whether the plaintiff is entitled to recover under the facts.

The jury rendered a verdict for the plaintiff below, as follows:

"The jury find for the plaintiff in the sum of ten thousand, five hundred and seventy-three and ⁸³/₁₀₀ dollars, subject to the opinion of the court upon the question of law reserved—whether the nonpayment by Mr. Getty of the renewal premium mentioned in the renewal receipt of June 7, 1895, (pro ut) constitutes a defense to this action upon the facts established by the verdict, namely, that it was the usual course of dealing between the defendant company and Mr. Scott, its general agent, for the company to charge Mr. Scott as its debtor with the premiums on policies of the insurance and on renewal receipts transmitted to him for delivery, and that in this particular instance the company, when it transmitted the renewal receipt of June 7, 1895, charged Mr. Scott as its debtor with the premium of \$50 named therein; and Mr. Scott having delivered the renewal receipt to Mr. Getty without requiring cash payment of the premium."

The court subsequently ruled the reserved question against the company, and ordered judgment accordingly. To this ruling the company excepted,—as it had done to the admission of some testimony produced to prove payment,—and brought the case here,

assigning numerous alleged errors. A separate consideration of these assignments is unnecessary. The first, which is to the part of the charge above quoted, covers the entire complaint, except as respects the admission of testimony, mentioned.

As the court below said when considering the question reserved, "the verdict of the jury establishes that it was the usual course of dealing between the company and its agent, Mr. Scott, for the company to charge Scott as its debtor with the premium on policies of insurance and on renewal receipts transmitted to him for delivery, and that in this particular instance the company when it transmitted the renewal receipt of June 7, 1895, charged Mr. Scott as its debtor with the premium of \$50 named in the receipt. The question of law reserved is whether under the circumstances the fact that the renewal premium was not actually paid by Getty to the company constitutes a defense." And this is the main question raised by the assignments of error. If it was new, difficulty might be found in answering it. It is not new, however. It was involved in *Miller v. Insurance Co.*, 12 Wall. 285; *Elkins v. Insurance Co.*, 113 Pa. St. 386 [6 Atl. 224]; *Insurance Co. v. Carter* (Pa. Sup.) 11 Atl. 102; *Insurance Co. v. Hoover*, 113 Pa. St. 591 [8 Atl. 163]; and numerous other cases which need not be cited. It is urged, however, on behalf of the plaintiff here, that *Miller v. Insurance Co.* is distinguishable from the case before us, and that all the other cases cited, which followed it, were decided under a misapprehension of that case. The only distinction pointed out consists in the fact that the Brooklyn Company instructed its agents that if they delivered policies without exacting prepayment of premiums as the policies required, they would be charged with and held responsible for the amount. It is difficult to see the importance of this fact. The instruction was a caution, simply, to the agents, who would have been as clearly responsible for such premiums without it. The delivery of the policies under the circumstances would be a violation of duty, and would necessarily render the agents liable for the premiums. The caution did not therefore affect their obligations to the company. The court thought it tended, with other circumstances named, to support an inference of authority to deliver policies without exacting prepayment. This may be so; but its tendency in that direction is certainly no greater than is the charge, itself, against the agents, on forwarding policies for delivery. What the case decides is correctly stated in the syllabus, as follows:

"Where an insurance company instructed its agents not to deliver policies until the whole premiums are paid, 'as the same will stand charged to their accounts until the premiums are received,' and the agent did nevertheless deliver a policy, giving a credit to the insurer and waiving a cash payment, * * * the company was bound."

Under the circumstances of that case, and of the one before us, the charge against the agent and delivery of the policy, or premium receipt, to the assured may be treated as a transfer of the assured's indebtedness to the agent, and consequently a payment as between the former and the company; or as an estoppel of the company

against setting up the stipulation for prepayment of the premium in avoidance of the policy. We are not called on to consider the reasonableness of this rule; it has become a part of the law of insurance. Companies can avoid it by avoiding the facts on which it rests, but in no other way.

The exceptions taken to the admission of evidence cannot be sustained. The evidence was competent to prove payment, under the circumstances shown, and the rule above stated.

The judgment is therefore affirmed.

CHEW v. LOUCHHEIM et al.

(Circuit Court of Appeals, Third Circuit. April 23, 1897.)

No. 24.

1. CONVERSION—EVIDENCE.

Plaintiff ordered certain brokers to purchase a specified number of shares in a corporation, and gave them money to partly pay for them. The brokers made written reports that they had purchased the stock, and afterwards repeatedly declared that they were holding it for plaintiff, and had received dividends thereon for him. They also accepted from him several payments on a balance due therefor. *Held* that, in view of the fact that in the common course of dealing certificates accompany the purchase of stock, and are the usual and only evidence of purchase and transfer of title, the above circumstances were sufficient to warrant the jury, in a suit for conversion by the brokers, in finding that they actually had possession of such certificates at the time of the alleged conversion.

2. SAME.

Where brokers hold stocks and bonds purchased through them by a customer for investment, awaiting payment by him of a balance due, with an express contract that they are not to transfer them to others, their possession is that of bailees, and a pledge thereof by them for their own benefit, or an assignment in payment of their creditors, is a conversion for which trover and conversion will lie.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Ellery P. Ingham, for plaintiff in error.

N. Dubois Miller and Wm. H. Staake, for defendants in error.

Before ACHESON, Circuit Judge, and BUTLER and BUFFINGTON, District Judges.

BUTLER, District Judge. The action is in trespass, and it may be conceded that to sustain it the plaintiff must show a case which would justify a recovery in trover and conversion. On closing his testimony the defendants moved for and the court granted a nonsuit. That the plaintiff's statement of claims filed sets out a good cause of action in trover is admitted. In the defendants' brief it is said:

"Plaintiff's counsel fully recognizing the impossibility of bringing the cause of action in the case within any of the various subdivisions of trespass on the case *ex delicto* except trover, carefully framed their affidavit to hold to bail and their statement of claim so as to make a good cause of action in trover, and succeeded so well that the defendants having taken a rule to discharge on common bail, ACHESON, circuit judge, upon the argument of the rule, said: 'The allegations of fact contained in the plaintiff's affidavit and in his statement

of claim are to be taken as true, and giving due effect to them, we cannot say that a prima facie case of trover and conversion is not thereby disclosed.' Had the proof come up to the allegations the plaintiff would not have been obliged to bring his case to this court."

The oral admission made on the argument, was even more emphatic. The statement of claim is as follows:

"The plaintiff, Joseph K. Chew, a citizen of the state of New Jersey, residing in Salem, claim of the defendants, Henry S. Louchheim and Frederick Leser, citizens of the state of Pennsylvania, residing in Philadelphia, the sum of ten thousand dollars as damages upon the following cause of action:

"For that in February, A. D. 1892, and for a long time before and thereafter, the said Henry S. Louchheim and Frederick Leser were co-partners as bankers and brokers, under the name of Henry S. Louchheim & Company. That during the said month of February, A. D. 1892, said Joseph K. Chew procured the said Henry S. Louchheim and Frederick Leser to purchase for him for the purpose of investment a \$1,000 bond of the Poughkeepsie Bridge Company for the sum of \$652.50, for which the said Joseph K. Chew paid in full and which said bond, under a scheme of reorganization, was thereafter duly changed into 4 per cent. bonds of the Philadelphia, Reading & New England Railroad Company to the amount of \$750 and Class B income bonds of the Philadelphia, Reading & New England Railroad Company to the amount of \$370. That during the month of December, A. D. 1892, the said Henry S. Louchheim and Frederick Leser purchased for investment for and on behalf of the said Joseph K. Chew, three certificates representing respectively 38, 5 and 7 shares of the capital stock of the Bergner & Engel Brewing Company for the sum of \$4,642.26. The said Joseph K. Chew then and there paid to the said Henry S. Louchheim and Frederick Leser for and on account of the same, the sum of \$2,800 in cash and borrowed from the said Henry S. Louchheim and Frederick Leser at 6 per cent. interest per annum, the balance of \$1,842.26, then due upon said certificates of stock, which said loan the said Henry S. Louchheim and Frederick Leser then applied to the payment of the said balance due. On January 18, 1893, said Joseph K. Chew paid to Henry S. Louchheim and Frederick Leser the sum of \$700, with direction to purchase 4 per cent. and Class B income bonds of the Philadelphia, Reading & New England Railroad Company of the par value of \$880 and to apply any balance remaining after said purchase toward payment of his said loan. On January 25, 1893, said Henry S. Louchheim and Frederick Leser purchased for investment for and on behalf of the said Joseph K. Chew 4 per cent. bonds of the Philadelphia, Reading & New England Railroad Company to the amount of \$250 par value for the sum of \$190.63 and Class B income bonds of the Philadelphia, Reading & New England Railroad Company to the amount of \$630 par value, for the sum of \$228.38. On March 15, 1893, the said Joseph K. Chew paid to the said Henry S. Louchheim and Frederick Leser the sum of \$950, leaving a balance due them of \$611.39, which by sundry payments and the collection and credits of dividends on the stock of the Bergner & Engel Brewing Company was reduced in the month of March, 1894, to the sum of \$140.36. The said Henry S. Louchheim and Frederick Leser then and there having in their possession certificates representing 50 shares of the capital stock of the Bergner & Engel Brewing Company of the par value of \$100 each and of the value of \$5,000, and 4 per cent. bonds of the Philadelphia, Reading & New England Railroad Company in the sum of \$1,000 and of the value of \$1,000, and Class B income bonds of the Philadelphia, Reading & New England Railroad Company in the sum of \$1,000 of the value of \$400 as hereinbefore set out (the said certificates and bonds having been in the possession of the said Henry S. Louchheim and Frederick Leser a more particular description cannot be set out), which said bonds and certificates of stock were then and there left in the custody of the said Henry S. Louchheim and Frederick Leser for safe keeping. And the said Joseph K. Chew avers that although he duly demanded the said certificates and bonds and tendered the balance then due to the said Henry S. Louchheim and Frederick Leser, heretofore, to wit: in March, A. D. 1894, the said Henry S. Louchheim and Frederick Leser in

violation of law, rehypothecated said certificates, stock and bonds and caused the same to be sold and disposed of to satisfy certain indebtedness then due and owing by them, the said Henry S. Louchheim and Frederick Leser, and therein and thereby embezzled and converted to their own use said certificates, stock and bonds to the damage of said Joseph K. Chew \$10,000."

The substance of the statement is that the defendants bought for the plaintiff certain bonds of the Philadelphia, Reading & New England Railroad Company (describing them with as much particularity as the circumstances allow) and 50 shares of stock in the Bergner & Engel Brewing Company, for which they took and held certificates; that the plaintiff furnished means, in advance, to pay a large part of the price, and subsequently paid nearly all the balance; that the object of the purchase was not speculation but investment; and that it was stipulated that the defendants should not part with or encumber the property, but safely hold it for the plaintiff, until the balance of purchase money should be paid; that the plaintiff subsequently tendered the balance and demanded possession of the property which demand was refused; and that the defendants wrongfully converted the property to their own use.

Were these allegations supported by the evidence—that is, might the jury have found them to be so supported? The motion for nonsuit was based on the assertion that there is no evidence of the purchase of certain, identified, bonds for the plaintiff, nor that certificates of stock were procured and held for him, as the statement alleges; and furthermore that if this were otherwise the plaintiff could not recover because he was not entitled to possession of the property at the time of the alleged conversion. The testimony describes the bonds with as much particularity as the circumstances allow, and as much as the statement does; and shows the defendants' admission that they had bought and were holding them for the plaintiff. As respects the stock certificates we think the evidence would have justified a finding that the defendants had procured and held them as claimed. It shows the defendants' written reports that they had purchased the stock; their repeated declarations that they had it, and were holding it for the plaintiff; that they had received dividends on it for him, and further that they had received several payments on account of the balance due for it. In the common course of dealing, certificates accompany the purchase of stock; they are the usual, if not the only evidence of purchase, transfer and title. It would seem clear therefore that the plaintiff was fully justified in understanding from the defendants' reports and declarations that they had, and were holding the stock for him, and that the jury would have been justified in finding this to be true. How could they have the stock, without having the certificates? What right had they to payments on account if they had not the certificates? Had the jury found, as it might, that the reports and declarations were virtual representations that the certificates had been procured and were held for the plaintiff, and that payments on account were thus obtained, it should have found the defendants to be estopped from denying the truth of the representations.

The conversion is clearly shown. Was the plaintiff entitled to possession of the property when it occurred? It is unimportant whether this event be referred to the date of the defendants' assignment for the benefit of their creditors, or to an earlier period when they pledged it for their own benefit. We are not called upon to consider whether this disposition of the property would have been justifiable in the absence of a stipulation that they should not part with it; with the stipulation it was clearly wrongful. The relation of the parties was that of bailor and bailee. The property was the plaintiff's, and the obligations of the defendants were the same as they would have been if he had delivered it to them to hold for the balance of purchase money. The defendants' transfer of it, whether for the payment of their debts, by the assignment, or previously to secure money borrowed, was a fraudulent conversion, which instantly terminated the contract of bailment, and vested the right of possession in the plaintiff. The right accrued, therefore, simultaneously, at least, with the act of conversion. Indeed it may justly be said that the entrance upon this fraudulent act vested him with the right. It was held in abeyance by the contract alone, and when that was terminated it no longer availed them for any purpose. In *Berge & Co. v. Foster*, 42 Leg. Int. 313, the syllabus which accurately states the decision is as follows: "Where oil held as collateral security, is sold without the owner's consent, before the debt matures, trover may be sustained." *Reynolds v. Cridge*, 131 Pa. St. 189 [18 Atl. 1010] decides the point in the same way. It is unimportant that the question was not discussed in either case. The defendant in each appears to have conceded the point. *Brisben v. Wilson*, 60 Pa. St. 452, is substantially in point. See, also, *Cooley*, Torts, 449, 450; 2 Hill. Torts (3d Ed.) 100-102; 2 Am. & Eng. Enc. Law, 58, 59; 2 Am. & Eng. Enc. Law, 741-743, 784, 785, and footnotes to the several pages.

The effect of the plaintiff's tender, and demand of his property, shortly before suing, need not be considered. One of the defendants only being present at the time, it would not affect the other so as to justify this suit against him. Whether it would justify the suit against the one of whom the demand was made, under the circumstances shown, may be open to doubt.

These questions were sprung upon the able trial judge under circumstances which afforded no opportunity for examination or reflection, and it is not surprising therefore that his first impression should have been such as he adopted.

The judgment must however be reversed.

RUCKER v. BOLLES.

(Circuit Court of Appeals, Eighth Circuit. April 19, 1897.)

No. 790.

1. FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP—EVIDENCE OF CITIZENSHIP.

For the purpose of proving that a plaintiff was a citizen of a certain state when his suit was filed, he may be asked the direct question of what state he was a resident at such date; but such question is improper when propounded to a third party, since such third party can only form an opinion of the plaintiff's intentions as to citizenship from his acts and declarations, which should be passed upon by the jury uninfluenced by the opinion of the witness.

2. SAME.

The fact that a party, in executing legal instruments, described himself as a citizen of a certain state, is evidence to show that at that time he regarded himself as a citizen of the state.

3. SAME.

The determination of the citizenship of a party, where dependent upon the question of intention to abandon one residence and take up another, is for the jury, under proper instructions.

4. CHAMPERTY AND MAINTENANCE.

The assignment of a portion of a claim in suit, in good faith, for a money consideration, the assignor retaining entire control of the suit, is not void either under the statute of Colorado concerning maintenance, or at common law, although the assignee have no previous interest in the claim.

5. SAME.

A bona fide contract for the assignment of a part of a claim in suit is not rendered invalid because the ulterior motive of one of the parties is to prevent a compromise of the claim, and to prolong the suit, in order to annoy and embarrass the defendant therein.

6. RELEASE AND DISCHARGE—CONSIDERATION.

The consideration for a release from a contract may consist in something detrimental to the party released as well as in something beneficial to the other party.

In Error to the Circuit Court of the United States for the District of Colorado.

This suit was brought by Richard J. Bolles, the defendant in error, against Atterson W. Rucker, the plaintiff in error, in the circuit court of the United States for the district of Colorado, the action being founded upon the following contract, to wit:

"This agreement, made this 16th day of April, A. D. 1892, by and between A. W. Rucker, of the county of Arapahoe, and state of Colorado, party of the first part, and Richard J. Bolles, of the city of New York and state of New York, party of the second part, witnesseth: That said party of the first part in consideration of the sum of twenty-seven thousand five hundred (\$27,500) dollars, to him in hand paid by the said second party, the receipt of which is hereby acknowledged and confessed, has and does hereby sell, assign, and convey unto said second party, his heirs and assigns, one-fourth ($\frac{1}{4}$) of the amount of any judgment that may or shall be recovered by said first party in a certain cause or proceeding now pending in the district court of the county of Arapahoe, in the state of Colorado, wherein said A. W. Rucker is plaintiff, and Harvey Young, Jerome B. Wheeler, and others are defendants, in which action said plaintiff seeks to recover an interest in the Aspen Lode mining claim, situate in Pitkin county, in said state of Colorado, and an accounting and judgment for the value of the ores and minerals taken from said premises, and for a conveyance of an interest in said premises and the value of certain interests therein sold by defendant Wheeler; hereby selling and conveying one-fourth of any

judgment for money that may or shall be found or entered in said cause in said court, or in any court to which the same may or shall be removed; also in and to all contracts and agreements relating to said cause of action to the extent of one-fourth ($\frac{1}{4}$) of all moneys that shall or may be collected or otherwise, but no part of the interest or title that shall be recovered in and to said lode mining claim shall be held to be assigned under this contract. Said first party further agrees that he will prosecute said action, and all actions and proceedings relating thereto that are now pending or that shall hereafter be begun, to a final determination, at his own proper costs. Said party hereby reserves the right to settle said cause for a sum not less than three hundred thousand (\$300,000) dollars, one-fourth ($\frac{1}{4}$) of which shall belong to and be paid to said second party upon his compliance with the terms hereof. In consideration of which said second party agrees to and with said first party that upon the final determination of said cause in the courts in which it is now pending, or in any court or courts to which it may be removed or appealed, and all proceedings relating thereto or affecting said cause, he will pay to said first party an additional sum sufficient to make a total payment hereunder of twelve and one-half (12 and $\frac{1}{2}$ per cent.) per cent. of the amount of said judgment, and all moneys belonging thereto, and shall receive one-fourth ($\frac{1}{4}$) of all moneys collected upon said judgment and all moneys deposited in court or in any manner collected under or by virtue of said proceeding, which additional sum shall be paid within ninety (90) days after the second party shall have received notice of the final determination of all such proceedings: provided, if said second party shall not pay said additional sum within said time, or shall elect not to do so, said first party shall repay to said second party the said sum of twenty-seven thousand five hundred (\$27,500) dollars, with interest thereon from this date at 8 per cent. per annum, which payment shall be made by said first party from the first proceeds received by said first party in said action or in settlement or compromise of the same or any part thereof, but not otherwise: provided, also, that in any settlement or compromise made of said cause said second party shall receive a sum of not less than seventy-five thousand (\$75,000) dollars upon paying the further sum of ten thousand (\$10,000) dollars. It is further agreed that the said first party reserves the control and management of said cause, subject only to the limitations herein. This contract shall extend to and bind the heirs and assigns of each party hereto. In witness whereof the parties hereto have set their hands and seals the day and date first above written.

"A. W. Rucker.

"Rich. J. Bolles."

The complaint averred, in substance, that after the execution of the aforesaid contract and the payment to the defendant, Rucker, of the sum of \$27,500, mentioned therein, the said Rucker, in the suit brought by him against said Harvey Young and Jerome B. Wheeler and others, recovered a judgment against said Wheeler in the sum of \$801,670; that an appeal was taken in said suit to the supreme court of Colorado; that while it was so pending on appeal and undetermined it was compromised by said Rucker without the plaintiff's knowledge or consent; that by virtue of said compromise agreement, the said Rucker received from the said Wheeler a sum not exceeding \$300,000, and that thereafter the plaintiff had duly tendered to the defendant the sum of \$10,000 in addition to the sum of \$27,500 first paid. In view of the premises, the plaintiff, Bolles, demanded a judgment against the defendant for the sum alleged to be due to him under the provisions of the aforesaid agreement.

The defendant demurred to the complaint on the ground that the same did not state a cause of action, but the demurrer was overruled, whereupon he filed an answer, which contained five pleas or defenses. The first defense was a denial of certain material allegations contained in the complaint. The second defense averred that both the plaintiff, Bolles, and the defendant, Rucker, were citizens and residents of the state of Colorado, and that the suit for that reason was not within the jurisdiction of the federal court. The third, fourth, and fifth pleas were as follows:

"(3) For further answer, the defendant alleges that prior to the execution of the contract set forth in the complaint herein the said Jerome B. Wheeler, named in said complaint, had commenced an action, which was then pending

In one of the courts of the state of Colorado, against the plaintiff and one J. J. Hagerman and others as defendants, in which action said Wheeler sought to recover of and from the said defendants, to wit, the plaintiff herein, said Hagerman, and others, a large sum of money, and that the plaintiff and his co-defendants aforesaid, on or about the date of the making of said contract between the plaintiff and the defendant herein, knowing and being informed of the pendency of the suit in the district court of Arapahoe county between this defendant and the said Wheeler and others mentioned and referred to in the complaint herein, for the purpose of preventing a compromise and settlement of said action between this defendant and said Wheeler, and to protract and prolong the said litigation so pending between this defendant and said Wheeler, came to this defendant, and offered and proposed as an inducement to this defendant to prosecute his said suit against said Wheeler and others to final judgment, and not to compromise or otherwise discontinue the same during the pendency of said litigation between the said Wheeler and the plaintiff, Hagerman, and others aforesaid, to aid and assist this defendant with money sufficient to enable him to further prosecute the said suit against said Wheeler; and the plaintiff and the said Hagerman agreed to further assist the defendant in the prosecution of the said suit and litigation against said Wheeler with further advances of money, and in other ways, and that they would not in any wise aid or assist said Wheeler or the opponents of this defendant in his said suit and litigation. And defendant further avers that the contract set forth in the complaint was drawn up by the plaintiff, and a portion of the money therein agreed to be paid to this defendant was furnished him by the plaintiff and said Hagerman for the purpose and with the intent on the part of the plaintiff and said Hagerman of intermeddling in and prolonging the said suit and litigation between this defendant and said Wheeler and others, and preventing an early settlement or compromise of the same; and the money so paid to the defendant by them was furnished and advanced for that purpose, and for the further purpose of compelling the said Wheeler to settle or discontinue the said action against the plaintiff, said Hagerman, and others. And defendant further avers that said money was so advanced and agreed to be advanced by them to aid and assist this defendant in the prosecution of his suit in the complaint mentioned and referred to, and that neither the said plaintiff nor the said Hagerman had any interest in or concern with the said suit or the subject-matter of the same. And defendant further says, in consideration of the said promises and agreements of the plaintiff and said Hagerman, it was agreed between them and this defendant that the defendant should and would assign to them the one-eighth part of any money judgment that might be recovered in his said action against said Wheeler and others, and of any moneys that might be collected and received upon said judgment, or any compromise or settlement of the same upon the full and faithful performance by the plaintiff and said Hagerman of their several promises and agreements aforesaid, and not otherwise; that the said agreement so drawn up by the plaintiff and signed by him and the defendant, and set forth in the complaint herein, was so drawn and executed for the purpose of expressing the said contract and agreement aforesaid, which is the true meaning, purpose, and intent of the same, and the same was so understood, regarded, and treated by the plaintiff and defendant. Defendant further says that said promises of the plaintiff and said Hagerman to advance and furnish other moneys in addition to the moneys paid by them as aforesaid, and to aid and assist defendant in the prosecution and conduct of his said suit and litigation, and their further promise and agreement not to render aid or assistance to his opponents, form the material part of the consideration for the making of said contract and agreement with the plaintiff. Defendant further alleges that after the making of said agreement, the plaintiff and said Hagerman failed and refused to pay to the defendant the moneys agreed by them to be furnished and paid, or to aid or assist him in other ways, or in any ways in the conduct and prosecution of his said suit and litigation, but, on the contrary, they thereafter interfered and meddled in said litigation on behalf of said Wheeler and against the defendant, and rendered aid and assistance, by advances of money and otherwise, to the said Wheeler in that behalf, and gave agreements and promises to said Wheeler of additional and further aid therein; so that the defendant was finally induced and compelled to settle and compro-

mise the said judgment against said Wheeler for a very small and inconsiderable sum and portion of the same.

"(4) For further answer, defendant alleges that subsequent to the making of said contract the plaintiff stated to the defendant that he did not desire to be further bound by the terms and provisions of said contract, or to perform the same, or to make any further advances or payments to the defendant as he had agreed to do as aforesaid, in consideration of the said contract of assignment, and then and there, at the request and solicitation of the plaintiff, and for divers good and sufficient considerations thereunto moving from the defendant to the plaintiff, it was agreed by and between the plaintiff and defendant that the said contract of assignment, and all rights and interests of said plaintiff therein or thereunder, should cease and terminate, and that the plaintiff and the said Hagerman should have no further interest in said lawsuit or cause of action, or any judgment therein, or moneys realized therefrom; and said contract, and every part thereof, was thereupon rescinded by the plaintiff and defendant.

"(5) For further answer, defendant alleges that, subsequent to the making of the contract of assignment set forth in the complaint and the several agreements hereinbefore in the several defenses of this answer set forth, the plaintiff failed and refused to perform or carry out the said contract of assignment, or any of the agreements aforesaid on his part, and absolutely and finally refused to perform the same, or to be further bound thereby, and utterly renounced, rescinded, and abandoned the same, and all and every part thereof, and thereupon released the plaintiff from the same and all the obligations thereof."

The plaintiff below demurred to the aforesaid defenses Nos. 3 and 4, which demurrer was sustained. The issue presented by the second plea—as to whether the plaintiff, Bolles, was a citizen of the state of New York, as alleged in his complaint, or a citizen of the state of Colorado—was first tried to a jury, which found and determined that he was a citizen of the state of New York. The case, upon its merits, was then submitted to a jury on the issues made by the first and fifth of the aforesaid defenses, the trial of said issues resulting in a verdict and judgment in favor of the plaintiff below, in the sum of \$70,040. To reverse that judgment the defendant below has prosecuted a writ of error to this court.

J. E. McKeighan (S. D. Walling and T. M. Patterson with him on the brief), for plaintiff in error.

Joel F. Vaile (Edward O. Wolcott with him on the brief) for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first question to be considered is whether any error was committed on the trial of the plea in abatement relative to the citizenship of the plaintiff, Bolles. In this behalf it is assigned for error that the trial court permitted the plaintiff to testify, in response to a direct question, that he was a citizen of New York up to April or May, 1894, and that it also permitted two other witnesses to testify that he was a citizen of New York prior to the spring of the year 1894. With respect to this assignment, it is only necessary to say that, in our opinion, no material error was committed in allowing the plaintiff himself to testify that he was a citizen of the state of New York up to a given date. Citizenship is largely a matter of intention. When a citizen of a state has removed to another state, it is a very common

practice to permit him to declare what his intentions are with respect to making the latter state his permanent place of abode. It is his intention to make the place to which he may have removed his permanent place of domicile which determines whether he has become a citizen of that state, and definitely abandoned his former residence. As a general rule, a person's intentions in that respect can be ascertained in no other way than by his declarations, and for that reason he is permitted to state what his intentions are or were, when the fact becomes material in a judicial proceeding. Such statements, as a matter of course, are not conclusive on the question of his intention, but we have no doubt that they are competent evidence in the party's own favor. When the plaintiff testified, therefore, that he was a citizen of New York up to April or May, 1894, it was but another form of stating that his intention to abandon his residence in New York and to take up his abode in Colorado was not formed until the latter date. We perceive no objection to such testimony, coming as it did from the plaintiff himself. But a different view must be taken of similar testimony which was elicited from third parties, to wit, from the witnesses Palmer and Edsall. These witnesses had no knowledge of the plaintiff's intention to remain a citizen of New York, except as that intention was manifested by his acts, and they should have been required to state the facts within their observation on which their opinion that he was a citizen of New York prior to the spring of the year 1894 was founded. The jury were equally as competent as these witnesses to decide whether the observed facts indicated a purpose on the part of the plaintiff to remain a citizen of New York until the time stated, and it was the province of the jury to decide that question uninfluenced by the opinions of witnesses.

Another specification of error is that the trial court erred in permitting the plaintiff to show that in a deed for certain property which the plaintiff bought in June, 1893, and in a will which he made in October, 1893, he was therein described as "Richard J. Bolles, of the city of New York." We are not able to say that this evidence was erroneously admitted. It tended to show that at the date of these instruments the plaintiff regarded himself as a citizen of New York, and had not formed the intention of making his home in Colorado. It was relevant testimony for the purpose last stated, and ought not to have been excluded, unless the trial court was satisfied that the plaintiff had thus described himself as a citizen of New York for the purpose of influencing the decision in this case on the question of citizenship. As the suit at bar was not brought until December, 1893, and as the answer raising the issue of citizenship was not filed until July 2, 1894, there seems to be no adequate ground for the inference that the testimony in question was manufactured for the purpose last stated.

Nor are we able to say that there was any error in the instructions on this branch of the case. With reference to the issue of citizenship, the material parts of the charge were as follows:

"Now, citizenship is a matter of residence and intention. If one come from the state of New York, or from any other state, to this state, and in coming he has no intention to return to New York, but intends to take up his residence

and reside here permanently, he thereupon and at once simply allies himself to this state, and becomes a citizen of this state. But one may have a residence in one state while his citizenship continues in another state. If he comes here for a temporary purpose, or if he be undecided at the time of coming as to whether he will return to New York and continue to live there, or take up his residence here, he will not become a citizen of the state of Colorado until he has decided to make his permanent residence and acquire citizenship in this state. So that it is entirely true that the intention and the residence must unite in order to form what is called in law a permanent domicile, which is equivalent to citizenship. And so, if the plaintiff, * * * in coming to this state, had no intention, at the time of his coming or afterwards, to acquire a residence, and become a permanent citizen of the state, if it was his desire to maintain his citizenship in the state of New York, he would not acquire a residence or citizenship here until he made up his mind to reside here permanently, and to abandon his residence and citizenship in the state of New York. Residence is generally described as the place where one lives. It means literally, according to its derivation, a sitting down and staying for a time; and so, when one goes to another place from that in which he has his permanent home, and sits down there for a time, but not with the intention to remain there permanently, it is said that, while he has his residence in that place, he still remains a citizen of the place from whence he came. I do not think it necessary for me * * * to advert to any of the evidence in the case. You have heard it all. It was all received with intent that you should be able to determine when, if at all, the plaintiff became a citizen of this state. It is said that this was at the time he made up his mind to reside here permanently, and abandoned his residence in New York, * * * in the early part of the year 1894, which was after this suit was brought. You will remember that it has been stated a number of times in your hearing that this suit was brought on the 6th of December, 1893. If, upon all the evidence before you, you are of the opinion that he did in fact make up his mind to become a resident and citizen of the state of Colorado prior to that time, * * * then, of course, your finding should be for the defendant. But if you are of the opinion that he did not become a citizen of the state—that is to say, that he did not abandon his home and residence in New York—until the spring of 1894. * * * then he could bring his suit in this court as he did."

The instructions, as thus given, were applicable to the facts proven on the trial. They fully covered the point in issue, and any further instructions on the question of citizenship, if such instructions had been given, would have served to confuse, rather than to enlighten, the jury.

Passing to the merits of the controversy, the first question to be noticed is whether the trial court erred in sustaining the demurrer to the third and fourth defenses stated in the answer. The fourth plea to which the demurrer was addressed averred, in substance, that the contract on which the suit was founded had been canceled and discharged by mutual agreement of the parties thereto. It is suggested in argument that the allegation that the contract was canceled by mutual agreement of the parties is merely an inference of the pleader from the fact first alleged in the plea that on a certain occasion the plaintiff, Bolles, had stated to the defendant, Rucker, that he did not desire to be further bound by the provisions of the agreement. It is urged, in substance, that the plea is bad, because it avers no more than that such a statement was at one time made by the plaintiff to the defendant. But obviously this is not a correct view, for, after that fact is stated in the plea by way of inducement, the pleader proceeds to allege in clear and concise language that it was thereupon agreed by and between the plaintiff and the defendant, for a good

and sufficient consideration, moving from the defendant to the plaintiff, that the agreement in question should be terminated, and that the interest thereby acquired by the plaintiff, Bolles, in the suit against Wheeler and others should cease and determine. We perceive no reason why the plea did not state a good defense to the action, such defense consisting in a mutual agreement made by the parties before this suit was commenced to the effect that each party would discharge the other from the obligations imposed by the contract on which the suit is founded. Such an agreement was clearly pleaded according to its legal effect, and, in our judgment, the demurrer to the fourth plea should have been overruled.

A more debatable question is whether the demurrer to the third defense was properly sustained. By that defense the pleader endeavored to show that the contract in suit was void for champerty and maintenance. We are of opinion that the contract on its face was not void on either of the grounds last mentioned, whether the question be considered in the light of the Colorado statute concerning maintenance, or in the light of the common law as generally understood and enforced in this country. The agreement, by its terms, purports to be no more than a sale by Rucker to Bolles of a one-fourth interest in a judgment for money which he (Rucker) might recover in a pending lawsuit. Bolles did not agree to furnish any aid or assistance in the prosecution of the suit against Wheeler, or to interfere with the litigation in any way, the agreement being, on the contrary, that Rucker should prosecute said suit at his own proper cost and expense. Nor was there any agreement that Rucker should devote the money which he had received from Bolles to the further prosecution of the suit against Wheeler and others. The former was at full liberty to appropriate it to any other use which he saw fit, and, for aught that appears, he may have devoted it to other uses. Furthermore, Rucker did not bind himself not to compromise the pending suit if he received a favorable offer of compromise, which he desired to accept, the only stipulation in that behalf being that, if the suit was compromised, Bolles should receive not less than \$75,000 on paying to Rucker an additional \$10,000. The purpose of this stipulation would seem to have been not to prolong the litigation, but to secure to Bolles an adequate return for his money, considering the character of the investment. We are not able to say that this contract discloses an officious intermeddling by a third party in a suit which in no wise concerned him, with a view to promote litigation, within the meaning of the Colorado statute on the subject of maintenance,¹ for, according to the modern view, a person has a right to assign an interest in a chose in action which he happens to own, and this right exists although the claim happens to be at the time in litiga-

¹ "If any person shall officiously intermeddle in a suit at common law or in chancery, that in nowise belongs to or concerns such person, by maintaining or assisting either party with money or otherwise, to prosecute or defend such suit, with a view to promote litigation, every such person so offending shall be deemed to have committed the crime of maintenance, and upon conviction thereof, shall be fined and punished as in cases of common barratry. * * *"
Mills' Ann. St. Colo. 1891, § 1299.

tion. The old rule that choses in action are not assignable has not only been abolished, but the prevailing doctrine is that causes of action for torts to property, real or personal, which survive to executors or administrators, are also assignable. *Snyder v. Railway Co.*, 86 Mo. 613; *Pom. Rem. & Rem. Rights*, § 147. Under a variety of circumstances which may be supposed, a man might find it necessary to sell or hypothecate an interest in a claim which happened to be in litigation for the purpose of raising money wherewith to prosecute his business successfully, or to assert or defend his rights in the courts; and it would be a great hardship if he were denied the right to raise money by such means, or if money so obtained could not be recovered. We can perceive no reason, therefore, founded either on considerations of public policy or the terms of the Colorado statute, why the contract sued upon should be pronounced invalid.

It is insisted, however, that the plea avers certain facts, not disclosed by the contract itself, which render it invalid. A careful analysis of the plea will show, we think, that the only fact tending to overthrow the agreement which the plea avers is that the plaintiff, Bolles, proposed to buy, and did purchase, an interest in the claim against Wheeler, for the purpose of preventing a compromise of the claim and prolonging the suit that had been commenced to enforce it. The question then arises whether the agreement is rendered unlawful by the motive which prompted one of the contracting parties to execute it, although the contract, when judged by its provisions, is valid and enforceable. The law furnishes some examples, notably in the case of fraudulent conveyances, where an agreement, otherwise valid, may be avoided because of the motive which induced the parties to execute it. So, when it appears that a contract for the sale of a commodity is merely colorable, and made to cover a gambling transaction, no delivery of the commodity sold being intended by either party, the law pronounces the same to be void. Such contracts are held invalid on account of their fictitious character, because neither the vendor nor the vendee intended to do what they in terms agreed to do, but rather to lay a wager on the rise and fall of prices. It is also true that a contract valid on its face may be impeached by showing that the consideration on which the promises, or some of them, rest, was the doing of an act which was either unlawful, immoral, or opposed to public policy, or a promise to do acts of that kind. All of this is familiar law. Ordinarily, however, a contract which is valid on its face, in that it does not require either party to do an act that is unlawful, immoral, or opposed to public policy, will be enforced, regardless of the motive which may have inspired one of the parties to execute it. The ulterior motives of the parties to a contract are usually immaterial when the thing agreed to be done is lawful, and does not injuriously affect the public welfare, and the consideration paid or promised for doing the act contemplated was not illegal. *West Plains Tp. v. Sage*, 32 U. S. App. 725, 16 C. C. A. 553, and 69 Fed. 943. It is manifest from the averments of the plea that the contract in suit was neither fictitious nor colorable. The parties to the agreement evidently intended to do precisely what it bound them to do, nothing more and nothing

less, for while the alleged proposal to supply money to assist in the prosecution of the pending suit against Wheeler and others may have been held out as an inducement when the negotiations which culminated in the contract began, yet, when the contract was executed, it took the form of a bona fide sale of an interest in the claim for a stipulated sum, and did not bind the purchaser to contribute a cent towards the maintenance of the litigation, nor obligate the defendant, Rucker, to use the money which he had received in the prosecution of the pending suit. It is clear, therefore, that there was no arrangement or understanding existing between the parties binding them to do or refrain from doing any acts except such as were distinctly specified in the agreement. The plea does not even aver that Rucker's motive in entering into the agreement was to obtain funds wherewith to further prosecute his suit against Wheeler. Moreover, the consideration moving from one party to the other, and upon which their promises were founded, was clearly set forth and described in the agreement. The contention, therefore, that the plea shows the agreement to have been unlawful, rests upon the single proposition that it was invalid, because of the motive which induced the plaintiff, Bolles, to execute it; and we are not able to assent to that proposition. We are of opinion that the contract cannot be impeached by showing that one of the parties thereto was influenced by improper motives in executing it, inasmuch as the contract itself did not bind either party to do any act that can be esteemed unlawful, immoral, or against public policy. It results from these views that the demurrer to the third defense was properly sustained.

It is further contended that an error was committed by the trial court in instructing the jury relative to the issues raised by the fifth plea contained in the answer. With reference to that defense, the court instructed the jury that the plea averred, in substance, that the plaintiff, Bolles, had renounced and rescinded the agreement on which the suit is founded, and had released the defendant from all obligations thereon. It further charged the jury in these words:

"To make this defense available, it must be made to appear by the evidence that there was some consideration moving to the plaintiff, Bolles, to support the release and rescission of the contract as alleged by the defendant. The consideration need not necessarily be the payment of money, but it must be something beneficial to the plaintiff, and if, from the evidence in this case, you do not find that there was any consideration for the release alleged in this fifth defense, then, upon this issue, you should find for the plaintiff."

An exception was saved to this instruction, on the ground that it confined the consideration necessary to support the release to "something beneficial to the plaintiff," ignoring the fact that the consideration for the release might as well have consisted in the doing of something that was detrimental to the defendant. We have felt some doubt as to whether the trial court properly construed the fifth defense in holding, as it appears to have done, that the defense stated in the plea was a release founded upon a consideration moving from the defendant to the plaintiff. It seems more probable, we think, in view of the character of the fourth defense, that by the fourth plea the defendant intended to plead a release of the contract by

breach—that is to say, that while the contract was in a measure executory, he (the defendant) had been discharged from all obligations under the same by the plaintiff's refusal to further execute the agreement on his part. This would seem to be the character of the defense which the defendant intended to make in the fifth paragraph of his answer. But, be this as it may, the trial court clearly erred in holding that the release could only be supported by showing that something of value was received by the plaintiff. It is familiar law that the doing of an act which is detrimental to one party to a contract will support a promise made by the opposite party, as well as a benefit conferred on him by whom the promise is made. If one party to a contract agrees to release the opposite party therefrom in consideration of his doing some act which he is under no obligation to do, the doing of that act is a sufficient consideration for the release, although it was not beneficial to the first party. *Violett v. Patton*, 5 Cranch, 142; *Dyer v. McPhee*, 6 Colo. 174, 193; *Clark v. Sigourney*, 17 Conn. 517. In the case at bar there was some evidence tending to show that Bolles requested Rucker to compromise his suit against Wheeler, promising the latter that if he did so he would release him from all obligations under the contract in suit; and that the compromise with Wheeler was made in pursuance of such request. In any aspect, therefore, in which the case may be viewed, the instruction above quoted concerning the fifth defense was misleading and erroneous. Some other questions of less importance have been argued by counsel, but, for the reasons already disclosed, we think that the judgment must be reversed, and a new trial granted. It is so ordered.

UNITED STATES v. JONES.

(Circuit Court, E. D. Virginia. April 11, 1897.)

LARCENY FROM MAILS—DECOY LETTERS,

Criminal prosecutions for abstracting money from the mails may be based upon the taking of money from decoy letters mailed by post-office inspectors.

This was an indictment, under Rev. St. § 5467, against Ulysses T. Jones, Jr., for abstracting and embezzling money from the mails.

The facts, as developed in the evidence, show that complaints had been made against the post office at Mattoax, where the defendant was assistant postmaster, in consequence of which the post-office department had delegated one of its inspectors to investigate the matter. This investigation showed that two letters mailed on the train from Richmond to Mattoax by the inspector on the 9th of February last, which contained money, were not in the mail bag after it passed through the hands of the assistant postmaster at Mattoax, whereupon the post-office inspector visited the post office at Mattoax, and, together with a person called in as a witness by him, found the money, which had been placed in one of the letters and marked, in a barrel in the post office, and one of the other letters, which had been mailed by him that morning, with money in it, marked, together with four other letters in the post office. The assistant postmaster stated to the inspector that he knew nothing of the letters at first, but subsequently produced one of the decoy letters and four other letters which had been detained from the said mail. The accused stated that these five letters had been left out of the mail accidentally, and denied all knowledge of

the other letter, the money from which was found in the barrel. Such, in brief, are the facts. Upon these facts the defense asked the court to instruct the jury that a decoy letter, addressed to a fictitious person, could not be the subject of theft. The court declined to give the instructions, and, under decisions of the supreme court of the United States, instructed the jury that such a letter could be the subject of theft.

W. H. White, U. S. Atty., cited the following authorities:

U. S. v. Rapp, 30 Fed. 818; U. S. v. Hamilton, 9 Fed. 442; U. S. v. Cottingham, 2 Blatchf. 470, Fed. Cas. No. 14,872; U. S. v. Foye, 1 Curt. 364, Fed. Cas. No. 15,157; U. S. v. Matthews, 35 Fed. 890; Goode's Case, 159 U. S. 663, 16 Sup. Ct. 126; Montgomery's Case, 162 U. S. 410, 16 Sup. Ct. 797; Price v. U. S., 17 Sup. Ct. 366.

HUGHES, District Judge. The circuit courts of the United States have not been disposed to encourage the use of decoy letters as the basis of criminal prosecutions for depredations upon the mails. There is something repugnant in the idea of the government, by art and contrivance, entrapping one of its citizens into the commission of crime in order to subject him to criminal prosecution; and such prosecutions have been felt by the courts to be more or less objectionable in morals and in policy. The use of decoy letters for the purpose of discovering who the mail robbers are is in itself probably necessary, and, if objectionable, is at least tolerable, on the ground of necessity. But to go farther, and, after the citizen has been seduced by the government into robbing the mail, to prosecute him criminally for the act, is more or less offensive to public sentiment. I should have been disposed to follow the rulings of some of the circuit courts in discouraging these prosecutions, but I think the supreme court has decided, unmistakably, not only that the use of decoy letters is necessary to the detection of certain offenses, but that criminal prosecutions based on decoys must be sustained. I will therefore give to the jury the instructions asked for by the district attorney, and will refuse to give the instructions offered by counsel for the defense.

HOLMES v. HURST.

(Circuit Court of Appeals, Second Circuit. May 3, 1897.)

COPYRIGHT—VALIDITY—SERIAL PUBLICATION.

The publication of a work in serial form in a monthly magazine, before depositing a copy of the title, as required by the statute, invalidates a copyright afterwards obtained.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal from the circuit court, Southern district of New York, dismissing complainant's bill. 76 Fed. 757. The suit is brought to restrain publication of the well-known book written by Oliver Wendell Holmes, and entitled "The Autocrat of the Breakfast Table." On November 2, 1858, the title of the book was deposited in pursuance of the statutes of the United States relating to copyrights. On November 22, 1858, a copy of the book was delivered to the clerk of the district court, as therein provided, and the other statutory require-

ments were duly complied with. Thereafter the statutory provisions concerning renewals were complied with, whereby the copyright was extended for a period of 14 years from July 12, 1886. Complainant, as ancillary executor, holds the legal title to the copyright. The defendant contends that the author never became entitled to the benefit of the copyright act in force in 1858 (the act of 1831), for the reason that he did not, before publication, deposit a printed copy of the title, as required by the fourth section of the act, which reads: "Sec. 4. And be it further enacted: That no person shall be entitled to the benefit of this act unless he shall before publication deposit a printed copy of the title of such book," etc. The evidence shows that the book was printed or published in parts or fragments, as it was written (such publication being without copyright), in the *Atlantic Monthly*, beginning with the number of the magazine for November, 1857, and continuing from month to month until the number for October, 1858, in which number the last part or fragment of the book appeared,—a full month before deposit of the title. Each of these parts, as it appeared, was entitled "The Autocrat of the Breakfast Table"; and none of the numbers of the *Atlantic Monthly* were copyrighted. The judge who heard the cause at circuit reached the conclusion that this was a publication, and the same opinion was expressed in the United States circuit court for the Northern district of Illinois in a suit against another alleged infringer. *Holmes v. Donohue*, 77 Fed. 179.

Rowland Cox, for appellant.

Andrew Gilhooly, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. It seems unnecessary to add anything to the opinion of the circuit court and the one cited above from 77 Fed. The complainant's brief has much to say as to the author's having no "intention to abandon." Of course, there are cases where knowledge of a person's intent is materially helpful towards the determination of what his actions really were. The statue or picture exhibited to friends in the artist's studio, the MS. submitted to critics for suggestions as to alteration, the books distributed for purposes of future sale, are cases in point. But where an author causes what he has written to be printed, and then allows it to be put publicly on sale, offering copies to whomever chooses to buy, and actually selling such copies by the thousand, it is idle to say that there had been no publication of what is thus printed and given to the world, because the author intended thereafter to combine what he has thus sold with other writings of his own, and then to apply for copyright on the combination. The statute, it will be observed, says nothing about "abandonment" or "intention to abandon." Copyright is refused where the printed copy of the title has not been filed "before publication." As to so much of the book as has been published before filing title the author cannot under this statute obtain copyright. If he has published part of the book only, he may no doubt copyright the remainder; but where he has actually published and sold in separate parts every chapter and sentence from the first word to the last, it is difficult to conceive how, in the face of this statute, he could nevertheless obtain a copyright for the book as a whole. He might have copyrighted each part monthly as it appeared. Suppose he had done so, and then sold each copyright to some one else. What rights would each purchaser have? Clearly, to enjoin any one, even the author, from

offering for sale copies of the particular part covered by the particular copyright the purchaser owned. But would it be contended for a moment that, although the author could not lawfully sell copies of any single part thus copyrighted (and the copyright transferred for value to another), he might nevertheless sell copies of all the parts, if printed and bound together in a single book, justifying his infringement of any one copyright by the fact that he at the same time infringed eleven others. The proposition contended for that the whole book is something other or different from the aggregation of all its parts is a refinement of which we do not think the statute is susceptible. The decree of the circuit court is affirmed, with costs.

J. L. MOTT IRON WORKS v. HENRY McSHANE MANUF'G CO.

(Circuit Court, S. D. New York. April 8, 1897.)

PATENTS — DURATION OF RIGHT — FOREIGN PATENT FOR SAME INVENTION — SUPPLY TANKS.

The Robertson patent, No. 245,318, for an improvement in supply tanks for water-closets, etc., which covers, in substance, a balance float valve, in combination with other parts, in a tank for intermittent supply, is for substantially the same invention covered by the earlier Canadian patent, No. 7,128, to the same inventor, and consequently expired with the said Canadian patent, under the provisions of Rev. St. § 4887.

W. P. Preble, Jr., for plaintiff.

Thomas A. Connolly, for defendant.

WHEELER, District Judge. This suit is brought upon United States patent No. 245,318, dated August 9, 1881, and granted to John Robertson, of Montreal, for an improvement in supply tanks. Canadian patent No. 7,128, dated February 23, 1877, granted to the same inventor for an automatic hydraulic supply tank, and which expired before this suit, is, among other things, set up as a defense, by limitation of this one. The inventor, in the specification of the Canadian patent, says:

"My invention relates to two floating bodies, which are confined within a case that is intended to contain a reservoir of water for the use of water-closets and urinals, or for any other purpose to which it can be made applicable. The action of these two bodies in the case is as follows: First, the case is filled with water from the supply pipe in the following manner: The pressure of water passing from the supply pipe into the case is regulated by the size of the aperture, where the water passes through into the case, forcing downwards the floating body or ball. As soon as the water rises sufficiently high in the case to float the ball, the valve, which is attached to the top of a spindle fastened onto this ball, closes the small aperture through which the supply flows. The case is now charged with water, ready for use. The second part of my invention relates to the action of the smaller floating body, to the lower part of which is attached a valve spindle. This valve may be raised up by a connecting rod, or by any other suitable mechanical arrangement. When it is required to draw water out of the case for flushing a water-closet, or for other purposes, it is done by the action of a lever pressing up the valve, which allows the water to rush out of the pipe. This pipe is made of such dimensions that the water rushing out from the case or tank through this pipe to supply the water-closet cannot pass down it as fast as it flows under the

valve. There is, in consequence, an upward pressure of water on the ball, which assists to keep it elevated until the case is sufficiently empty for the ball to lose its floating power. Then it drops and closes the valve. At the same time that the lower ball is raised, the upper ball, being deprived of its floating power, also drops slightly, thus opening the valve, which allows a fresh supply of water to flow into the case, and which continues flowing into it until it floats the ball sufficiently high to again force its valve against the seat, and thus close the communication. By this arrangement there is a continuous automatic action of the ball, by which the case or tank is always kept supplied with water until required for use. I am aware that tanks of different shapes are in use for supplying a head of water for water-closets, and that floating bodies are attached to levers to open and close the valves to the same, but I disclaim such apparatus used in this form, but I claim as my invention the two valve spindles, connected to two balls or floating bodies confined within a water-tight case or tank, for the purpose of regulating, by their automatic action, the admission and discharge of water into closets and urinals, and for similar purposes, substantially as and for the purpose hereinbefore set forth."

In the specification of this patent, he says:

"The invention consists, first, in combining with the supply tank or cistern a balanced float valve, which is so constructed that when it is on its seat it will not float, but as soon as it is raised off its seat a certain distance the area of the valve seat is added to its floating power, and it will remain floating till the water gets down low enough to uncover an equal area of the valve seat on top of float, when it will descend on its seat, and remain there till raised by the action of the closet handle and trip. The object of the trip in connection with the tank is that, as soon as the floating valve is tripped up, the ball is left free to drop as soon as enough water is run out to uncover the floating valve. The amount of water is regulated by the capacity of the tank and the pressure of the inlet valve. The invention also consists in combining with said balanced float valve another upper float, which by its own movements controls the inflow of water into the tank or cistern, and in further details of improvement, which are hereinafter more fully described." "The apparatus operates substantially as follows: Supposing the tank to be filled with water to the upper end of the pipe; the float valve to be held to its seat by the loss of its floating power, and weight of water on top of it; the inlet valve to be also closed by the buoyance of the float. If the water is now to be discharged, the lever is moved on its pivot, and the float valve raised, thereby allowing the water to rush down into the pipe. Being once raised, the float valve remains in the elevated position, it being so balanced that the water which is beneath it in the elevated position will have the power of buoying it, or holding it raised. As the water escapes through the pipe the float gradually descends until it rests on the crossbar, dropping the lever, and causing the valve to open, and the inlet pipe to admit water to the tank; but the stream of water which thus enters the tank at the same time that the tank is discharging is smaller than the stream of water which leaves the tank, so that there is no possible danger of the tank becoming refilled while the pipe is open; but, on the contrary, by my arrangement, I am enabled, while the float valve is raised, to draw, not only the actual contents of the tank, but also a suitable proportion of fresh water. As the level of the water in the tank finally recedes from below the center of the float valve, the latter drops by its own weight back upon the pipe, and the discharge of water from the tank now ceases, whereas the supply of fresh water to the tank continues, and the more water there is being added to the tank the more securely will the float valve be pressed down upon its seat. As soon as the water reaches to the level of the overflow pipe the float rises to its normal position, and lifting the lever raises the valve to its seat, and stops further inflow of water."

There are six claims for various combinations of these parts, the first of which (claimed, among others, to be infringed) is for:

"The combination of the tank, having outlet pipe and inlet pipe, the inlet pipe being of less diameter than the outlet pipe, with the balanced float valve,

rod, and lever, all arranged so that the float valve will be held to its seat by the weight of water above, and, when raised into a full supply of water, held off its seat by the water below it, substantially as described."

The statute (section 4887) provides:

"But every patent granted for an invention which has previously been patented in a foreign country shall be so limited as to expire at the same time with the foreign patent."

The identity of invention patented required by the statute is of material substance, and does not extend to minor details. *Siemens' Adm'r v. Sellers*, 123 U. S. 276, 8 Sup. Ct. 117. Open tanks, containing floats connected with inlet valves or spindles for opening them with falling, and closing them with rising, water, and an overflow, appear to have been long known before this invention, as is well shown by the admission in the Canadian patent and otherwise. What Robertson invented appears to have been the balanced float attached to the valve or spindle of an outlet larger than the inlet, which, when in place, is held down by the water, closing the outlet, and, when raised, is floated, letting water out, till the falling water lets it again down to place. In a closed tank no overflow could be used; in an open one, it would be necessary. The Canadian patent is for this balanced float valve, in combination with other parts, in a tank for intermittent supply; and the United States patent is for the same thing, in various combinations with other parts in such a tank. They appear to be for the same invention, in substance, and by the expiration of the former the latter was ended. Bill dismissed.

McKAY-COPELAND LASTING MACH. CO. v. COPELAND RAPID-
LASTER MANUF'G CO.

(Circuit Court of Appeals, First Circuit. April 24, 1897.)

No. 199.

PATENTS—ANTICIPATION—MACHINE FOR FLANGING COUNTERS.

The Hurlbut and Kennard patent, No. 243,917, for a machine for flanging the counters of boots and shoes, is void because of anticipation by the device for bending wood for which a patent was issued to Kriebel, October 24, 1865. 77 Fed. 306, affirmed.

Appeal from the Circuit Court of the United States for the District of Maine.

This was a suit in equity by the McKay-Copeland Lasting Machine Company against the Copeland Rapid-Laster Manufacturing Company for alleged infringement of letters patent No. 243,917, issued July 15, 1881, to R. H. Hurlbut and C. E. Kennard, for a machine for flanging the counters of boots and shoes. The circuit court dismissed the bill after a hearing on the merits (77 Fed. 306), and the complainant has appealed.

Frederick P. Fish and James J. Storrow, for appellant.
Elmer P. Howe and Walter K. Griffin, for appellee.

Before COLT, Circuit Judge, and WEBB and ALDRICH, District Judges.

PER CURIAM. The whole controversy in this cause is in regard to the first and third claims of the complainant's patent, which two claims are substantially the same. They relate to the single matter of clasping and drawing the leather of shoe counters closely to the last or former. Upon deliberate examination of the device covered by the two claims named, and making due allowance for the nature of the material to be manipulated, we are of opinion that the circuit court correctly held that the invention of the complainant was anticipated by the Kriebel patent, issued October 24, 1865. The decree of the circuit court is affirmed, with costs.

A. B. DICK CO. v. WICHELMAN.

(Circuit Court, S. D. New York. April 12, 1897.)

1. PATENTS—INFRINGEMENT—STENCIL SHEETS.

In a patent for coated or waxed sheets of paper for stencils, the specifications described, as a preferred method, the coating of the sheets by immersing them in a bath "of melted gummy or waxy substance, such as paraffine, of about 120° F. fusion point, or any other suitable method of waxing paper now known in the arts." The claim was for paper "coated with a substance impervious to ink, as paraffine, substantially as described." *Held*, that the expression "about 120° F." was not an absolute guide, and that the claim was infringed by a coating of the specified consistency, though its fusion point was above 140° F.

2. SAME.

The Broderick patent, No. 377,706, for a "prepared sheet for stencils," construed, and *held* infringed.

This was a suit in equity by the A. B. Dick Company against Frederick A. Wichelman for alleged infringement of letters patent No. 377,706, issued February 7, 1888, to John Broderick, for a "prepared sheet for stencils." A decree was heretofore entered by the court for an account of profits and damages. See 74 Fed. 799, where a fuller statement of the case will be found. The cause is now heard on exceptions to the master's report.

Daniel H. Driscoll, for plaintiff.

Frederick A. Wichelman, pro se.

WHEELER, District Judge. An interlocutory decree was entered herein for an account of profits and damages from infringement by defendant of patent No. 377,706, for waxed stencil sheets owned by plaintiff. A. B. Dick Co. v. Wichelman, 74 Fed. 799. The master has reported as profits \$981.75. Hearing has now been had on an exception that:

"Defendant will show at the time the master's report comes up for confirmation that the paper waxed by him for stencil sheets was made entirely different from the waxed paper described in the specifications of patent No. 377,706, and that he is therefore not liable for any sums of money to complainant for profits made; and defendant furthermore claims that the decretal order of

April 22, 1895, directed the master to ascertain and report defendant's profits growing out of paper made for stencils by defendant in violation of patent No. 377,706, and that under such directions it was the master's duty to ascertain what said patent covered."

This showing is only that the fusion point of the coating of his sheets is above 140° F., and he insists that such sheets are not covered by the patent, because this point is so high. The patent mentions a coating such as paraffine of about 120 degrees. It was before the circuit court for the district of New Jersey (*A. B. Dick Co. v. Fuerth*, 57 Fed. 834); and again before this court, held by Judge Townsend (*A. B. Dick Co. v. Henry*, 75 Fed. 388). The claims make no mention of any fusion point, and they are not limited by the specification to any particular fusion point by number of degrees, except by the expression mentioned. That expression seems to be an example merely of a method of beneficial use, and not an absolute guide; and, as an example, it gives latitude by mentioning about, not exactly, 120 degrees. The fusion point of the coating, which may not be paraffine, is that which will leave the consistency specified as proper for producing the required result. This appears to be well shown in these cases by various modes of expression of substantially the same meaning. The proofs before the master well showed the coating of the defendant's sheets to have been of this consistency. The *Hammerschlag* patent, upon the result of litigation respecting which the defendant here much relies, was for a method of waxing paper by machinery, and not for waxed sheets of paper for stencils, or of any sort. *Manufacturing Co. v. Wichelman*, 38 Fed. 430. The judgment there has no legitimate bearing upon any question here. Exceptions overruled.

CARROLL v. GOLDSCHMIDT et al.

(Circuit Court, S. D. New York. April 14, 1897.)

1. PATENTS—INFRINGEMENT SUITS—RES JUDICATA.

When purchasers of a machine, on being sued for infringement, justify under an alleged equitable right or title to the patent in suit claimed by the manufacturers of their machine, a prior decree obtained by plaintiff's assignors, enjoining said manufacturers from infringing the patent, is admissible, and would seem to be conclusive both as to plaintiff's title to the patent and the validity thereof.

2. SAME—EQUITABLE TITLE—PAROL AGREEMENT.

A parol agreement between the members of a firm that all inventions and patent rights obtained by either of them "should be the property of the firm, and should belong to both whilst members of that firm," gives to each partner a right to the use by the firm of inventions for which the other obtained a patent; but such right ends on the dissolution of the partnership, leaving the title in the partner to whom the patent is issued.

Arthur v. Briesen, for plaintiff.

Edwin H. Brown and W. Laird Goldsborough, for defendants.

WHEELER, District Judge. This suit is brought on letters patent of the United States No. 395,077, dated December 25, 1888, and granted to Henry Blackford Payne, of Nottingham, England, assign-

or of one-half to A. G. Jennings & Sons, for a warp-knitting machine; and on letters patent No. 397,140, dated February 5, 1889, and granted to the same Payne and William Campion, of Nottingham, assignors to A. G. Jennings & Sons, for a warp-knitting machine. Both patents were assigned regularly to the plaintiff, as the trustee of Payne and of Jennings. The first consists of a warp machine, which combines a needle-bar, having bearded needles, a presser-bar, a point or sinker-bar, a fixed sley-bar, guide-bars, mechanism by which motion is imparted to the needle-bar, presser-bar, point or sinker-bar, and guide-bars from a longitudinal cam shaft, and devices for imparting endwise motion to the guide-bars. The claims are for various combinations of these parts. The second is expressly for improvements on the first, and consists of a warp machine, which combines a needle-bar, having bearded needles, a presser-bar, a sinker-bar to which is secured the sley, said sley being placed below the sinkers on the sinker-bar, guide-bars, and mechanism by which motion is imparted to said bars from cams of a longitudinal cam shaft; the laterally reciprocating motion of the guide-bars being extended or shortened by suitable adjusting mechanism, and endwise motion being imparted simultaneously thereto by a rotary stud-wheel and lever connection. The claims are for various combinations of these parts in such a machine. The principal new elements of these combinations are the independent presser-bar and stationary sinker-bar.

Payne was a partner, at Nottingham, with William Henry Revis, in the manufacture of such machines, and Campion was in their employ. These inventions were used in their business, and patented in England. The assets of the firm went to an assignee, and finally to Revis, who became a partner in the firm there of Revis, Brewin & Marriott, which also manufactured and sold such machines in England, using, among others, these inventions. Payne made such machines for sale in this country. He claimed that Revis, Brewin & Marriott sent machines to this country. In 1891, Payne brought a suit on each one of these patents in this court, against Revis and Jennings, for infringements. Service was made on Revis, and he answered that he and Payne had been partners at Nottingham, under the firm names of H. B. Payne & Co. and J. B. Whitehall & Co., and that Campion was one of the employes of the partnership; that the partnerships paid all the expenses, and furnished all the materials and necessary facilities, for experimenting, perfecting, and testing the inventions; and that it was understood and agreed between Revis and Payne and Campion that all the inventions and improvements which should be made or discovered by themselves, or by their workmen, during the continuance of the partnership, should be the property of and held and used for the benefit of the partnership; and that the patents issued therefor, either in England or any country foreign to the firms, should be the property of the partnership; and that, by reason of these facts, the inventions patented in these letters patent were and continued to be the property of the partnership; and that these patents, therefore, in equity, belonged to him, and to the firm of which he was a member. The bills were amended by leave of court, and Marriott made a party defendant; and, on failure of Revis to answer

the amended bill, it was taken pro confesso, and decrees were entered therein, adjudging the patents to be valid, that the defendant had infringed, and enjoining them from in any manner, directly or indirectly, making, constructing, issuing, or vending to others, without the license or authority of the complainant, any warp-knitting machine made according to and employing and containing these inventions. After this, Revis, Brewin & Marriott manufactured in England four such warp machines, made according to these patents, having the independent presser-bar and stationary sinker-bar and their attachments in the combinations of the patents, and sold them to these defendants, who brought them to the United States, and now use them here. This bringing and use of these machines is the infringement complained of.

In this suit the defendants answer that the inventions covered by these letters patent, and all rights in the same, were vested in a partnership consisting of William Henry Revis and Henry Blackford Payne, doing business in the city of Nottingham, England, under the names of J. B. Whitehall & Co. and H. B. Payne & Co.; and that all the property, including the inventions and rights thereunder, was, for valuable considerations, sold to William Henry Revis; and that these alleged inventions were and are the property of William Henry Revis; and that the machines alleged to infringe these patents were made by William Henry Revis or the firm of Revis, Brewin & Marriott, of which he was a co-partner; and that, by virtue thereof, the defendants had the right and license to use these machines. So, these machines came from Revis, or the firm of Revis, Brewin & Marriott, into this country, in violation of the injunctions of this court against Revis in the suit brought by Payne against Revis here; and these injunctions still, so far as appears, continue in force; and the decrees, although not made between exactly the parties to this suit, were made between those under whom the parties here respectively claim, and would, on common principles, be conclusive of what was there decreed; and if the parties were not technically the same, either in name or in privity, the decrees upon the point of the ownership of the inventions, which was there in controversy, might be conclusive as a link in the plaintiff's chain of title. *Barr v. Gratz*, 4 Wheat. 213. When the defendants justify under Revis and his title, the decrees would be admissible, as a deed from him might be to show that he did not have the title. This seems to settle the title of the plaintiff to, and the validity of, the patent. If not, the evidence in this case to show the title of Revis to the inventions consists largely of the testimony of Revis as to an oral arrangement by which he claims it was to go to him; and in one place, when asked directly what the terms of this oral agreement were, he answered: "The terms of the oral agreement were that all inventions and patent rights obtained for said inventions should be the property of the firm, and should belong to both whilst members of that firm." *Prima facie*, the title to the inventions was previously, and at the time of the grant of the patents, in the patentees; and, if the question was open, all the evidence in the case, considered with this statement of Revis, would fail to show that the title to the patents, either legally or equitably, belonged to Revis, or

that anything more belonged to him than the right, as partner, to the use of the inventions by the firm or firms of himself and Payne, while both should be members. The dissolution or winding up of the partnerships would end his right, and leave the title to the patents as before, and in the plaintiff. Now, infringement is denied, but apparently not very strenuously. Altogether, as the machines were avowedly made under these patents in connection with others, claiming the right to so make them, infringement seems, without going through the intricacy of the mechanism, to be well established. The plaintiff therefore appears to be entitled to relief.

In the course of taking the testimony, several objections were taken to answers of witnesses for inadmissibility, which have been made subjects of motions to suppress. The objections relate to the consideration to be given to these particular answers, and not to the general competency of any witness, or branch of his testimony. Such objections do not warrant such proceedings. Motions to suppress overruled, and decree for plaintiff.

E. M. MILLER CO. v. MERIDEN BRONZE CO.

(Circuit Court, D. Connecticut. April 22, 1897.)

1. PATENTS—LIMITATION BY PRIOR ART—BURDEN OF PROOF.

A defendant who relies upon the prior art to limit the scope of the patent sued on has not the burden of proving that earlier patents were useful, operative, or commercially successful, or that they stated all the undeveloped possibilities of the invention therein disclosed. The mere fact that a patented device is limited in operation or application is not alone sufficient to destroy its relevancy in a consideration of the prior art. Mere paper patents may negative patentable novelty, if they sufficiently disclose the principles of the alleged invention, or if the alleged objections thereto could be obviated by mere mechanical skill.

2. SAME—INVENTION—INFRINGEMENT—LAMP-WICK ADJUSTERS.

The Homan patent, No. 477,865, for a device for adjusting the wick of a central-draft lamp, which combines the advantages both of a screw action and a direct-thrust action, is without patentable invention or novelty, and, even if conceded to be valid, is limited to the exact construction shown, or the ordinary equivalents thereof.

Mitchell, Bartlett & Brownell, for complainant.
John K. Beach and E. M. Marble, for defendant.

TOWNSEND, District Judge. This bill in equity alleges infringement of the first claim of patent No. 477,865, granted June 28, 1892, to William C. Homan, and duly assigned to the complainant. Said claim is as follows:

"(1) In a wick adjuster for central-draft lamps, the combination, with a wick-band, of a drawbar attached thereto; a stem connected at its upper end with the upper end of the said bar, and provided at its lower end with coarse screw threads; a tube having a centrally perforated knurled operating nut, located at its upper end, and constructed with internal screw threads corresponding in pitch to the threads of the stem aforesaid; and a rotatable suspension sleeve mounted on the tube below the said nut, and adapted to be removably secured to the lamp found in which it suspends the said tube,—substantially as described."

The defenses are denial of patentable invention, in view of the state of the art, and noninfringement. The object of the alleged invention was to provide a special form of wick-adjusting devices for central-draft lamps, which would combine the advantages of a screw and direct-thrust action in the adjustment of the wick and extinguishment of the light. This was accomplished by a combination of the ordinary wick band with a shank projecting laterally outward, to which was rigidly secured a perpendicular rod or drawbar passing up through the upper surface of the lamp, coupled at its upper end to another, parallel rod or stem, extending into a tube suspended perpendicularly in the lamp; said tube and the lower end of said stem being provided with coarsely-pitched screw threads. At the upper end of said tube was placed a centrally perforated operating nut, and beneath this a rotatable threaded suspension sleeve, which served to suspend said tube and the stem therein. By this combination it was possible either by rotating said operating nut to slowly raise or lower the wick, or to move it quickly, as for lighting or extinguishing the lamp, by simply taking hold of the drawbar, or the connection between it and the stem, and directly raising or lowering it. The coarseness of the pitch of the threads permitted them to operate as idlers within the tube. Every element of this combination was old. Such a drawbar was shown in the prior Meyrose and Parker patents. Broadly coupling a drawbar and stem was old, is shown in the prior Woodward, Davis, and Hoerle patents, and is specifically disclaimed. In the prior Miller, Carr, and Atwood patents were shown means for raising or lowering the wick by ratchets or pinions. These patents are further important because they show devices "combining the advantages of a screw and a direct-thrust action in the adjustment of the wick and extinguishment of the light," which were the results accomplished by the device of the patent in suit, as stated by the patentee. A screw device for raising or lowering the wick was shown in the prior patent granted to F. R. Rhind, April 19, 1887. It comprised a tube extending into the body of the lamp, and capable of being used as a filler, and provided with exterior spiral ribs, on which a yoke attached to the wick holder operated to raise or lower the wick by means of a rotatable head. The patentee, Rhind, says, as to the pitch of the screw, as follows: "Preferably, the spiral rib is made of a quick pitch, so that slight extent of rotation will impart a considerable up or down movement to the wick." Patent No. 394,465, granted December 11, 1888, to Z. Davis, shows a solid drawbar and stem, and a screw device passing through a nut like that of the patent in suit. It describes a construction with the screw nut either at the top or the bottom of the bowl of the lamp. Patent No. 435,357, granted August 26, 1890, to N. M. Hoerle, shows a construction similar to that of Davis, except that in this device the screw thread appears to be sufficiently coarse to permit the quick-thrust operation described in the claim in suit. All the results ascribed to the patented combination are old, and the new construction is due to the assembling together of old elements, "effected without requiring any modification of the parts which was not an obvious one, and within the ordinary skill of the mechanic." *Briggs v.*

Ice Co., 8 C. C. A. 480, 60 Fed. 87, 89. Counsel for defendant therefore strenuously contends that there was no patentable novelty in the claimed combination, or in the resultant operation. He contends that in the light of the prior art, and of the disclaimer by the patentee, there is nothing more than an aggregation of the old and well-known push devices and the quick pitch screw illustrated by Hoerle and described by Rhind. He further contends that those prior patents which show the result of slow screw and quick thrust by means of a ratchet and pinion would, if later, infringe the patent in suit, and therefore anticipate it, under the familiar rule. Complainant contends, as to these prior patents, that it does not appear they were anything more than mere paper patents, that there is no suggestion that they were capable of successful practical operation, and that in none of them is shown the conception of any combination in which an idler screw tube is so constructed as to provide the advantages of the screw adjustment and direct thrust in one combination. It has not been shown that the prior screw devices were commercially successful, or that they were intended to be so operated as to combine the screw adjustment and quick thrust. But I do not understand that the law necessarily imposes upon a defendant, who relies upon the prior art to limit the scope of a patent, the burden of proving that prior patents were useful, operative, or commercially successful, or that they stated all the undeveloped possibilities of the invention therein disclosed. It is not necessary that the patentee should have conceived the idea of all the uses of which his invention is capable. He is entitled to all the beneficial uses embraced within the scope of his invention. *Manufacturing Co. v. Cary*, 147 U. S. 635, 13 Sup. Ct. 472; *Dixon-Woods Co. v. Pfeifer*, 5 C. C. A. 148, 55 Fed. 390; *Manufacturing Co. v. Robertson*, 23 C. C. A. 601, 77 Fed. 985. Nor is the mere fact that a patented device is limited in operation or application, alone sufficient to destroy its relevancy in a consideration of the prior art. The development of new industries, the discovery of new products, the adaptation of old materials to new uses, may suggest improvements upon devices of the prior art, the principles of which are already sufficiently disclosed, although not fully developed, because not demanded by the prior existing conditions. In the application of this doctrine, patents have been held void for improved stamps required by new internal revenue laws; for new adaptations of gate guards for elevated railways; new forms of bicycle bells, pedals, and rubber tires. It is well settled that mere paper patents may negative patentable novelty, provided they sufficiently disclose the principles of the alleged invention, or provided the alleged objections could be obviated by mere mechanical skill. *Pickering v. McCullough*, 104 U. S. 310. "The very fact that a machine is patented is some evidence of its operativeness, as well as of its utility." *Dashiell v. Grosvenor*, 162 U. S. 425, 432, 16 Sup. Ct. 805. When, therefore, a prior patent appears upon its face to be relevant to the consideration of the prior art, I think the later inventor should show either that such device was not useful, or that it did not so disclose the principle of the later patent as to deprive it of its claim of patentable novelty. Com-

plainant has failed to show that these devices either lacked utility, or were incapable of successful practical operation.

Two illustrative exhibits were produced upon final hearing,—one by complainant, known as the “Rhind Lamp”; the other by defendant, known as the “Hoerle-Davis Lamp.” The Rhind lamp is constructed substantially in accordance with the specifications of the Rhind patent. Its operation is practically identical with that of the patented apparatus, as stated in the specification:

“The wick may be raised and lowered with care and accuracy by simply turning the operating nut, while, when it is desired to lift the wick very quickly, or push it down suddenly, the coupler is taken hold of, and a direct upward or downward thrust given the drawbar and stem, which will at once respond to such movement, owing to the coarseness of the threads,” etc.

The only material difference between the Hoerle-Davis patents and the Rhind lamp is that the screw on the latter is a somewhat quicker pitch than that shown in the Davis patent. I fail to find any inventive conception or patentable novelty in the patented construction or operation. But even if the patent, as limited to the precise construction described and claimed, could be sustained, it is not infringed by defendant. The construction of the defendant's device is best shown by a reference to the Davis patent, already considered, and by a comparison of its construction with that of the patent in suit. Each of these constructions has the wick band, the drawbar attached thereto, the operating sleeve by which the screw tube is suspended in the lamp fount, and the tube with the central perforated operating nut located at its upper end. As already stated, the screw of the Davis patent does not have a quick pitch, such as is described and shown in the Rhind specification and drawing. While the defendant's device does have such a quick-pitch screw, it does not have a stem “provided at its lower end with coarse screw threads,” and a tube “constructed with internal screw threads corresponding in pitch to the threads of the stem aforesaid.” Nor does it have any coupling connecting the upper end of the stem to the upper end of the drawbar for communicating movement from the operating stem to the drawbar. That the patentee in the claim in suit used the word “connected” in the ordinary sense of fastening by means of an intervening coupler, appears from the associated words, “a stem connected at its upper end with the upper end of said drawbar,” as well as from the specification, drawings, and other claims of said patent describing, illustrating and specifically covering said coupler, and is further shown by another patent taken out on the same day by this patentee, wherein he described, illustrated, and claimed an integral drawbar and stem. In the defendant's device such a single piece of wire fulfills the functions of drawbar and stem. Defendant's screw-tube device is like that shown in the Rhind, and illustrated in the Davis, patents. An arm extends laterally from the wick holder, and is provided with a nonrotatable collar or sleeve, so threaded as to operate in the external threads of the screw-tube. In this connection, I have not overlooked the contention of complainant for the application of the well-settled princi-

ple that a mere reversal or immaterial change of parts will not avoid a charge of infringement. *Société Anonyme Usine J. Cleret v. Rehfuß*, 75 Fed. 657; *Devlin v. Paynter*, 12 C. C. A. 188, 64 Fed. 398. If this patent covered a primary invention, the broad range permitted to equivalents would embrace the device of defendant. But the only consideration for its grant was a modification of old devices. The patentee chose to confine himself to a claim for a stem connected at its upper end with said bar, and provided at its lower end with coarse screw threads. The defendant does not use such a stem connected at its upper end with said bar, but a solid bar. In its lamp it has availed itself, as it had a right to do, of a construction well known in the prior art. The Rhind patent and the illustrative exhibit of the Rhind lamp show substantially the defendant's construction, except the old and well-known drawbar. When Homan, in differentiating his improvement from Rhind, Davis, and Hoerle, secured a patent therefor, the state of the art was such that he could only claim the exact construction which he selected as the embodiment of his improvement, or its ordinary equivalent. While I do not consider the evidence afforded by dismembering elements of a combination as relevant generally, yet in this case I think it may be material upon the contention of mere immaterial transposition of parts. If the complainant's stem and drawbar be disconnected at the upper end, the device is inoperative, while, if thus disconnected in defendant's device, it continues to operate as before. In view of the fact that complainant insisted that one of the essentials to his patent was this connection at the upper end, with which the defendant may dispense, and which, at best, he uses, not as essential to its construction, but as a convenient guide to its operation, I think infringement is not shown, and therefore a decree may be entered dismissing the bill.

KENNEDY VALVE MANUF'G CO. v. CHAPMAN VALVE MANUF'G CO.

(Circuit Court of Appeals, First Circuit. April 29, 1897.)

No. 208.

PATENTS—LIMITATION BY PRIOR ART—VALVE INDICATORS.

The Kennedy patent, No. 404,844, for a valve indicator, if valid at all, must be limited, in view of the prior state of the art, to the specific structure shown and described; and is narrow. 75 Fed. 277, affirmed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a bill in equity by the Kennedy Valve Manufacturing Company against the Chapman Valve Manufacturing Company for alleged infringement of the first claim of letters patent No. 404,844, issued June 11, 1889, to Daniel Kennedy, for a valve indicator. The circuit court was inclined to the opinion that the claim was valid, but was limited to the specific structure shown and described, and, being so construed, was not infringed by defendant's valve indicator. 75 Fed. 277. From this decree the complainant has appealed.

William P. Preble, Jr., for appellant.

William H. Chapman, for appellee.

Before PUTNAM, Circuit Judge, and WEBB and ALDRICH, District Judges.

PER CURIAM. Assuming that the device of the complainant below covers a patentable invention, which, however, we do not determine, we agree with the circuit court, for the reasons stated by it, that the patent is so narrow that the respondent below did not infringe it. The decree of the circuit court is affirmed, and the costs of appeal are adjudged to the appellee.

INTERIOR LUMBER CO. et al. v. PERKINS

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 118.

1. PATENTS—COMBINATIONS—SELECTION FROM PRIOR CONSTRUCTIONS.

To prevent a combination from being patentable, it is not necessary that all its elements shall be found in the same relation and combination in one prior patent or device; for the mere bringing together of old devices or elements, especially if they belong to the same or kindred arts, without producing anything new in function, result, or mode of operation, is not patentable.

2. SAME—INVENTION—SHINGLE MACHINE—DUPLICATION OF PARTS.

A movable section having been introduced into one of the two rails constituting the track of a shingle machine, it required no invention to introduce a like section in the other rail beside the first.

3. SAME.

In a patent for a shingle machine the specification stated that the bearing blocks for the saw carriage are preferably of wood cut to present the edge of the grain towards the wheel, and inserted in a trough connected with an oil cup, so that the oil will pass into the trough around the bottom of the block, and be carried up through the pores by capillary attraction, so as to constantly lubricate the bearing. The claim was simply for the "combination, with the saw carriage, of a wooden block, furnishing a bearing for the same, and an oil-retaining trough in which said block is seated." *Held*, that as the claim did not mention the oil cup, nor require the block to be so placed as to present the end of the grain to the wheel, this was not an essential feature, and could not be relied on as sustaining the claim.

4. SAME.

The Perkins patent, No. 380,346, for improvements in shingle machines, is void for want of invention as to claims 4, 5, and 45, which relate to certain dogging devices; also as to claims 26, 27, 29, 30, and 31, which relate to the spalling devices; and as to claim 43, which is for a wooden bearing in combination with the saw carriage. 51 Fed. 286, reversed.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The questions presented by this appeal are of the validity and infringement of claims 4, 5, 26, 27, 29, 30, 31, 43, and 45 of letters patent of the United States, No. 380,346, granted on April 3, 1888, to Willis J. Perkins, for improvements in shingle-sawing machines. Claims 4, 5, and 45, which are for dogging devices, read as follows:

"(4) The combination, with the rotating carriage of a shingle-sawing machine, of a dog near the periphery of said carriage, a bent arm pivotally connected at its outer end to said carriage, and at its inner end bearing an anti-friction

roll, a spring surrounding said arm, having an abutment on the carriage, and an adjustable abutment on the arm, whereby the pressure of the spring may be regulated, and a cam or incline on the frame against which the anti-friction roll has a bearing in the rotation of the carriage, substantially as described.

"(6) The combination, with the rotary carriage of a shingle-sawing machine, of a dog near the periphery thereof, and guided in radial ways in said carriage, an arm connected to said dog, and extending inwardly past the stationary dog toward the center of the carriage, a spring pressing said arm and dog inwardly, a cam-surface on the frame in position to press out the said arm during a portion of the revolution of the carriage, and a support for the inner end of said arm, substantially as described."

"(45) In combination, in a shingle-sawing machine, a series of block-receptacles grouped round a central axis, a movable dog at the outer side of each block-receptacle, a fixed dog at the inside of each block-receptacle, and an arm connected to the movable dog, and extending inward past the fixed dog."

The prior art, in view of which it is denied that these claims show novelty amounting to invention, consists of the following patents issued by the United States and dated respectively as indicated: No. 11,858, to H. H. Everts, October 31, 1854; No. 20,704, to K. Freeman, June 29, 1858; No. 24,111, to K. Freeman, May 24, 1859; No. 39,272, to A. H. Clark, July 21, 1863; No. 49,228, to George Challoner, August 8, 1865; No. 85,103, to Kinney & Parker, December 22, 1868; No. 99,940, to W. H. H. Palmer, February 15, 1870; No. 358,474, to P. O'Connor, March 1, 1887.

The claims numbered 26, 27, 29, 30, and 31 are for spalting devices, and read as follows:

"(26) In a shingle-sawing machine, the combination of the saw, the rotating carriage having bolt-receptacles which move over the saw, a bolt-supporting way consisting of two concentric circular tracks, and two movable sections, slide by side, and forming part of said tracks, adapted to be displaced from normal positions under the bolt.

"(27) The saw and carriage, substantially as described, the circular guideway, movable sections in and forming part of said guideway, supported on hinged posts, and lever mechanism connected to the posts, whereby the sections may be swung radially in opposite directions, all in combination, substantially as stated."

"(29) The combination, with the rotating carriage and its saw, arranged substantially as shown, of the circular way beneath the carriage, having a movable section, a movable bar outside the rotating carriage, and connected to the movable section of the way, and a trip on the carriage, adapted to be thrown into position to displace the movable track-section, as set forth.

"(30) The rotating carriage and saw, arranged substantially as described, the way beneath the carriage having a movable section, the movable bar outside the carriage connected to the movable section, the trip on the carriage, adapted to be thrown into position to engage the movable bar, and a stop on the frame in position to throw the trip out of operative position, substantially as described.

"(31) The combination, with a rotary carriage and a horizontal saw, of a block-supporting way, consisting of two tracks, a section of each track in advance of the saw made movable, and a catch on the carriage in position to operate both tracks simultaneously, as set forth."

These claims, it is contended, are anticipated by the O'Connor patent, No. 358,474, supra, and by certain machines made under and in conformity with that patent.

The forty-third claim reads as follows:

"(43) The combination, with the saw-carriage, of a wooden block furnishing a bearing for the same, and an oil-retaining trough, in which said block is seated."

This combination, it is insisted, is also found in the O'Connor patent, the specification of which does not state whether the bearing blocks shown in a receptacle are of wood or iron, and therefore leaves to the constructor or user of the machine the choice of either.

L. L. Bond, for appellants.

Edward Taggart and Charles K. Offield, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

Following the testimony of the expert, Bates, the prior art in dogging devices may be summarized as follows: The Freeman patent of 1858 has a rotating carriage, with a dog near the periphery, which is forced inward to hold the bolt, and an arm, pivoted to the dog and to the frame of the carriage, which serves to operate the dog. A cam acts upon the arm, and forces the dog inward, causing it to bite the bolt, and another cam, acting upon an extension of the arm, throws the arm and dog outward to release the bolt. The Freeman patent of 1859 has a rotary carriage, a dog near the periphery, an arm attached to the dog, and bearing a friction roller, and two cams, one of which acts upon the roller to move the dog outward and to release the bolt, and the other to produce the opposite effect. In the patent of Kinney and Parker there is a rotary carriage, a dog, a bent arm pivotally connected to the dog, and a cam acting on the arm to release the dog from the bolt, the dog being near the middle of the carriage, and the cam acting upon the outer end of the arm, instead of the reverse, as in the Perkins device; but, if transposed, as they might be without making any change in them, they could be described in the language of the Perkins claims. The Everts patent has a rotary carriage, movable dog, bent arm connected with the outer end of the dog, and acted upon at its inner end by a cam to cause it to release the dog from the bolt. The Clark patent has a rotary carriage, a dog near its periphery, a spring arm attached to the dog, a friction roller on the arm, and two cams acting upon the roller, one of which withdraws the dog, and the other causes it to bite. The Palmer patent contains almost the exact mechanism of Perkins' fourth claim in its essential details, namely, a rotary carriage, with a dog near its periphery, a bent arm connected at its outer end to the dog, extending inward, with a cam or incline on the frame, which acts upon the inner end of the arm, and a spring connected to the projections or abutments on the arm and the carriage, the spring and the central cam both causing the dog to bite and hold the bolt, and a second cam near the periphery of the carriage, acting upon the arm, to withdraw the dog and release the bolt. This is the entire combination of the fourth claim except the anti-friction roll, but such rolls had theretofore been common in shingle machines and in other kinds of machines. The Clark patent has a rotary carriage with peripheral dog, a bent arm to actuate the dog, and a cam near the center of the machine to act upon the arm. The O'Connor patent has a rotary carriage with a dog near its periphery, and an arm or lever pivoted to the carriage, connected at one end to the dog, and carrying an anti-friction roll at the other end. There is a rod connected to the arm or

lever, and two abutments, one adjustable on the rod and the other fixed upon the carriage, and a spring, surrounding the rod between the abutments, serves to move the dog inward and cause it to bite the bolt. A cam on the frame, against which the anti-friction roll has a bearing when the carriage rotates, moves the dog outward to release the bolt. The only changes from the device of O'Connor necessary to convert it into that of Perkins are suggested by the prior patents mentioned, and especially by the Palmer; that is, the substitution of a bent arm and a cam near the center of the machine for the pivoted straight arm or lever and peripheral cam of the O'Connor design. The O'Connor patent has all the parts of the fifth and forty-fifth claims except that the portion of the arm which extends inwardly is not quite long enough to reach past the stationary dog,—a circumstance which does not affect its function, purpose, or operation, and therefore is not a material difference.

The foregoing propositions, and especially the conclusions supposed to result from them, are strenuously controverted by the opposing expert, Mr. Powers, who after pointing out particulars of difference between the devices of O'Connor and Perkins, says:

"I am aware that the witness Bates states that the missing elements not shown by the O'Connor patent may be found in some other patents in the record, but I do not understand that an anticipation can be created by taking up elements in different patents, and combining them for the occasion; but, on the other hand, in order to anticipate the claim of a patent, all of its elements, either identically or substantially, must be found in the same relation and combination with each other in some one patent or device."

To the doctrine of selection he refused to subscribe, and for that reason failed to find the invention of Perkins in the patent of O'Connor. In matters of fact the entire testimony of the witnesses shows them to be in substantial accord. Their differences of opinion are explained by Mr. Powers' mistaken understanding of the rule by which the patentability of combinations of old devices should be determined. That the mere bringing together, in a new combination, of old devices or elements, especially if they belong to the same art or to arts kindred to that to which the combination belongs, does not constitute invention is well settled. "It is not enough that a thing shall be new, in the sense that in the shape or form in which it is produced it shall not have been before known and that it shall be useful, but it must, under the constitution and the statute, amount to an invention or discovery." *Thompson v. Boisselier*, 114 U. S. 1, 11, 5 Sup. Ct. 1042; *Hill v. Wooster*, 132 U. S. 693, 10 Sup. Ct. 228; *Burt v. Evory*, 133 U. S. 349, 10 Sup. Ct. 394; *Pickering v. McCullough*, 104 U. S. 310; *Florsheim v. Schilling*, 137 U. S. 64, 11 Sup. Ct. 20; *Adams v. Stamping Co.*, 141 U. S. 539, 12 Sup. Ct. 66; *Deere & Co. v. J. I. Case Plow Works*, 9 U. S. App. 567, 6 C. C. A. 157, 56 Fed. 841. The differences between the dogs described in the patent of Perkins and those of the earlier patents are differences of form and arrangement which produce nothing new in function, result, or mode of operation. It is certainly not a matter of invention that a bent arm is operated by a centrally located cam instead of an outside ring; there being no essential difference in the result; or that one dog, rather than the other, is made

movable; or that an arm is not radial, extending centrally down in a machine to operate upon an interior cam; or that levers extend over and are actuated outside of instead of inside the periphery of the carriage; or that a spring is shown without means of adjustment for greater or less tension, such means being well known; or that a radial arm extends outward a considerable distance beyond the periphery of the carriage, and has its outer dog not pivoted to, but integral with it; or that a radial arm does not extend over and beyond the inner dog; or that a dog is adapted to be released beyond the periphery of the carriage instead of by an interior cam; or that a rectangular frame is employed instead of an arm; or that a cam instead of a spring is used to push a dog into place. It is testified, and perhaps would be evident without proof, that of these various forms of construction and arrangement of parts, while one may be better than another, the differences are not such as to affect the question of invention.

Of the claims for spalting devices, the special feature of the first—No. 26—is, “two movable sections, side by side, and forming part of said tracks, adapted to be displaced from normal positions under the bolt.” In the O'Connor patent there is a single movable section in one of the two tracks, and it follows that “two movable sections, side by side,” can be regarded only as a duplication, unless their being adapted to be displaced from normal position under the bolt is a novel and patentable improvement. That cannot be conceded, because it is a mere matter of adjustment whether the displacement shall be in advance of or directly under the moving bolt. As examples of movable sections in parallel or concentric tracks, reference is made in the testimony of Mr. Bates to the store railway or cash carrier, as illustrated in the Holbrook patent, No. 282,320, the machine for sorting and loading lumber, shown in the Davies patent, No. 238,220, and to the well-known movable sections in railway tracks. If, therefore, there is patentability in this feature of the Perkins patent, it must be found in the other claims.

The twenty-seventh claim adds to the twenty-sixth hinged posts to support the movable sections and lever mechanism connected to the posts, whereby the sections may be swung radially in opposite directions, substantially as stated. The one section of the O'Connor patent is moved in a radial direction by means of a lever mechanism connected to it. It is not supported on hinged posts, but, as Bates testifies, hinged posts were old devices, of which harvester reels and buggy tops were examples, and therefore it would require no invention to mount the O'Connor movable section on hinged posts like the harvester reel or buggy top, so that both ends of it would move equally, instead of pivoting it at one end, so that one end moved more than the other. Swinging gates, if supposed to move in perpendicular instead of horizontal planes, afford a familiar illustration.

The additional features of the twenty-ninth claim are “a movable bar, outside the rotating carriage,” connected to the movable section of the way, and “a trip on the carriage,” adapted for the purpose stated. There are corresponding parts in the O'Connor machine, except that the operation is reversed, the lug or trip being

made adjustable, and the bar stationary, instead of the bar adjustable and the lug stationary. "The function, operation, and purpose," the expert says, "are the same, and the use of the one or the other is merely mechanical expediency."

The thirtieth claim adds to the twenty-ninth "a stop on the frame in position to throw the trip out of operative position"; but that there was no novelty in that feature is clear. Stops and trips are "old and well-known devices for all sorts of purposes."

The thirty-first claim differs from the twenty-ninth and thirtieth in that the block-supporting way is described as "consisting of two tracks," with a section of each in advance of the saw made movable. This, at most, is mere duplication.

Without further pursuit of details, it is evident that the important feature of both the O'Connor and Perkins patents is the movable section or sections in the tracks or guideways. As between the two certainly, and, upon the evidence here adduced, as against the world, O'Connor is the pioneer, and the question is whether the Perkins patent shows a patentable improvement or advance in the art. If so, it must be found in the fact that his movable section or sections in the process of operation are withdrawn from the track, not in advance of the approaching block, but under it, at the instant of passage, so that the spalt, or remnant of the block, will drop squarely through the opening, and not be tilted or turned sidewise, as in the O'Connor machine. The invention is not to be looked for in the hinged posts, levers, lugs, trips, and cams, or combinations thereof, employed to move the sections. Those, as set forth, were mere expedients, open alike to the use of every inventor. The single movable section of O'Connor was pivoted at one end, and it is plain that large pieces were liable to be caught, and made the means of retarding or obstructing the operation of the machine; but it is not true upon the evidence that the invention of O'Connor was a failure. On the contrary, it was as compared with anything before it a great improvement, and, to say the least, was so far successful as to require that the invention be accorded full significance in the prior art. It is not invention to improve a defective contrivance by the exercise of merely mechanical skill, however great the success. It is clear in fact as well as in law that, a movable section having been introduced into one of the two rails, constituting the track of a shingle-machine, it required no invention to introduce a like section in the other rail, side by side with the first; and it is equally clear as matter of fact that it involved nothing patentable to make the section in O'Connor's rail, singly or in duplicate, movable equally at both ends; and we have already seen that it was a mere matter of expediency to so adjust the movement that the sections should be withdrawn when immediately under, rather than in advance of, the block. We are therefore forced to the conclusion that these claims are invalid.

It remains to consider the forty-third claim, the essential feature of which is a wooden bearing block, seated in an oil-retaining trough. The specification, it is to be observed, says that these pieces are preferably blocks of wood cut to present the edge of the grain toward the wheel which rests on them; that the blocks are inserted in troughs,

each of which has a lubricating cup attached to and connected with it; and that the cup may be filled with oil, which will pass into the trough around the bottom of the block, and will be carried up the pores of the block by capillary attraction, so that the surface of the block will be constantly lubricated. The cup, it will be noticed, is not mentioned in the claim, implying a trough of different construction from the one specified, to the extent, at least, that it should be without openings at the bottom to admit oil from the cup, and leaving it to be presumed, though unexplained, that there must be in the trough itself a space, not filled by the block, capable of use as an oil receptacle. The claim departs from the specification in the further particular that it does not require the block to be so placed as to present the end of the grain to the wheel to be supported. It is, therefore, not an essential feature of the claim that the oil shall be carried to the surface of the block by force of capillary attraction. But with that feature eliminated, there remains no reasonable pretense of patentability. It is conceded that the O'Connor patent shows bearing blocks used for the same purpose as those of the Perkins machine, but without stating of what substance they should be made. The use of wood for that purpose was certainly free to all, and it required no invention to provide a metal receptacle, socket, or trough, in which the block of wood should be placed and held in position, and, when in place, to oil it; and if by accident or design there was room in the receptacle for the accumulation of oil and an accumulation happened and capillary attraction was brought into effective play, it could hardly be said to have been invention, because, the operation of capillary attraction being well known, the result, to the extent possible in the particular kind of wood used, was just what was to have been and by a man of ordinary understanding would have been expected to happen. We are of opinion that none of the claims here brought into question contain patentable novelty. The decree below is, therefore, reversed.

CLARK et al. v. DEERE & MANSUR CO.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 351.

1. PATENTS—LIMITATION OF CLAIMS—DISK HARROWS.

The Clark patent, No. 369,163, for an improvement in disk harrows, must be limited, by its own terms as well as by force of the prior art, to the particular construction described.

2. APPEAL—ASSIGNMENTS OF ERROR.

Upon an appeal from a decree which simply dismissed a bill for infringement of a patent, the assignment of error read that the court erred "in holding that respondents had not infringed upon the patent in suit, and it erred in declining to grant a provisional injunction, with reference for accounting in damages and profits." *Held*, that the assignment was contrary to rule 11 of the circuit court of appeals (21 O. O. A. cxii., 78 Fed. cxii.), in that it embraced two distinct propositions; and that it was also improper and unavailing, in that it was predicated, not upon the ruling of the court, but upon the reason given for the decision.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

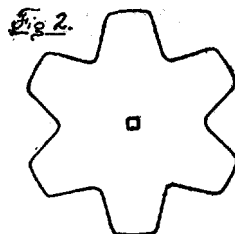
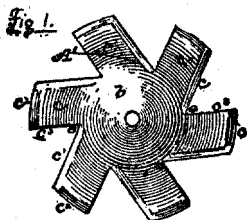
This was a suit in equity by Clemontine I. Clark and the Cutaway Harrow Company against the Deere & Mansur Company for alleged infringement of a patent. In the circuit court a decree was entered dismissing the bill on the merits, and the plaintiffs appealed.

This appeal seeks to bring under review a final decree, the entry of which reads as follows: "On this 20th day of March, 1896, this cause having been heard at final hearing upon the pleadings and proofs, * * * it is ordered, adjudged, and decreed that the bill of complaint herein be, and the same is hereby, dismissed at the complainants' cost, to be taxed in favor of the defendant and for the amount of which the defendant shall have judgment and execution; the ground of dismissal being that defendant's harrow does not infringe the claims of letters patent of the United States No. 369,163, granted to George M. Clark, August 30, 1887, the court, however, not expressing any opinion upon the validity of the claims of the said letters patent."

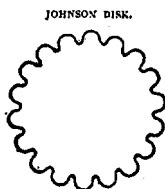
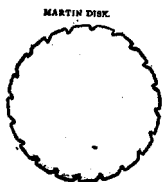
The patent in controversy is for improvements in disk harrows. The specification, after recognizing the existence and pointing out the defects of prior revolving disk harrows and revolving toothed harrows, says: "Among the many prior harrows heretofore patented are some which embody what may be termed 'revolving bladed disks,' because of their general disk-like form and the presence of a series of blades which have not only a cutting capacity, but also the function of harrow teeth; and there are other forms of harrows embodying disks which have corrugated edges, and still others which have teeth which are not cutting blades. As compared with any prior harrow known to me, a harrow embodying my invention has soil-working devices, each of which in its best form possesses all of the following characteristics, viz.: First, a central circular earth-working face, which may be flat, but which in its best form is concave; second, cutting blades which have their forward edges sharpened, and also their outer ends, and said outer ends occupy a circular line concentric to the axis of the disk; third, said forward edges are substantially tangential to said central circular working face, and in its best form each blade as a whole is substantially tangential to the axis of the disk; fourth, at the junction of the edges of any two adjacent blades their lines are merged, so that no wedging crevice is afforded into which a root or stalk can be forced and retained therein; fifth, when employed in gangs angular to each other and to the line of draft, my bladed disks of one gang must be 'rights,' and those of the other 'lefts,' as distinguished from any prior harrow known to me, whether it had either toothed or bladed devices, with the single exception of a certain special type of prior harrow embodying an angular frame, and having at each side thereof individual earth-working wheels provided with spade-like blades, which were twisted substantially parallel with the axis, and then at their outer ends bent or curved in the line of the periphery of the wheel, and hence said blades were specially bent in each wheel for service at one particular side of said frame. * * * Although for obtaining the best results the bladed disks should be formed and arranged substantially as shown, it is to be understood that it will be within certain portions of my invention if the disks be flat, instead of concavo-convex, provided they be otherwise constructed as shown and described."

The claims in issue read as follows: "(1) In a harrow the combination of angularly arranged gangs of bladed disks, each disk having a circular central earth-working face, and also cutting blades, each having a forward or front cutting edge tangential to said central working face, and a cutting edge at its outer end in a line concentric to the axis of the disk, substantially as described. (2) A harrow disk having a central circular earth-working face, and blades having front cutting edges which are tangential to said central face, substantially as described. (3) A harrow disk having a central circular concave earth-working face, blades having front cutting edges which are tangential to said face, and cutting edges at their outer ends which occupy a line concentric with the axis of the disk, substantially as described."

The annexed Fig. 1 represents the disk of the patent, and Fig. 2 the disk made by the appellee, which is alleged to infringe:



In the prior art are the following, among other, disks.



Chas. E. Mitchell, Wm. E. Simonds, Chas. A. Dupee, Noble B. Judah, Monroe L. Willard, and Henry M. Wolf, for appellants.
John R. Bennett, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court:

It is evident that the patent in suit, by its own terms as well as by force of the prior art, is one of very narrow scope. It must be limited substantially to the particular construction described, and when that is done it is impossible to reach any other conclusion upon the question of infringement than that declared by the court below. This is so clear upon a mere statement of the case that a discussion of the question would be unprofitable.

It is to be observed that the assignment of error is not such as required an examination into the merits of the appeal, because if it were found that error was committed to the full extent alleged it would not follow that the decree rendered should be reversed. The assignment contains but one specification, and that, contrary to our rule 11 (21 C. C. A. cxii., 78 Fed. cxii.), embraces two distinct propositions. It reads as follows:

"The circuit court erred in holding that respondents have not infringed upon the patent in suit, and it erred in declining to grant a provisional injunction with reference for accounting in damages and profits."

The one thing done by the court was to dismiss the bill, and on that action the assignment should have been predicated. The record shows no refusal to grant a provisional injunction, and if there had been such a ruling the question of its correctness could be involved in an appeal from a final decree of dismissal only incidentally,

if at all. The decision was put upon the ground that there had been no infringement, but it is also said that the court expressed no opinion upon the validity of the claims of the patent. If, therefore, this court should have determined that on the question of infringement the court had erred, the conclusion could be of no avail to the appellant, unless, going beyond the assignment of error, we had also determined that the patent in suit is valid. The assignment is predicated, not as it ought to have been, upon the ruling of the court, but upon the reason given for the decision. That, as we have more than once declared, is improper and unavailing. *Caverly v. Deere*, 24 U. S. App. 617, 13 C. C. A. 452, 66 Fed. 305; *Russell v. Kern*, 34 U. S. App. 90, 16 C. C. A. 154, 69 Fed. 94.

The decree below is affirmed.

ENTERPRISE MANUF'G CO. v. SNOW et al.

(Circuit Court of Appeals, Second Circuit. May 3, 1897.)

PATENTS—INFRINGEMENT—MEAT CUTTERS.

The Baker patent, No. 271,398, for an improved machine for cutting up plastic substances, in which the main idea consists in pressing the meat, by means of a forcing screw, and without any preliminary cutting, against a perforated plate, on the inner face of which is a knife, which, operating in connection with the plate, serves as the sole means of the cutting, held not infringed by a somewhat similar device, in which there was a preliminary cutting or slitting of the meat by stationary knives. 72 Fed. 262, affirmed.

Appeal from the Circuit Court of the United States for the District of Connecticut.

Charles E. Mitchell and Charles Howson, for complainant.

Albert H. Walker, for defendants.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The complainant brought its bill in equity before the circuit court for the district of Connecticut to restrain the defendants from the alleged infringement of claims 1, 4, and 5 of letters patent No. 271,398, granted on January 30, 1883, to John G. Baker, for an improved machine for cutting up plastic substances. From the decree of the circuit court, which dismissed the bill (72 Fed. 262), the complainants appealed.

The claims which are in controversy are as follows:

"(1) The combination, in a machine for cutting up plastic or yielding substances, of the following instrumentalities, namely: First, a casing for containing the substances to be cut up; second, a perforated plate at or near the end of the casing; third, a device for forcing the crude mass forward in the casing and against the said plate, without otherwise disturbing the integrity of the said mass; and, fourth, a knife operating against the inner face of the plate, and serving as the sole means, in connection with the said plate, of cutting up the mass by severing therefrom the portions which enter the perforations, all substantially as set forth."

"(4) The combination of the casing, E, made larger at its outer than at its inner end, with a perforated plate, a knife, and a feed-screw.

"(5) The combination of a casing, E, made larger at its outer than at its

inner end, with a perforated plate, a knife, and a feed-screw, the thread of which conforms with the said casing, as set forth."

This patent was carefully considered, and the invention was fully described, by the circuit court for the district of Connecticut, in *Manufacturing Co. v. Sargent*, 28 Fed. 185, 34 Fed. 134, and the views therein expressed were approved by the circuit court of appeals for the Third circuit in *Wanamaker v. Manufacturing Co.*, 3 C. C. A. 672, 53 Fed. 791. The first claim describes the patentable combination which constituted the distinctive features of the invention, and distinguished it from any of its predecessors in meat-chopping devices. The third element, as described in the specification, is simply a forcing screw; and the fourth element is a knife, which is the sole cutting means, in connection with the plate. It will thus be perceived that in the invention which was protected by the patent the forcing screw was not a cutting instrument, and interfered with the wholeness of the meat in no other manner than was incidental to its function of pressing the mass forward, while the cutting was solely performed by the knife when in connection with the plate. In order to point out the patentable character of the improvement, and to distinguish it from previously existing machines, particularly the Purchase Miles patents of 1861 and 1864, the decision in the second *Sargent Case*, *supra*, said:

"The main object of the patentee was to construct a machine which should get rid of the supposed necessity of preliminary cutting or chopping knives, and rely for its cutting character entirely upon the plate and knife at the end of the casing. Thus the patentee said in his specification: 'A perforated plate and a knife have been used in a cutting machine, but in combination with preliminary cutting or chopping knives, moving and stationary, acting independently of the plate, for mincing meat before it reaches the said plate in a minced condition, the plate and knife being in this case for the purpose of preventing the escape of large lumps which may have escaped the action of the preliminary chopping knives. In my invention, reliance for cutting up the substance is placed entirely on the plate and knife and a device for imparting direct pressure to a crude, uncut substance against the plate without any action on the substance during its passage to the plate, excepting that for effecting the desired pressure, the aim being to cut up the substance to uniform, or nearly uniform, sizes,—a result which cannot be attained when there are intervening choppers to cut the substance up to different sizes, large and small.' But it does not follow that the patentee meant, or that his patent is to be fairly construed as meaning, that the meat was to come to the plate in a condition in which no rubbing, or no abrasion, or no disintegration had taken place. He simply meant that, in contrast with the Miles machine, there was no cutting action in his device; that no reliance was placed, for cutting up the meat, upon anything else than the plate and the knife; and that the mass was forced to the plate without any other disturbance of its integrity than was incident to the forcing process."

The defendants' device has a casing, a forcing screw, a rotating perforated plate, structurally integral with the screw, and stationary knives, structurally a part of the casing. The terminal walls of the grooves in the casing are the knives. As the edges of the threads of the screw near the perforated plate come in contact with the edges of the grooves in the casing, lengthwise and parallel incisions are made in the meat before the knives co-act with the perforated plate. These lengthwise incisions are about an inch from the point where the perforated plate begins its work, but they are manifestly

the result of a preliminary cutting operation. The circuit court found the facts of similarity and dissimilarity in the operation of the two machines as follows:

"The practical operation of complainant's and defendants' machines showed that in each the screw independently forced the meat forward towards the perforations under great pressure, and that in defendants' machine there was a preliminary longitudinal cutting, amounting to a severance of the mass before the meat reached the perforations, which, if repeated, was sufficient to reduce the strips to hash, while in complainant's machine the masses of meat were indented by the forcing ribs, but were not ordinarily preliminarily severed."

Under this state of facts, the question is whether the first claim is infringed. The complainant's expert does not deny that "a number of slight incisions are made in the face of the mass of meat as it is forced forward against the perforated plate," but he regards this action as purely incidental, and entirely immaterial to the essential operation of the machine. It is true that the cutting action is not extensive, but the machine is so constructed that preliminary cutting—the action which Baker avoided—must necessarily take place. The distinctive feature of the Baker device is its abandonment of the preliminary cutting by the cutters around the shaft, and its reliance upon the knife on the inside of the perforated plate. When the defendants turned the terminal edges of the grooves in the casing into knives, which co-acted with the edge of the threads of the screw, they necessarily created a cutting of the meat before the plate was reached. As the device is constructed, cutting action by the stationary knives must commence before the meat reached the rotating plate, which is integral with the screw; and thereby the defendants place themselves outside of the territory occupied by claim 1 of the Baker patent. Inasmuch as the same preliminary noncutting characteristic of the invention must enter into the construction of claims 4 and 5, they also are not infringed. The decree of the circuit court is affirmed, with costs.

PRIETH et al. v. CAMPBELL PRINTING-PRESS & MANUF'G CO.

(Circuit Court of Appeals, Third Circuit. March 22, 1897.)

No. 9.

PRELIMINARY INJUNCTION—PATENT CASES—DECISIONS IN OTHER CIRCUITS.

Where a preliminary injunction has been granted solely on the strength of a decision in another circuit, and thereafter the judgment in the latter case is reversed and vacated by the circuit court of appeals, and the bill ordered to be dismissed, even because of an accord and satisfaction, this so changes the status of affairs that the preliminary injunction will be dissolved on an appeal therefrom.

Appeal from the Circuit Court of the United States for the District of New Jersey.

This was a suit in equity by the Campbell Printing-Press & Manufacturing Company against Theodora Prieth, Edmund S. Prieth, and Benedict Prieth, for alleged infringement of letters patent No. 376,053, issued January 3, 1888, to John H. Stonemetz, for an improvement in printing presses. The court below granted a preliminary

injunction, on the strength of a decision by the circuit court for the district of Massachusetts (64 Fed. 782) sustaining the patent. 77 Fed. 976. From the order granting said injunction the defendants have appealed.

Arthur E. Dowell, for appellants.

Louis W. Southgate, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and BUFFINGTON, District Judge.

ACHESON, Circuit Judge. The interlocutory order granting an injunction, which is the subject-matter of this appeal, was based altogether upon the adjudication on the patent in suit by the United States circuit court for the district of Massachusetts in the case of Manufacturing Co. v. Marden, 64 Fed. 782; the court below declining to consider any question involving the regularity and validity of that adjudication. The learned judge below in his opinion said:

"So long as the decree of the circuit court of the district of Massachusetts stands unrevoked and unmodified, the comity which exists between federal courts justifies this court, upon an application of this kind, in accepting its conclusions." 77 Fed. 976.

Now, pending this appeal,—on March 9, 1897,—the United States circuit court of appeals for the First circuit reversed the decree of the circuit court for the district of Massachusetts, and directed the dismissal of the bill of complaint there. The decree of the court of appeals, as appears from a duly-certified copy filed in this court, is in the words following:

"The petition for a rehearing is granted, and, having been fully heard, the judgment heretofore entered is vacated, the decree of the circuit court is reversed, and the case is remanded to that court, with directions to dismiss the bill because of accord and satisfaction, and without costs to either party in either court."

This latter decree, while not decisive of the merits of the controversy, nevertheless deprives the adjudication of the circuit court of the district of Massachusetts of the conclusive effect which the court below felt constrained to give to it; and, in view of the changed condition of the litigation touching this patent, we are of the opinion that the appellants should be relieved from preliminary injunction. It is therefore ordered and decreed that the injunction granted by the circuit court against the appellants be, and the same is, dissolved, with costs in this court to the appellants.

J. J. WARREN CO. v. ROSENBLATT.¹

(Circuit Court of Appeals, Seventh Circuit. May 14, 1897.)

No. 402.

1. PATENTS—VALIDITY—CYCLE LUGGAGE CARRIERS.

The Allen, Sachtleben, and Walters patent, No. 444,642, for a luggage carrier for cycles, is void for want of invention, and as involving merely a change in the form of an ordinary hand bag to fit the space between the arch, strut, and tie of a cycle.

¹ Rehearing denied June 17, 1897.

2. SAME—PRESUMPTION FROM GRANT OF PATENT.

The presumption of validity arising from the grant of a patent cannot control the judgment of the court when it is manifest there is no invention.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

The J. J. Warren Company, the appellant, as assignee of the patentees, filed its bill to restrain the infringement of letters patent of the United States No. 444,642, issued January 13, 1891, to Thomas Gaskell Allen, Jr., William Louis Sachtleben, and John Forrest Walters for "luggage carrier for cycles." The answer denied patentable novelty and invention, and asserted that the alleged invention required nothing more than the exercise of mere mechanical skill, and that the letters patent were invalid. Testimony was taken upon the part of the complainant below solely upon the question of infringement, and which established such infringement. The defendant introduced by stipulation a certain old medicine case in use in 1889. At the hearing the bill was dismissed for want of equity, and upon the ground that the patent was invalid. The specification of the patent contains the following: "The usual and present construction of carrier for attaching to a cycle is of laced metal or of basket work, like a flat, rectangular screen, with fasteners for fixing it onto the tip of the frame of the machine, and it is on such a screen that a coat or other article of wearing-apparel is usually fastened by a cord or a strap; and in some cases, when a small bag is used, it is generally hung from the handle-bar; there being in every instance a difficulty of adjusting the carrier to the balance of the machine, which renders it inconvenient for the rider to master the motion of the machine, and necessarily increases his labor in working the pedals. Another disadvantage arises from the tendency of the machine to overbalance itself by the height of the article fastened on the upper frame,—circumstances which have always prevented cyclists from taking a change of clothing with them on a journey. All the foregoing disadvantages are completely eclipsed by our invention, which consists of a hold-all or casing of a shape corresponding to the space between the 'arch,' 'strut,' and 'tie' of a machine, so that it occupies a position below the rider's body, and sufficiently low to the gravity-center as to steady the machine while traveling. Its position in no wise interferes with the rider's legs while operating the pedals, and its capacity is such that all the necessary articles for personal use, besides a stock of the most essential small articles of wearing-apparel, such as socks, collars, and the like, besides a complete change of clothing, can be stored in it for use, as required. The hold-all is provided internally with web-loops or pockets, and the opening, which is at the side, is covered by a flap, over which is another flap to fold in an opposite direction to enable the inclosed articles to be protected from dust and rain."

The luggage carrier occupies the space between the arch, strut, and tie of a safety bicycle, and is of the form and shape of that space, and by straps and buckle fasteners is attached to the arch and strut and other portions of the cycle; the specification further stating that: "The shape or formation of the hold-all will depend essentially upon the curvature of the machine frame, the hold-all being in every case, according to our invention, of such a character that it can be fixed into and occupy the space between the arch, strut, and tie of a cycle-machine propelled by manual power acting on pedals, as hereinbefore set forth. * * * The hold-all, when removed from the cycle-machine, can be readily carried in the hand, like an ordinary hand-bag, by the loop-strap, U."

The claim of the patent is as follows: "A hold-all, adapted to fit within the space between the arch, strut, and tie of a cycle-machine, and composed of two side plates, A, B, edge strip, C, one of the side plates being provided with a flap, D, to fold downward, and coverable by an outside flap, E, to fold upward, for inclosing the contents, and preserving them from dust and rain, substantially as described."

William Zimmerman, for appellant.

T. A. Banning, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). It may be difficult to accurately define the distinction between invention and mechanical skill. Possibly no better definition can be presented than that stated by Justice Matthews in *Hollister v. Manufacturing Co.*, 113 U. S. 59, 72, 73, 5 Sup. Ct. 717, 724. "Invention," he says, "is that intuitive faculty of the mind put forth in the search for new results or new methods, creating what had not before existed, or bringing to light what had been hidden from vision." This is in contradistinction to "the suggestion of that common experience which arose spontaneously and by a necessity of human reasoning in the minds of those who had become acquainted with the circumstances with which they had to deal." And mechanical skill, he says, is that which "involves only the expression of the ordinary faculties of reasoning upon the material supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice." Within the provisions of the constitution touching the issuance of patents, the beneficiary must be an inventor, and he must have made a discovery. It is, therefore, "not enough that a thing shall be new, in the sense that in the shape or form in which it is produced it shall not have been known before, and that it shall be useful, but it must, under the constitution, amount to an invention or a discovery." *Thompson v. Boisselier*, 114 U. S. 1, 5 Sup. Ct. 1042; and authorities cited; *Hill v. Wooster*, 132 U. S. 693, 700, 10 Sup. Ct. 228; *Burt v. Ivory*, 133 U. S. 349, 359, 10 Sup. Ct. 394. Within these decisions, can the subject-matter of this patent be deemed an invention, or a product of mechanical skill? It appears from the specification of the patent that previously there had been in use attached to a cycle a carrier of laced metal or basket-work like a flat, rectangular screen, attached to the tip of the frame. The carrier of the patent is of the shape corresponding to the space between the arch, strut, and tie of the machine. It was not novel to make the flaps of the carrier fold in opposite directions. That is shown in the medicine case presented by the defendant, and was old. What, then, did the patentees accomplish? They adopted the idea of a valise or hand bag, and conformed its shape to the space between the arch, strut, and tie of the cycle. The specification itself declares that when removed from the machine it can be carried as an ordinary hand bag. This is, therefore, a mere change in the shape of a hand bag. To be sure, it overcomes the objections to that which was formerly in use. It is more convenient, and by means of straps and buckle fasteners it will not sway from side to side when the cycle is in motion. There is, however, nothing novel in such fastening to prevent motion, and we are unable to perceive anything in this alleged invention except the adaptation in shape and size of an ordinary hand bag to the space between the arch, strut, and tie of the machine. It is a mere change of form and size, and that is not invention. *Smith v. Nichols*, 21 Wall. 112, 119, and cases supra. It even does not exhibit a high degree of mechanical skill.

A certain presumption in favor of the validity of the patent arises from the action of the patent office in granting the patent. In the consideration of the case we have allowed to this presumption its due weight, and we have assumed it to be true that no such article of such shape or size, or for the purpose designed, was before known, and that it is of superior utility. The presumption referred to is sometimes defined to mean that the patent itself is *prima facie* evidence of novelty and of invention, but that presumption is probably a mere rule of evidence, which casts the burden of proof upon the alleged infringer. This presumption cannot usurp the province of the court to declare what constitutes novelty. The court should give due consideration to the action of the patent office, but should not permit that action to control its deliberate judgment when it is manifest that there is no invention. *Hollister v. Manufacturing Co.*, 113 U. S. 59-71, 5 Sup. Ct. 717. If we entertained doubt touching the question of invention here, the presumption arising from the issuance of the patent would perhaps avail to resolve the doubt in favor of the patent. Entertaining no such doubt, we cannot yield our judgment to a presumption which arises merely from the patent itself, and casts the burden of proof upon the infringing party. The decree will be affirmed.

CHURCH v. AYER.

(District Court, D. Connecticut. April 10, 1897.)

NATIONAL BANKS—INDIVIDUAL LIABILITY OF STOCKHOLDERS.

An agent chosen by stockholders to take charge of the business of a national bank in liquidation cannot, after all debts have been paid, enforce the individual liability of stockholders, under Rev. St. §§ 5151, 5234, as he has no greater powers than those conferred upon the receiver.

This was an action at law brought by Louis K. Church, receiver of the Puget Sound National Bank, against Edwin Ayer, to enforce his individual liability as a stockholder, under Rev. St. §§ 5151, 5234. Upon motion to strike out amendment to answer.

Holcomb & Pierce, for plaintiff.

Lewis E. Stanton, for defendant.

TOWNSEND, District Judge. Motion to expunge defense and strike out whole of amended answer. This is an action at law brought by the receiver of the Puget Sound National Bank to enforce the individual liability of one of its stockholders, in accordance with the provisions of sections 5151 and 5234 of the Revised Statutes of the United States. The defense that the controller of the currency had no jurisdiction to appoint such receiver was raised in this court, and was disposed of by the writer, and said decision was affirmed by the supreme court in *Bushnell v. Leland*, 164 U. S. 684, 17 Sup. Ct. 209. The motion to expunge said defense is granted.

The defendant has filed an amendment to the answer, alleging that since the commencement of this action the controller of the currency

has paid to all creditors of said bank, other than stockholders, the amount of their claims in full; that the expenses of the receivership and redemption of the circulating notes of said bank have been fully provided for by the deposit of money with the treasurer of the United States; that under the provisions of the act of congress of June 30, 1876, as amended by the act of August 3, 1892, a majority of the stockholders duly elected an agent of said bank; that the plaintiff herein duly transferred and delivered to him "all the assets of said association then remaining in the hands of the receiver, or subject to the order of the receiver or of the controller of the currency"; that all the provisions of said acts have been fully complied with; that said agent is now proceeding to wind up and distribute the assets of said association; that said receiver has been discharged; that said bank is no longer insolvent or in the hands of a receiver; and that its debts have been paid. The amended answer further avers that certain persons have bought up a large amount of the claims against said bank, have advanced moneys to take it out of the receiver's hands, and have issued a statement of its assets and liabilities, showing that it has nearly \$100,000 of good assets with which to pay debts of some \$18,000; that the acts aforesaid were done without defendant's knowledge or consent, except by notice of said meeting, and that said agent "is now seeking to enforce the demand in this action for no other purpose than to compel this defendant to contribute towards the payment of said claim or amount of \$18,331.14 said to be due to creditors, although said agent has in his hands ample assets to pay the same. Defendant further says that said A. S. Taylor, agent, instead of distributing the assets of said association among the stockholders who have been assessed, as required by said act of August 3, 1892, is still endeavoring to enforce stockholder liability against this defendant in the present suit, long after the outstanding claims against said association have been paid by the controller of the currency, and after the receiver has been discharged." The plaintiff moves to strike out the whole of said amendment, on the ground that it does not present any defense to said action. The first question of law thus raised is whether the receiver has transferred to this agent defendant's liability as a shareholder to pay the debts of said bank. The statute provides that such shareholders shall be individually responsible for all debts of such association, to the extent of the amount of their stock therein, and that the receiver "may if necessary to pay the debts of such association" enforce such individual liability. Rev. St. §§ 5151, 5234. The act of 1892 provides for the election by the shareholders of an agent to wind up the affairs of the association after the "controller of the currency shall have paid to each and every creditor of such association, not including the shareholders, who are creditors of such association whose claim or claims as such creditor shall have been proved or allowed as therein prescribed the full amount of such claim," etc., and that if such agent shall be elected, and a bond shall be duly filed, "the controller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and control of said controller and said

receiver," and that such agent shall hold and dispose of such assets, and may sue and do all other lawful acts necessary to finally settle and distribute the assets and property in his hands. 27 Stat. 345. The plaintiff contends that the language of said statute is sufficiently broad to cover this cause of action for an uncollected asset of the association. It is clear that such agent can have no greater powers than those which were conferred upon the controller and receiver. The receiver has the right to enforce the liability of the stockholder only when and "if necessary to pay the debts of such association." *Kennedy v. Gibson*, 8 Wall. 504. "The same statute of 1876 provides when the stockholders may choose an agent to take charge of the business of a bank in liquidation; that is, after the receiver has had charge of it long enough to pay all its debts, and after its debts have all been paid, then the stockholders can select an agent to take charge of what remains of the assets." *Bank v. Eckels*, 57 Fed. 870. It is unnecessary, in the determination of this motion, to consider defendant's further claim that such a liability is not an asset of the corporation, and that the obligations now sought to be paid have been created since the failure of said association, and that, therefore, the individual liability of the shareholders cannot be enforced for their payment. The amendment to the answer alleges that all the debts of said association have been paid. The motion to strike it out is denied.

In re HYDRAULIC STEAM DREDGE NO. 1.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 375.

1. ADMIRALTY JURISDICTION—STEAM DREDGE.

Quære: Whether an hydraulic steam dredge, which sucks up material from the bottom by means of a pipe and pump, and discharges the same through a line of adjustable pipes upon the adjacent shore, is a subject of admiralty jurisdiction.¹

2. SAME—MARITIME CONTRACTS.

A contract under which coal is furnished to an hydraulic steam dredge engaged in sucking up material from the bottom of a lake, and discharging it through pipes upon the adjacent shore, not for the purpose of improving navigation, but merely to make a fill to be used for railroad purposes, is not a maritime contract, under which a maritime lien may arise.²

Appeal from the District Court of the United States for the Northern District of Illinois.

A libel in rem was filed in the district court of the United States for the Northern district of Illinois by the O. S. Richardson Fueling Company, appellant here, against the Hydraulic Steam Dredge No. 1 for supplies of coals furnished to the dredge at the port of Chicago, and which were necessary to enable her to engage in her business. These supplies amounted to \$4,520.75, and were furnished between June 3, 1895, and June 27, 1896, which amount was claimed to be a lien upon the dredge by virtue of the water-craft laws of the state of Illinois. The Northwestern National Bank of Chicago, intervening as claimant, denied that the dredge was a vessel within the maritime and admiralty jurisdiction of the court, or that it was used, or intended to be

¹ See *Saylor v. Taylor*, 23 O. C. A. 343, 77 Fed. 476.

² See note to *The Richard Winslow*, 18 C. C. A. 347.

used, in navigating the waters and canals of the state of Illinois, or employed in commerce and navigation upon any waters whatever; denied that any maritime lien or charge arose by reason of the furnishing of the supplies; and alleged that it was the mortgagee of the dredge by virtue of a mortgage dated June 15, 1896, executed by the American Hydraulic Dredging Company, the owner of the dredge, to secure payment of an indebtedness of \$18,600, with interest, which mortgage was filed for record in the office of the recorder of Cook county in the state of Illinois, and in the Northern district of Illinois, on June 18, 1896, alleged default in payment of the indebtedness secured by the mortgage, and that the mortgagee thereupon entered and took possession of the dredge on the — day of July, 1896, and continued to hold possession thereof until it was taken from the possession of the bank under process issued upon the libel.

The cause was submitted to the court below upon an agreed statement of the facts, as follows:

"That said dredge, at the time of the filing of the libel, was owned by the American Hydraulic Dredging Company, a corporation of the state of Illinois, having its principal place of business at Chicago; that she was then lying in the waters of the harbor of Chicago in said district; that she was built at Milwaukee, in the state of Wisconsin, in the latter part of the year 1892, but did no work there; and, immediately on her substantial completion, was towed on Lake Michigan from said Milwaukee to Chicago, in the state of Illinois, being intended for work there; that said dredge is of a cubical capacity of more than twenty tons burden; that the hull of said dredge is a timbered and floating wooden structure, corresponding in general construction with that of other dredges used in the dredging business, and of some lighters and scows, and is flat-bottomed and without a keel, with perpendicular sheeted sides except at the rear end, where it is somewhat rounded to give less resistance when dragged or towed through the water, and is partly inclosed and roofed over above; is ninety feet long, thirty-three feet wide, and six feet in draught, without any sail, paddle-wheel, propeller screw, or other means for self-propulsion; carries no rudder or steering gear; and is towed or pushed through the water by independent means when occasion requires it to be moved. In it are placed an engine of about four hundred horse power, with four boilers and furnaces to supply the same with steam, together with an eighteen-inch centrifugal pump operated by said engine, with subordinate equipment and machinery suitable for the operation of the dredge. The dredge has geared to and suspended from its front end a cylindrical metal pipe twenty inches in diameter, which pipe runs to and is connected with said centrifugal pump at one end, and at its other or exterior end carries a rotary cutting apparatus operated by a small subsidiary engine, which exterior end of said pipe with said rotary cutting apparatus is so geared and adjusted that they may be lowered to the ground surface or bottom under the water where it is intended to operate the same, and, when so lowered, said dredge is operated substantially as follows: Said rotary cutting apparatus and said centrifugal pump are put into operation by said engines respectively, with such effect that the earth, sand, or gravel forming said bottom, being dug out, loosened, or disintegrated by said rotary cutting apparatus, is then at once, together with the adjacent water, mixed with it, sucked up through said exterior end of said cylindrical pipe, and is thereupon pumped and drawn into and through said centrifugal pump, which discharges the whole volume thereof, of which from eighty-five to ninety-five parts in each one hundred is water, through a continuous line of adjustable pipes, twenty inches in diameter, to the adjacent shore or place of deposit of the volume so discharged. That, after arriving at Chicago from Milwaukee, said dredge made docks for the Illinois Steel Company at South Chicago, and excavated a slip at Waukegan, Illinois, at which vessels could lay, but was chiefly employed in the construction of a part of the drainage canal of the sanitary district of Chicago, and, in such employment, excavated a portion of the main channel of said canal of over one-half a mile long, and from two hundred to two hundred and fifty feet in width, and from six to twenty-five feet in depth, through and over prairies and meadow lands where said channel was located, performing said excavation substantially in the manner following: Said dredge was towed to a point on the Illinois and Michigal canal where a breach or opening through the bank of said canal into the adjacent land was

made by independent means, in which land, by like means, a cavity or excavation was then dug out, sufficient in capacity to admit the said dredge, which was pushed into and occupied said cavity, after which said opening was closed up, and said dredge disconnected from any navigable waters. A ditch three or four feet in width was then, by independent means, dug from this cavity through the adjacent land to the Desplaines river, some three hundred and fifty feet distant, through which ditch a stream of water was admitted and flowed from said river to said cavity in continuous quantities, sufficient to enable said centrifugal pump to be operated in connection with said rotary cutting apparatus. Whereupon said dredge floated upon said admitted water, and began said operation, thereby excavating and removing the earth in front of it, and, being pushed or dragged forward from time to time in the enlarged cavity thus opened up by it, made its way, and proceeded in said excavation through said prairies and meadow lands.

"That last prior to the filing of the libel in this cause the employment of said dredge was by the Illinois Central Railroad Company to fill in earth for its railroad purposes behind a line of piling on its grounds on the lake front in Chicago, during which said employment said dredge was upon the navigable waters of Lake Michigan, at the lake-front harbor of said Chicago; and said filling was done by said dredge pumping the sand, gravel, and earth from the bottom of said lake, thereby incidentally and necessarily deepening the channel of said harbor where it was located, and depositing said earth, sand, and gravel, with water, behind said piling on said railroad grounds; but the object for which it was so employed was to fill in said earth, and not to deepen said channel. That the coal furnished by said libellant to the said dredge was consumed and used by said dredge while it was so engaged in its operation of filling for said Illinois Central Railroad Company, to wit, from the 30th of June, 1895, to the 16th day of August, 1895, when there was a balance due the libellant on account of the coal used and furnished of three hundred and fifty dollars (\$350); and from November 20, 1895, to June 27, 1896, when the amount of coal so furnished as aforesaid amounted to the sum of forty-one hundred and seventy and $\frac{75}{100}$ dollars (\$4,170.75), making a total amount due the libellant of forty-five hundred and twenty and $\frac{75}{100}$ dollars (\$4,520.75) for coal furnished to said dredge as aforesaid, upon its credit; and that said coal so furnished to said dredge as aforesaid was necessary to enable said dredge to be operated and engage in her said business. That in connection with said dredge, and as one of the appurtenances, was a scow, used on which to place and store its supplies of coal, but not used to receive or carry the earth excavated by said dredge, which earth was by said method of its operation discharged through the pipes aforesaid, on the adjacent land. That neither said dredge nor scow was registered, enrolled, or licensed under the laws of the United States, and neither has ever been so registered, enrolled, or licensed. That said dredge was operated by a force of about twelve men, working partly on the dredge, and partly at the shore end of said discharge pipe, and operating under the direction of a superintendent and two foremen, neither of whom was a licensed master. All employed on said dredge went ashore for their meals and to sleep, the dredge never having carried either cooking appliances or accommodations for sleeping. That said claimant, the Northwestern National Bank of Chicago, intervenes herein by virtue of being mortgagee of said dredge, her boilers, engines, machinery, tools, furniture, gear, appurtenances, and said scow, there being included in said mortgage also furniture and chattels located in the office of the American Hydraulic Dredging Company, in said city of Chicago, which said mortgage was made by said American Hydraulic Dredging Company to said claimant, and executed on the 15th day of June, 1896, by Lindom W. Bates, its president, and by Charles H. Whiting, its secretary, and was acknowledged by them before George P. Foster, a justice of the peace of the town of South Chicago, in Cook county, in the state of Illinois, in the district aforesaid, on the 15th day of June, 1896, which was filed for record in the recorder's office of said Cook county on the 18th day of June, 1896, and was given to secure one note of said dredging company for \$600, dated June 15, 1896, payable in five days from date, and one note for \$2,000, payable in thirty days from date, and one note of \$11,500, payable in ninety days from date, said notes all being of even date with said mortgage; and that said bank, claiming as said mortgagee, on the 16th day of July, 1896, took possession of

said dredge, and her said machinery and appurtenances, and was in possession thereof as such mortgagee when the libel herein was filed, and when the marshal, under and by virtue of the process under said libel, on the 28th day of July, 1896, took possession of said dredge and her machinery and appurtenances; but no sale of said mortgaged property had been made under or by virtue of said mortgage when said libel was filed, and when said marshal so took possession. That this stipulation is not to be construed as an admission by either party thereto of the conclusions of law drawn or stated by the other party, either in the libel or answer herein, which conclusions of law affirm or deny that said dredge is a maritime structure engaged in commerce and navigation within the admiralty jurisdiction of this court, and which on the part of said libellant affirm, and on the part of said claimant and respondent deny, the jurisdiction of this court over said dredge in that behalf."

At the hearing, the district court dismissed the libel, from which decree the libellant appeals to this court.

John C. Richberg, for appellant.

1. Under the fourth assignment of errors it is claimed that the court below erred in holding that it had not jurisdiction to entertain a libel against the steam dredge for coal furnished upon its credit, and used by it while engaged in its business upon the navigable waters of the United States, when a lien was given for such supplies, so furnished, by the local law.

That a steam dredge is subject to admiralty jurisdiction has been expressly decided in several well-considered cases where the question was directly in issue, viz.: *The Pioneer*, 30 Fed. 206, decided by Judge Benedict in 1886; *The Starbuck*, 61 Fed. 502, decided by Judge Butler in 1894; *The Alabama*, 19 Fed. 544; *Id.*, affirmed on appeal, 22 Fed. 449; *Aitcheson v. The Endless Chain Dredge*, 40 Fed. 254; *Maltby v. Steam Derrick Boat*, 3 Hughes, 477, Fed. Cas. No. 9,000; *Coasting Co. v. The Commodore*, 40 Fed. 258; *The Atlantic*, 53 Fed. 607 (citing *The Alabama*, supra, with approval). Admiralty jurisdiction has also been held in numerous cases of water crafts not actually engaged in transporting or carrying cargoes, but engaged in navigation and certain employments incident thereto. In such cases, Judge Brown, of the United States district court for the Southern district of New York, has always taken jurisdiction, notably in *The Public Bath No. 13*, 61 Fed. 692, decided in 1894, citing *The Pioneer*, supra, with approval; *The Paradox*, *Id.* 860, citing *The Public Bath No. 13*, supra; *The Queen*, 40 Fed. 694; *Disbrow v. Walsh*, 36 Fed. 607; *The City of Alexandria*, 31 Fed. 427. Other cases by other federal judges are *Kearney v. A Pile Driver*, 3 Fed. 246; *The Hezekiah Baldwin*, 8 Ben. 556, Fed. Cas. No. 6,449; *Woodruff v. One Covered Scow*, 30 Fed. 269; *The Menominee*, 36 Fed. 204; *The Hendrick Hudson*, 3 Ben. 419, Fed. Cas. No. 6,355; *Wood v. Two Barges*, 46 Fed. 204; *The W. F. Brown*, *Id.* 290; *The Dick Keys*, 1 Biss. 408, Fed. Cas. No. 3,898; *The Kate Tremaine*, 5 Ben. 60, Fed. Cas. No. 7,622; *The Old Natchez*, 9 Fed. 476; *The Minna*, 11 Fed. 759, and note. The admiralty jurisdiction has been extended over water crafts which 75 years ago were unknown, and to-day do 75 per cent. of the water-borne commerce. In the case of *The General Cass*, 1 Brown, Adm. 334, Fed. Cas. No. 5,307, Judge Longyear decided in favor of admiralty jurisdiction in all classes of modern water crafts engaged in commerce or navigation, or in aid thereof. The words "admiralty" and "maritime," as they are used in the constitution and acts of congress, are by no means synonymous. They were evidently both inserted to preclude a narrower construction which might be given to either word had it been used alone. *Martin v. Hunter's Lessee*, 1 Wheat. 304. Maritime cases are more properly those arising under the maritime law, which is not the law of a particular country, and does not rest for its character or authority on the peculiar institutions and local customs of any particular country, but consists of certain principles of equity and usages of trade, which general convenience and a common sense of justice have established in all the commercial countries of the world to regulate the dealings and intercourse of merchants and mariners in matters relating to the sea. 3 Kent, Comm. (3d Ed.) 1; *Laws of Oleron*, arts. 14, 15; *Laws of Wisbuy*, arts. 26, 27; *Marine Ord. of France*; *Roccusus*; *Loix Mar.*; 2 Valin, 177, 188; *Rhod. Law*, 36; *Consulat*, 18; *Godolp*, 43, 155.

2. Is the water craft in question a ship or vessel of which the admiralty will take jurisdiction?

"Ship" is a general term, and in the law is equivalent to 'vessel.' It is defined: 'A locomotive machine adapted to transportation over rivers, seas, and oceans.'" Ben. Adm. (3d Ed., 1894) § 215. "Includes whatever is built in a particular form for the purpose of being used on water." The Mac [1892] Law T. 909, Brett, L. J. "In its original acceptation, it is generic for anything formed for the purpose of going on the water." Id., 910, Cotton, L. J. "Ship" and 'vessel' are used in a very particular sense to include all navigable structures, but a fixed structure, like a dry dock, is not used for such purposes; a general designation for any vessel employed in navigation; and, in the Roman law, anything which floated upon the waters, and was accessory to commerce." And. Law Dict. Congress has defined the word as follows: "The word 'vessel' includes every description of water craft or other artificial contrivance used or capable of being used as a means of propulsion on water." Rev. St. U. S. 1874, tit. 1, c. 1, § 3. The word includes a steam dredge. The Pioneer (1886) 80 Fed. 206; Chaffe v. Ludeling (1875) 27 La. Ann. 611. Those structures can hardly be denied the character of ships and vessels which in every particular are superior to the ships and vessels of those countries and periods in which the great codes of maritime law were promulgated and enforced. Ben. Adm. (1894) § 217. The true test of admiralty jurisdiction over water crafts is the navigability of the waters upon which the water crafts are employed. The Genesee Chief, 12 How. 443, expressly overruling the principle laid down in the case of The Thomas Jefferson, 10 Wheat. 428, and affirmed in Ex parte Boyer, 109 U. S. 629, 3 Sup. Ct. 434. The admiralty jurisdiction depends upon the subject-matter, the nature, and character of the controversy. If that be connected with ships or shipping, commerce, and navigation, the admiralty has jurisdiction. "Toutes les affaires relatives a la commerce et navigation et aux navigatures appartient au droyt maritime." 3 Pardessus, Loix Mar. 451. A contract made on land, to be performed on land, as the contract for building a ship, is not a maritime contract. Roach v. Chapman, 22 How. 129. The contract for delivering the supplies, and which were delivered in the case at bar, however, is a maritime contract; for the dredge when the supplies were furnished was on navigable water, engaged in her employment, a great agent of maritime commerce, its wants and exigencies, to which she was well adapted. Those who furnish water crafts with what is necessary to enable them to navigate the sea, and to perform their appropriate functions, and to make such crafts available for the great purpose for which they are created, have always found favor in admiralty. The General Cass, Brown, Adm. 334, Fed. Cas. No. 5,307, in which Judge Longyear held that "the true criterion by which to determine whether or not a water craft or vessel is subject to admiralty jurisdiction is the business or employment for which it is intended or is susceptible of being used, or in which it is actually engaged, rather than its size, form, capacity, or means of propulsion." That the thing in question is not propelled by oars, sails, or steam power, and is engaged only in harbors and docks, and is moved from place to place by tugs, does not prevent its being a vessel within the admiralty jurisdiction. 1 Am. & Eng. Enc. Law (2d Ed.) 655, and cases there cited, and cases herein referred to. The fact that a water craft is not registered, enrolled, or licensed, and is exempt from payment of the hospital tax, they are, nevertheless, recognized as vessels by act of congress of July 20, 1846. The act of March 2, 1831 (section 1), speaks of "any raft, flat, boat, or vessel of the United States entering otherwise than by sea * * * are exempt from custom house fees." Also, by provision of the act of March 3, 1851, it is provided: "This act shall not apply to the owner or owners of any canal boat, barge or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation." Now, the general term used throughout the act was "ship or vessel." Here is a clear implication, therefore, that congress understood "ship or vessel" to include the craft named in the proviso. A steam dredge for deepening channels of navigation is a subject of admiralty jurisdiction. The General Cass, Brown, Adm. 334, Fed. Cas. No. 5,307; The Endless Chain Dredge, supra. A dredge and her scow are to be treated as one concern, and subject to admiralty jurisdiction. The Starbuck, supra.

3. Lien of libellant.

Contracts made for supplies after the vessel has been launched and received are held to be maritime contracts. *The Manhattan*, 46 Fed. 797. For supplies furnished in a home port to a domestic vessel, the right of action is conferred by state statute. *The Transfer No. 4*, 9 C. C. A. 521, 61 Fed. 364; *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949. "Contracts depend upon the subject-matter or nature of the service, or employment which relate to commerce, or navigation." *Ex parte Easton*, 95 U. S. 72. "Jurisdiction as to contracts depends not upon locality, but upon the subject-matter of the contract." *The Jerusalem*, 2 Gall. 348, Fed. Cas. No. 7,294 (Judge Story). The object of the state statute is to put the local lien on a par with the general maritime lien, that the creditors of the domestic vessel, in her home port, may be put on the same footing with creditors of a foreign vessel, and with creditors of a particular vessel in a foreign port. *The Lena Mowbray*, 71 Fed. 720, citing *The Daisy Day*, 40 Fed. 538. The rule is well settled that a lien for supplies furnished in a home port given by a state statute can be enforced in rem in the United States district court. *The Menominee*, 36 Fed. 197; *The Lottawanna*, 21 Wall. 558. The statute of the state of Illinois gives a lien upon the craft in question for the supplies furnished by appellant. *Rev. St. Ill. c. 12*.

Charles M. Sturges, for appellee.

Under the authorities, and on the facts answered and admitted on the record, was the libeled dredge a maritime structure, engaged in commerce and navigation, within the federal admiralty jurisdiction?

It is not controverted that such structures have been repeatedly ruled to be within that jurisdiction where operated in connection with attendant scows or barges for the maritime transportation of the material excavated. It is respectfully urged that it is this test which logically determines the boundary of jurisdiction in respect of this class of structures,—a boundary, perhaps, like others, not always easy of precise delimitation,—and distinguishes a mere floating machine from a congeries, which, as a whole, may be said to be engaged, although in a very subordinate degree, in the essential functions of maritime transportation. It is not contended that no case can be found in which the jurisdiction may not have been recognized on other incidental grounds, but it is believed that this is the true and reasonable distinction, both on principle and by the great weight of authority. The safe and practicable channel of the authorities is marked out, not by the ripple of an occasional adjudication, but by the steady flow of concurrent cases, progressing in harmony with established principles. In *Cope v. Dock Co.*, 119 U. S. 625, 7 Sup. Ct. 336, the supreme court of the United States carefully and authoritatively discussed the limitations of admiralty jurisdiction in respect of structures lying near the boundary, and, once for all, it is believed, negatived the proposition that because such a structure floats on the water, and has some incidental relations to navigation and commerce, it is thereby brought within the domain of admiralty. The principles and reasoning of this case are believed to have finally disposed of some inclination, perhaps to be discerned in a few earlier decisions of lower courts, to extend the jurisdiction to everything that floats, or can be found to have some argumentative relation in its functions to navigation and commerce. In this case, Mr. Justice Bradley extendedly quotes from *The Mac*, 7 Prob. Div. 126, 130, in which a "hopper barge," used for receiving mud from a dredging machine, and carrying it out to deep water, though it had no means of locomotion of its own, but was towed by other vessels, having nevertheless a bow, stern, and rudder, and being steerable, was held by the court of appeal in England to be a "ship," within the English merchant shipping act. In the course of the quotation so made by Mr. Justice Bradley, it was said by Lord Justice Brett: "This hopper barge is used for carrying men and mud. She is used in navigation; for to dredge up and carry away mud and gravel is an act done for the purposes of navigation. Suppose that a saloon barge, capable of carrying 200 persons, is towed down the river Mersey, in order to put passengers on board of vessels lying at its mouth; she would be used for the purposes of navigation, and I think it equally true that the hopper barge was used in navigation." At the close of this quotation, Mr. Justice Bradley adds: "Perhaps this case goes as far as any case has gone in

extending the meaning of the terms 'ship' or 'vessel.' Still, the hopper barge was a navigable structure used for the purpose of transportation." It is respectfully submitted that this language, in connection with the language cited, is significant and authoritative in respect of the test above contended for. In *The Alabama*, 22 Fed. 449, the libel was filed against a steam dredge, and her two consort scows (to which, when operating, the dredge delivered the mud excavated, to be in them towed away by tow boats) for towage from Mobile Bay, Ala., to Tampa, Fla. On appeal in the circuit court the jurisdiction was sustained, Mr. Justice Pardee saying in the course of his opinion (page 450): "It would be of no use to dig up the earth in the channel unless it should be transported away, and it could not be transported away unless it should first be dug out; and the whole business seems to be the transportation by water of earth and dirt from one place to another place. * * * The scows are movable things engaged in navigation. The dredge boat by itself might not be up to the test." In *The Starbuck*, 61 Fed. 502, the jurisdiction was sustained against a dredge and her carrying scows, it appears, on the ground that they were "one concern,"—it is believed in recognition of the distinction here insisted on. In *Pile Driver E. O. A.*, 69 Fed. 1005, it is pointed out that jurisdiction in admiralty against steam dredges legitimately rests on their being operated in connection with scows to carry the mud dredged, that being essentially a marine transportation. Even in *The Pioneer*, 30 Fed. 206, which sustained the jurisdiction on other reasoning, it appears by the report that the dredge libeled in that case was operated in connection with scows to carry the earth dredged, although it is not stated that the scows were joined in the libel. Nor would such joinder seem necessary to support the jurisdiction. If, as a whole, the dredge and scows formed a maritime thing, it would appear that a libel must be sustained against any portion of it brought by seizure within the decreeing power of the court. With great deference to the distinguished judge who decided *The Pioneer*, last cited, it is believed that the reasoning which declared her maritime because she carried her own internal and functional viscera is unsound and illusory. Mr. Justice Swan, in *Pile Driver E. O. A.*, 69 Fed. 1005, above cited, declares the doctrine of *The Pioneer* to be irreconcilable with the authorities, and expressly rejects that case. Perhaps in no case to be cited, where jurisdiction in admiralty has been sustained against a dredge, is this fact of a consortium and joint operation with carrying scows or barges to receive and transport, by water transportation, the material excavated, absent or to be fairly unimplied,—a factor already above urged to be the test, on principle, of the jurisdiction in the case of such structures. In the case at bar the material excavated and removed is pumped up from the bottom by the hydraulic or centrifugal pump, and is discharged through pipes to the adjacent land. The structure at bar has its operation through its immediate pipe nexus with the shore, and not by maritime transshipment by navigation as in the case of dredges operated in connection with scows or barges. It is, in its essence, a floating pump, capable of sucking up earth mixed with water, with its discharge pipe carried on shore. It is not believed that the structure at bar was removed into the category of a maritime thing, because one of its appurtenances was a scow on which was placed and stored its supplies of coal.

The analogies of related structures, in respect of which jurisdiction in admiralty has been denied, disallow the jurisdiction.

In *Cope v. Dock Co.*, 119 U. S. 625, 7 Sup. Ct. 336 (already cited), a floating dry dock in the Mississippi river, near New Orleans (used to receive vessels that they might be therein inspected and repaired), was struck by a steamship which stove her in below the water line, whereby she began to fill with water, and would have sunk or been lost without succor which was extended to her. The structure was ruled to be not maritime, so as to subject her to a libel in admiralty for salvage. It is to be remarked on the case last cited that the incidental functions in aid of the welfare and safety of commerce and navigation, of which a floating dredge, as a mechanism, may be capable in deepening and removing obstructions from navigable channels, no more in principle bring it within the jurisdiction of admiralty, as engaged in functions appertaining to commerce and navigation, than would the very important functions towards a like safety and welfare afforded by the mechanism of the dry dock in the case last cited. The argument that functions of incidental benefit

to commerce and navigation bring the subject-matter within the jurisdiction of admiralty proceeds on reasoning disallowed in *Edwards v. Elliott*, 21 Wall. 532, 554, in which the building of a ship was denied to be a maritime function. The preparation of a navigable channel, or the excavation of slips or docks, no more appertains to commerce and navigation than does the building of the ships designed to sail or lie in them. In the very recent case of *Pile Driver E. O. A.*, 69 Fed. 1005, the structure libeled (to enforce a lien for supplies under a state statute) was a floating platform about 60 feet long, 20 feet wide, and 2½ feet deep, equipped with a rudder and steering wheel, and having a stern wheel by which, when connected with the engine used to operate the pile-driving apparatus, the craft could be moved in the performance of its work, or from place to place in Alpena bay, or Alpena river, where it was to build docks or drive piles. On this platform were placed a pile-driving mechanism, and an engine and boiler to operate the same. It was the business of the craft to drive piles and build docks. The platform or floating substructure (the pile-driving apparatus having been removed for that purpose, and placed on shore) had on two occasions, a number of years before the supplies in question were furnished, been used to transport on the water cedar ties and gravel. It appeared that persons connected with the management of the structure lived on her, where cooking was done for them. Upon very full and able consideration and examination of the authorities, Judge Swan ruled in this case that the state lien could not be enforced in admiralty unless the structure in respect of which it was asserted was maritime within the rules of that jurisdiction; that the functions of the pile driver were not maritime under those rules; that, to be within that jurisdiction, the structure in question must not only float, but must float for the performance of essentially maritime functions appertaining to commerce and navigation; and that the jurisdiction must be declined. The careful attention of the court to this *Pile Driver Case* is respectfully asked. Its analogies are submitted to be remarkably close to, if not identical in principle with, those of the case at bar. Its reasoning on the authorities is believed to be unanswerable.

In *Maltby v. Steam Derrick Boat*, 3 Hughes, 477, Fed. Cas. No. 9,000, the libel was for salvage for raising a sunken steam derrick boat from the channel of the Blackwater river, in Virginia. The structure was a boat of two decks, with a mast for hoisting purposes, and a steam engine and machinery. It was without sails or means of self-propulsion. It was used for removing obstructions from the channel. The jurisdiction was contested, on the ground that the craft was not maritime, or designed for commerce and navigation. The court sustained the jurisdiction, on the ground that admiralty had cognizance of the salvage of property on navigable waters, irrespective of the consideration as to whether the thing saved was, or was not, maritime in quality. The conclusion of the court on that ground would seem to have been erroneously reached, under the doctrine of *Cope v. Dock Co.*, 119 U. S. 625, 7 Sup. Ct. 336, already cited, not then decided, in which case the contrary is intimated unless the property saved be lost from a maritime structure. In the quite recent case of *The Big Jim*, 61 Fed. 503, a libel for wages was filed against a marine or hydraulic pump ballasted on piles, but capable of being towed from place to place where her services were needed, and which had been so towed, and which was used to suck up mud from the bottom of the water, or from scows alongside, and to force it by steam power on the adjacent land. It is believed to be necessarily inferred from the report (which is brief and with few details) that the pump was erected on a floating boat or platform, since the nautical terms of the "towing" and "ballasting" of the structure, used in the report, are not otherwise to be accounted for. The court ruled the structure not to be maritime in nature, within the rules of admiralty, and declined jurisdiction. The analogies of this case to the facts at bar are respectfully urged to be very close. The sucking up of the mud by the pump, and its being forced by steam power on shore, are essentially identical with that operation of the dredge in the case at bar. It is to be remarked that this case was decided on the same day with *The Starbuck*, 61 Fed. 502 (already cited), in which the same learned judge ruled in favor of the jurisdiction over a dredge and her consort scows "as one concern," as I have already submitted in recognition of the distinctions contended for here. In *The Hendrick Hudson*, 3 Ben. 419, Fed. Cas. No. 6,355, jurisdiction was declined of a libel for salvage

of a floating hulk of a dismantled steamboat, fitted up for a saloon or hotel, which was being towed from one point to another on the Hudson river. Judge Blatchford broadly discussed the limitations on the jurisdiction, and said: "The fact that the structure has the shape of a vessel, or had been once used as a vessel, or could by proper appliances be again used as such, does not affect the question. The test is the actual status of the structure, as being fairly engaged in commerce or navigation. A contract, claim, or service to be cognizable in admiralty must be maritime, in such a sense that it concerns rights or duties appertaining to commerce or navigation. [Citing authorities.] Though the service in the present case was maritime in one sense, because the hulk was in the water, yet it was not maritime in such a sense as to bring the case within the admiralty and maritime jurisdiction of this court. * * *

The service did not fairly and legitimately concern any right or duty which appertained to commerce or navigation, or to a structure engaged in commerce or navigation." The case of *The Hezekiah Baldwin*, 8 Ben. 556, Fed. Cas. No. 6,449, was a libel for repairs to a floating elevator in New York harbor, of which the court entertained jurisdiction. The structure transferred grain by its machinery from one barge or vessel to another. The jurisdiction is to be sustained by the test of the maritime transportation which the structure effected, and in which it was a factor. This aspect of that case is expressly noted by Judge Pardee in the analogies, which, in *The Alabama*, 22 Fed. 449 (already cited), he points out between the maritime transshipment effected by the floating elevator in question, and the same effected by the dredge in its delivery of its excavated mud to its consort-carrying scows, in the case of the dredge and scows before him for decision. The case of *The Hezekiah Baldwin* lies close to the boundary line, but is perhaps soundly decided. The structure was a floating link in a continuous transportation of merchandise by water. The same learned judge, in *Woodruff v. One Covered Scow*, 30 Fed. 269, sustained a libel for a lien for wharfage under the state law, against a floating scow or platform, on which a house was built, moored by lines to one of the docks in New York harbor, and there rising and falling with the tide, used for the storage of oars and sails of small craft landing near by, and as a means to afford persons egress from small boats to the adjoining wharf, and thence to the shore. The learned judge ruled that the structure could not be held to be a "ship" or "vessel," but sustained the jurisdiction, on the ground that the dock service to the house boat was maritime, it being used in connection with and having relations to navigation and commerce. This decision was rendered February 18, 1887, and would seem contradictory of the principles laid down in *Cope v. Dock Co.*, 119 U. S. 625, 7 Sup. Ct. 336, decided but a few weeks earlier (in January, 1887), which was not cited or referred to by the learned judge, and may be assumed not then to have been published or brought to his attention. This house boat would seem, on principle, to be no more maritime than a moored dry dock, or a floating bethel, hotel, or circus, or a floating warehouse in which sails or rigging might be stored. In *Ruddiman v. A Scow Platform*, 38 Fed. 158, jurisdiction of a libel for wharfage against a moored floating structure (with physical analogies akin to those of the structure before the court in *Woodruff v. One Covered Scow*, last cited) was, with better reason, declined, upon a reference (inter alia) to *Cope v. Dock Co.*, 119 U. S. 625, 7 Sup. Ct. 336. In *The W. F. Brown*, 46 Fed. 290, a floating house structure was towed by a propeller from Evansville, Ind., to New Orleans, being at intermediate points moored to the shore, whereupon exhibitions of a circus were given on her, the spectators coming from the land. The case is somewhat obscurely reported, but it is perhaps to be gathered that the propeller and the floating circus house were one plant, belonging to the same owner. Two libels were filed against the propeller,—one by her engineer for services; the other by performers on the circus boat, who, it would appear, had been employed to perform also some duties in and about the management of the propeller. It is not stated whether or not the circus boat was embraced in the libel. The court held the propeller engaged in maritime functions in the course of the towage, and sustained the libel of the engineer. As respects the performers, the court ruled that their services on the whole case were not maritime, and refused to exercise jurisdiction on their behalf. This case is cited, not as having close analogies to the case at bar, but as illustrating the extent to which structures may float or be towed on navigable waters, with

extended changes of place; yet, nevertheless, as in the case of the circus boat, not in the exercise of maritime functions.

It is to be here remarked, that the cases cited clearly show that a capability of being towed through the water from place to place, where the functions of a floating structure are desired to be exercised, forms no intrinsic test of the quality of the structure as maritime, for the purposes of admiralty jurisdiction. The floating dry dock above mentioned was undoubtedly capable of being towed, and being placed in position elsewhere in the river in which she lay, were that deemed advantageous. The Big Jim hydraulic pump was fitted to be towed for a change of position, and had been towed. Such, too, was the case of the hotel and saloon boat. The voyage of the circus boat, towed from Evansville to New Orleans, covered an extended stretch on navigable waters. In the cases of the pile driver and of the steam derrick boat, the capability of being moved on the water without difficulty, from place to place where it was desired to operate them, was an essential part of their structure. Nor is any such test to be found in the fact that such structures may be so shaped or fitted as to facilitate or conveniently accommodate themselves to such a movement on the water.

In conclusion on this branch of the case, it is respectfully insisted that, on the facts and on principle and authority, the structure libeled in the case at bar is, in the language of the answer, "in essence and substance merely a floating tool or implement, * * * and is not a structure or maritime creature subject to the jurisdiction invoked in this cause." Being assured of the careful scrutiny by the court of the stipulation of facts, I have not discussed in detail the elements of fact embraced therein. It is not believed that the men who operated the dredge can be regarded, under the circumstances of that operation, and in connection with their duties on the shore, and of their sleeping and eating there, as sailors or mariners. It is respectfully submitted that they were artisans or laborers, pure and simple, engaged in the operation of a machine. In *Edwards v. Elliott*, 21 Wall. 532, Mr. Justice Clifford remarked (page 554) on the distinction between artisans having their homes on the land and seamen living on the seas. It would seem a misnomer to attribute a maritime quality to the structure which plowed its way over prairies and meadows, as is set forth in the statement of facts. The mere fact that this was accomplished by the use of water fed to and under the dredge did not, it is believed, make it maritime in that operation, although it floated and progressed on that water, and made it a navigable channel.

Could the dredge be held "a vessel" or maritime structure, the libel could not even in that event be sustained for the supplies furnished, in the case at bar, to enable it to pursue its employment in making land for the railroad uses of the Illinois Central Railroad Company.

That employment is set out in the agreed statement of facts, and the coal in question was consumed and used by the dredge in the course of that employment. That employment was essentially a common-law land service, as much so, in principle, as would have been the construction, from a structure floating in the adjacent slip, of a warehouse for the railroad company on the land so provided. The service performed was in no legitimate sense maritime or appertaining to commerce and navigation. Could the court below, sitting in admiralty, take cognizance in rem against the dredge on the libel of the Illinois Central Railroad Company for the nonperformance of the contract to make or fill in this land? Could that be held a maritime contract? The building of docks and wharves has no such relation to commerce as to justify the jurisdiction of admiralty over the instruments of their construction. The *Pile Driver E. O. A.*, 69 Fed. 1005. It appears by the agreed facts that the contract was to make or fill in the land, and not to deepen the channel on which the dredge floated. No maritime lien can arise, as has been already shown, in respect of a contract or service not maritime in its nature. The functions in which the ship or vessel is engaged at the date of the contract or service is the test. On this ground the court in *The Pulaski*, 33 Fed. 383, declined jurisdiction in rem in respect of a contract for the storage of wheat in a schooner laid up for the winter, which wheat was alleged to have been damaged because of the hatches not being properly covered and protected. In a like case, and on the same ground, this circuit court of appeals, in the late case of *The Richard Winslow*, 18 C. O. A. 344, 71 Fed. 426, declined jurisdic-

tion in admiralty in respect of a similar contract. In both of these cases the contract was in connection with a contract for the carriage of the grain on navigable waters. Although it is a general rule that a contract is an entirety, nevertheless the court in each case, scrupulous as to exercising an illegitimate jurisdiction, discriminated the subject-matter of the contract as of a dual nature, and declined to take cognizance of that portion of it which did not appertain to navigation and commerce. On analogous grounds, in *The Murphy Tugs*, 28 Fed. 429, the use of a slip or dock by a vessel tied up on the lakes for the winter was ruled not maritime, the vessel being not then engaged in the functions of commerce and navigation. Other cases where, on like principles, jurisdiction was declined, are pointed out in the opinion of Mr. Justice Jenkins, in *The Richard Winslow*, above cited. If the person furnishing supplies to a vessel must furnish them on her credit,—and this is indispensable in admiralty, where reliance is had on a state lien, even although the state law contain no such requirement (*The Lena Mowbray*, 71 Fed. 720, and cases there cited),—he must in like manner also necessarily see to it, for the purposes of resort to and cognizance in admiralty, that this credit is extended to the vessel in the course of a maritime matter or employment.

On the whole case, the floating machine at bar is not within the reason for privileged maritime liens in the admiralty.

In *The St. Jago De Cuba*, 9 Wheat. 409, the court discussed the foundations in principle of the privileged liens of admiralty (overriding other rights and interests), and said (page 416): "The whole object of giving admiralty process and priority of payment to privileged creditors is to furnish wings and legs to the forfeited hull, to get back for the benefit of all concerned; that is, to complete her voyage. * * * In every case the last lien given will supersede the preceding. The last bottomry bond will ride over all that precede it, and an abandonment to a salvor will supersede every prior claim. The vessel must get on. This is the consideration that controls every other; and not only the vessel, but even the cargo, is sub modo subjected to this necessity." Such a structure as is before the court in this case is in no just sense within the considerations thus pointed out. The reasons for a privileged maritime lien are not applicable to such a structure. There is no voyage or cargo at hazard. There is no maritime exigency. "*Cessante ratione legis, cessat ipsa lex.*"

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge, upon this statement of the case, delivered the opinion of the court.

The allowance of a maritime lien for services and supplies had its origin in the necessities of trading vessels visiting distant ports, where the master and the owner would presumably be without credit to obtain them. The lien was created for the benefit of the vessel, and not for the benefit of the creditor, and to enable the vessel to pursue her voyage, and because the ship is made to "plow the sea, and not to rot by the walls." Henry, Adm. § 43; *The St. Jago De Cuba*, 9 Wheat. 409. Such liens take precedence of antecedent charges upon the vessel because of the paramount necessity for the service and the supplies, which tend to the preservation of the res. The lien was not allowed for necessary supplies furnished at the home port of the vessel, where presumably the owner and the master had credit, although the subject-matter of the contract to furnish them was of a maritime nature. The water-craft laws of Illinois allow a lien for supplies in the home port, which the admiralty, the subject-matter being maritime and within its jurisdiction, will recognize and enforce. The question here is therefore this: whether the contract for the supply of coals was maritime in its nature. If not, we need not stop to consider the interesting question argued at the bar, whether this steam dredge was a vessel, and subject to the jurisdic-

tion of the admiralty. We abstain, therefore, from a review of the many cases to which we are referred, not altogether at agreement, nor wholly in accord with the principle underlying the jurisdiction of the admiralty, speaking to the question of admiralty jurisdiction over a steam dredge or like floating structure. It is perhaps pertinent to suggest and sufficient to say, as was said in *Cope v. Dock Co.*, 119 U. S. 625, 7 Sup. Ct. 336, that the fact that a structure floats upon the water does not of itself make it a ship or vessel; for then a floating church or a floating barroom or a floating circus would come within the admiralty jurisdiction,—a conclusion which cannot be tolerated. The thing, the structure,—by whatever name it may be known,—must be engaged in, or in some sense related to, commerce and navigation. The decisions holding that a steam dredge is within the admiralty jurisdiction may perhaps be rested upon the ground that a dredge is not only a floating structure upon the waters, but, as stated by Judge Pardee in *The Alabama*, 22 Fed. 449, is accompanied by a scow, and that the scow and the dredge are to be deemed one movable thing upon the waters, engaged in a common enterprise, and carrying the excavated earth by water transportation, and so engaged in navigation and related to commerce. Judge Pardee observes, however, that “the dredge boat by itself might not be up to the test.” In like manner, the supreme court, in the case cited, spoke of the case of *The Mac*, 7 Prob. Div. 126, as going somewhat to an extreme in defining the meaning of the terms “ship” and “vessel,” and said that a “hopper barge was a navigable structure used for the purpose of transportation.” Here the floating structure was not operated for the maritime transportation of the material excavated by scows or barges, but it discharged upon adjacent land, and through a line of adjustable pipes, the earth sucked up from the bed of the lake. It is insisted that here is no element of navigation beyond the fact, which is not controlling, that the thing was a floating structure upon the water, and therefore such structure is not within the admiralty jurisdiction. The question is interesting, but we do not think it necessary to pursue it.

Upon the assumption that the structure in question is a ship or vessel, and within the admiralty jurisdiction, that jurisdiction will not be asserted to enforce a contract touching the ship, unless such contract is maritime in its nature. *Insurance Co. v. Dunham*, 11 Wall. 1. The admiralty deals alone with things pertaining to the sea. We declared in *The Richard Winslow*, 34 U. S. App. 542, 18 C. C. A. 344, and 71 Fed. 426, that “a maritime contract must therefore concern transportation by sea. It must relate to navigation and to maritime employment. It must be one of navigation and commerce on navigable waters.” It was there pointed out that not every contract having reference to a ship is within the admiralty jurisdiction, but only such as relate to maritime employment, such as pertain to the navigation of a ship or assist the vessel in the discharge of a maritime obligation. It is not enough that the service is to be done upon the sea or with respect to the ship. It must relate to trade and commerce upon navigable waters. The coals furnished by libellant were supplied to the dredge while it was engaged in its work for the Illinois Central Railroad Company, and to enable it to perform that work, which was “to fill in earth for its railroad purposes behind a line of

piling on its grounds on the lake front in Chicago." By means of its cutting apparatus, the earth on the bed of the lake was dug up, loosened, and disintegrated, and, with the adjacent water, sucked up into and through a centrifugal pump, and thence discharged through a continuous line of adjustable pipes to the place of deposit upon the adjacent shore. This is not a maritime employment. The fact that the dredge floated upon navigable waters is not controlling. The dredge in the performance of that contract was not engaged in navigation, nor even in the marine transportation of the earth dug from the bed of the lake. To the contrary, a peculiar mechanism dispensed with the necessity of marine transportation. The employment related solely to the land, to the creation of an embankment upon the land for the use of a railway upon the land. The only possible relation to the sea in this employment was in this: that for the purpose of obtaining the earth, and as a necessary incident thereto, the bed of the lake was dug out, and thereby the channel was deepened. That was not, however, for the purposes of navigation. It is not suggested that vessels engaged in navigation frequented the place; that wharves were constructed or designed; or that the excavation was for the purpose of or in aid of navigation. The work was done in and for the construction of an embankment upon the land, and for railroad purposes. The earth was taken from the bed of the lake because more convenient to the place of deposit, and less expensive than when brought from a distant point on land. The effect upon the channel was incidental and subordinate. The work had no possible relation to marine transportation. It is of no moment that the structure floated upon the water, and dug out the bed of the lake. That does not give marine character to this employment. The admiralty deals with vessels which "plow the sea," and with contracts touching navigation. In *The Richard Winslow*, supra, we held that a contract for storage of grain during the closed season of navigation was not maritime. The present case falls within the principle of that decision. It may be that this structure could engage in a maritime service, and its maritime engagements brought within the jurisdiction of the admiralty. It is enough to say that in the performance of its contract to plow the prairies of the state of Illinois, or in the construction of a railway embankment upon land, to dig up the bed of the lake, and shoot the earth through tubes for deposit on the land adjacent, it was not so employed. The supplies furnished to enable the dredge to perform a contract not maritime cannot attain to the dignity of a maritime lien.

It is of no moment to say that the coals supplied were furnished to the dredge from barges or scows, and that, therefore, there was maritime transportation. With equal propriety could it be asserted that supplies furnished by scows to a floating church, a floating drink shop, a floating dance hall, or a floating circus, gave to such enterprises a maritime nature. The question is not whether navigation was employed to supply the coals, but whether the dredge was engaged in commerce and navigation, so that the supplies furnished, being in aid of navigation, can be charged as a maritime lien upon the dredge. We are of opinion that the libel was properly dismissed. Decree affirmed.

THE EDMUND PHINNEY.

CLAYTON v. HEBB.

(Circuit Court of Appeals, Fourth Circuit. May 5, 1897.)

No. 202.

COMPULSORY PILOTAGE LAWS.

The provision in the Maryland statute (Acts 1896, c. 40), exempting from the compulsory pilotage law vessels "laden either in whole or in part with coke or coal mined in the United States," applies only to vessels which, in a commercial sense, are coal-laden, or carry a reasonable quantity to constitute a cargo, and not to one which carries only a small quantity (25 tons) as ballast.

Appeal from the District Court of the United States for the District of Maryland.

Robert H. Smith, for appellant.

Stewart Brown and Geo. Stewart Brown, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

GOFF, Circuit Judge. John S. Hebb, the appellee, filed a libel in the district court of the United States for the district of Maryland against Frederick L. Clayton, agent and consignee of the American bark Edmund Phinney, in a cause of pilotage civil and maritime. He alleged that he was a duly-licensed pilot, authorized and competent to pilot vessels of any tonnage and class over the waters of the Chesapeake, to and from the Atlantic Ocean; that the Edmund Phinney was an American vessel of between 700 and 800 tons burden, registered in the port of Portland, Me., in the name of J. S. Winslow & Co., as owners, of which Frederick L. Clayton was the agent and consignee in the port of Baltimore; that said vessel, laden with a full cargo of lumber, had cleared and was ready to sail from the port of Baltimore to a foreign port, to wit, to Rosario, on the river Platte, in South America; and that, as so laden, she drew rather more than 16½ feet of water. It is also set forth in the libel that under the provisions of the Code of the state of Maryland, as amended and re-enacted by the act of the general assembly of that state (chapter 40, Acts 1896), it is, among other things, provided that "all vessels sailing under register bound to and from Baltimore city (except vessels employed in and licensed for the coasting trade and American vessels laden either in whole or in part with coke or coal mined in the United States), shall take a licensed pilot or in case of refusal to take such pilot shall themselves, their owners or consignees, pay the said pilot, as if one had been employed, and such pilotage shall be paid to the pilot first speaking to such vessel (before Cape Henry bears south, if inward bound)." Also, it is alleged that the said Edmund Phinney, being so laden and ready to proceed on her voyage, the appellee, as a duly-licensed pilot, made application to both the captain and to said Frederick L. Clayton, the consignee, and offered himself ready and willing to pilot her to sea, but that both of them declined the offer and refused to take the pilot; that thereupon, he having so offered, and they having so refused, he presented to said captain and consignee a bill for pilotage, which, under the law, amounted to

\$82.50, but that payment of the same was refused; that he was informed by them that their excuse for not accepting a pilot was that, in addition to the cargo of lumber aboard said vessel, they had shipped a quantity of coal mined in the United States, amounting to from 20 to 25 tons in all, and that by reason of such alleged shipment of coal they claimed that the vessel was "laden in part with coal mined in the United States," and that it was therefore exempt from the demand of pilotage. The libel then claimed that such shipment of coal, if made, was not in the usual and regular course of trade to the port of destination, but that the same was colorable merely, and made for the express purpose of evading the requirements of said pilot laws, and that, as it was made for the purpose of evading the law, it was not within the fair and reasonable intent of the same, nor of its proper construction, and that, therefore, the vessel was not "laden in part" with coal so mined, and not exempt from paying the pilotage fees so demanded. Hence he prayed a decree against the consignee for the sum of \$82.50. The answer of Clayton admitted that the Edmund Phinney was an American vessel of about 650 tons burden, hailing from the port of Portland, Me.; that he was the agent of the vessel in the port of Baltimore for procuring a cargo for her, and that he was her consignee for such purpose; that she was laden in the port of Baltimore, but not that she was fully laden with lumber; that she cleared and sailed from Rosario, in South America, and that when laden she drew about 16½ feet of water. He alleged that the vessel was partly laden with coal mined in the United States. He denied that the libellant made application, either to him or to the master, after the vessel was loaded, or at any other time, to pilot her to sea, and he denied that any bill for pilotage had been presented to him. He admitted that the vessel did not take a pilot on the voyage from Baltimore, mentioned in the libel, and claimed that there was no obligation on her part so to do, and that a pilot was not needed. He set up that the vessel was partly laden with coal mined in the United States; that she carried 25 tons or more at the bottom of her hold, the balance of her cargo being lumber; and that both the coal and lumber had been shipped in the usual way. He claimed that the vessel was exempt from all pilotage charges. He denied that the coal was shipped for the purpose of evading the pilot laws, and claimed that there was no ground upon which any claim for pilotage could be lawfully made. The case came on to be regularly heard, when quite a number of witnesses were examined in open court, all the testimony being set out in the record. The district judge entered a decree in favor of the libellant for the sum claimed, together with the costs of the suit. From that decree this appeal was sued out.

The decision of the questions raised by the assignment of errors depends upon the meaning of the amendment to the Maryland Code, set forth in the libel,—upon its proper construction. There is no material conflict in the testimony, and no trouble as to the facts. The case is so clearly stated in the opinion filed by Judge Morris in the court below, and the construction he gives the legislation in question coincides so fully with the conclusion we reach, that we deem it eminently proper to adopt his views as the judgment of this court. We quote from his opinion, as follows:

"The legislature of Maryland, by the amendment to the pilot laws contained in the act of 1896 (chapter 40), did not intend to exempt all American vessels bound to or from Baltimore, engaged in foreign commerce, from the payment of pilotage, but only those laden in whole or in part with coke or coal mined in the United States. The exemption obviously was intended as a relief or encouragement to the coal trade. Being a statute to affect trade and commerce, it should receive a sensible construction, looking to its object. It was intended to continue to the pilots their statutory fees for compulsory pilotage, unless the fact of the cargo which the vessel was carrying made it an advantage to the coal trade to exempt her. It would seem, therefore, that to hold that putting on board a few bushels or a few tons of coal gratifies the law is to defeat the law in both these respects. It deprives the pilots of their fees, and does not benefit the coal trade. In the present case a vessel of 657 tons was chartered to take a full and complete cargo of spruce lumber to South America, but the owners reserved the privilege of putting some coal on board as part of her ballast. They bought 25 tons at a cost of \$55, and put it in the hold as ballast. The pilotage fees amount to \$82.50. The agent of the owners confesses that the incidental advantage of escaping pilotage was a motive, but states that he had also the wish to try the market for coal at the vessel's port of discharge, never having before made a shipment there. Obviously the owners could not lose, for they would be gainers even if they had to throw the coal overboard. I think, to be entitled to exemption, the vessel's cargo must, in some substantial proportion, consist of coal or coke, and that this vessel was not in part laden with coal, in any fair commercial sense. It is not sufficient, in my opinion, to entitle the vessel to exemption, if the quantity is of no commercial value as a shipment. Legislation with regard to commercial matters should be construed, if the language will permit, so as to give effect to the scheme which it is apparent the lawmakers had in mind; and it cannot be supposed that when the legislature of 1896 amended a general law, intended to provide for the support of pilots, by introducing into it an exemption in favor of vessels carrying coal, they intended to leave the law in such a state that it would deprive the pilots of their support without benefiting the coal-exporting trade. It is urged against the proposed construction that it will become a matter of doubt and dispute, as to every vessel which has any coal aboard, whether or not it is sufficient to enable her to say that she is laden in part with coal. But this is a difficulty which attaches to all similar legislation. It must be determined by considering all the circumstances by which reasonable men would be controlled in similar business transactions. If the legislature has failed to establish a definite criterion which can be applied with certainty, all that can be done is to apply a reasonable one. It is a matter of common knowledge in the port of Baltimore that coal is usually shipped in full cargoes, but it is also a fact that, for long voyages, coal is sometimes too weighty if the vessel is filled full, and, therefore, lighter cargo is used to fill up the vessel. It is not improbable that it was for this reason that the legislature, intending to favor the coal trade, provided that vessels should be exempt even when not fully laden with coal, and that it should be held to be essential to entitle a vessel to the exemption that she should be, in a commercial sense, a coal-laden vessel, carrying a reasonable quantity to constitute a cargo, looking to her capacity and the voyage she is to sail. In the present case, at all events, it seems to me clear that one car load of coal, belonging to the owners and of less value than the pilot fees, dumped as ballast into the hold of a large vessel, which was under charter to carry a complete cargo of lumber, is not a substantial part of her cargo, but is an attempt to evade the law. The other points are not strongly insisted, and I think could hardly constitute a good defense. The statute obviously contemplates that the consignee, as well as the vessel's owner, shall be liable. It seems to me that the offer of a pilot was made in good faith. It was made by a pilot who was competent and qualified to take the vessel himself, and the offer was declined solely and openly upon the ground that the vessel was not required to take a pilot because she had on board a cargo partly of coal. The issue was intended to be raised, and it seems to me that it was distinctly raised, and that what took place was an offer and a refusal. I shall sign a decree for the libellant."

The decree appealed from is affirmed.

SIMPSON et al. v. WARD et al.

(Circuit Court, S. D. New York. April 24, 1897.)

FEDERAL COURTS—ENJOINING SALES ORDERED BY STATE COURTS.

After the entry of an order in a state court dissolving a corporation and ordering a sale of its property, consisting chiefly of real estate, certain members of the corporation (some of whom had had notice of the proceedings in the state court two years before, but had taken no action) applied to the federal court to restrain the sale, on the ground that the state court was wholly without jurisdiction. *Held*, that such injunction should not be granted.

Application for an injunction to restrain the sale by receiver, under a judgment of the state court, of the property of the Peekamoose Fishing Club, a state corporation dissolved by special proceeding in the supreme court of the state under section 2420, Code Civ. Proc.

Benjamin F. Tracy, for plaintiffs.
David McClure, for defendants.

LACOMBE, Circuit Judge. Complainants' contention is that their bill is not obnoxious to section 720, Rev. St. U. S., and the many decisions holding that the federal courts will not interfere with proceedings in the state courts, for the reason that the supreme court was wholly without jurisdiction of the subject-matter,—having no power, under section 2420 of the Code, to dissolve a corporation which has no stock,—and that the judgment decreeing dissolution, appointing a receiver, and ordering sale is wholly void. If this be so, then the purchaser at the sale will take no title, and the receiver will be personally liable for all damages sustained. Inasmuch as the property is nearly all real estate located in a thinly-settled part of the state, it is difficult to see how any such irreparable injury would result as to make it necessary to issue a preliminary injunction. Moreover, if the complainants' contention as to section 2420 be sound, then the corporation itself was never dissolved. It is the property of the corporation which is offered for sale, and any proceedings to restrain or postpone the sale should be brought by the corporation, which owns the property, not by individual members, who do not hold the title, and whose bill of complaint fails to comply with the requirements of the ninety-fourth rule in equity. It further appears that one, at least, of the complainants, was advised two years ago of the pendency of the proceedings for dissolution. It was open to him to apply to the state court for leave to present the objection to such proceeding which is now relied upon. The state court was the proper tribunal to pass upon that objection, since it is a question of the construction of a state statute regulating special proceedings for dissolving state corporations. Complainants, by failing to make any effort to present this objection in the proper forum and at the proper time, have been guilty of such gross laches that they are in no position to invoke the favorable consideration of

a court of equity, or to ask for an injunction to restrain the receiver appointed by the state court from carrying out its instructions. The motion is denied, and restraining order vacated.

LILIENTHAL v. DRUCKLIEB et al.

(Circuit Court, S. D. New York. February 16, 1897.)

1. FEDERAL COURTS—JURISDICTION—RIGHTS UNDER STATE STATUTES.

Whenever a statute of a state gives a right, such right may, on proper citizenship, be enforced by suitable proceedings in the federal courts.

2. SAME—FRAUDULENT CONVEYANCES—FOREIGN CREDITORS.

Under chapter 740, Laws N. Y. 1894, providing that a creditor of a deceased insolvent debtor, having a claim over \$100, may disaffirm, treat as void, and resist all acts done and conveyances made in fraud of creditors by such debtor, and may maintain an action for the purpose, though no judgment has been obtained, a foreign creditor of a deceased debtor may maintain an action in a federal court in New York to set aside transfers made by him, though no judgment has been obtained in New York and no administration has been taken out there.

3. FOREIGN JUDGMENTS—FRAUDULENT CONVEYANCES.

A judgment of a French tribunal, adjudicating that a wife is entitled to a certain amount of property as against her husband, both being residents of France, which judgment has been voluntarily liquidated by him in part, is sufficient to constitute the wife a creditor of the husband for the purpose of bringing suit to set aside his fraudulent conveyances under Laws N. Y. 1894, c. 740.

William H. Blymyer, for plaintiff.

Henry B. Twombly and Louis O. Van Doren, for defendants.

WHEELER, District Judge. This suit is brought to reach property that was of Maurice Lilienthal, husband of the plaintiff, deceased, both of Paris, France, which is alleged to have come into the hands of the defendants here in fraud of the rights of creditors. The plaintiff has no judgment here on which execution could issue against the property, and no administrator has been appointed here. Without these, by the common law well established, the plaintiff would have no standing here. But by chapter 740 of the Laws of New York of 1894, amending chapter 314 of the Laws of 1858, as amended by chapter 487 of the Laws of 1889, any executor or administrator may, for the benefit of creditors, disaffirm, treat as void, and resist all acts done and transfers and agreements made in fraud of the rights of any creditor; "and any creditor of a deceased insolvent debtor having a claim or demand against the estate of such deceased debtor exceeding in amount the sum of one hundred dollars, may, in like manner, for the benefit of himself and other creditors interested in the estate or property of such deceased debtor, disaffirm, treat as void, and resist all acts done, and conveyances, transfers and agreements made, in fraud of the right of any creditor or creditors, by such deceased debtor, and for that purpose may maintain any necessary action to set aside such acts, conveyances, transfers or agreements; and for the purpose of maintaining such action, it shall not be necessary for such creditor to have obtained a judgment upon

his claim or demand, but such claim or demand, if disputed, may be proved and established upon the trial of such action."

This statute is said, in argument, to furnish no warrant for this suit here. But, whenever a statute of a state gives a right, the right given may, on proper citizenship, be enforced by suitable proceedings in the federal courts. In *re Broderick's Will*, 21 Wall. 503; *Ellis v. Davis*, 109 U. S. 485, 3 Sup. Ct. 327; *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495. The plaintiff had property when she was married, in 1865. It came into the possession of her husband, and by the French law, as shown by a witness learned in that law and not disputed, she was entitled to a judgment of separation of her goods against him in the civil tribunal of the Seine, Paris. She has proved such a judgment March 7, 1892, in that tribunal, with a reference to a notary in liquidation, by an examined copy, and a liquidation at 161,362 francs, with interest, upon which he made satisfaction in furniture, towards interest, of 9,957 francs, leaving the balance unsatisfied, which has so remained. This may be such a judgment upon the status of the property of the parties under their marital relations in the country of their domicile as will be recognized everywhere. *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139. But, whether it is by itself so or not, his recognition of it by voluntary satisfaction of it would be a valid recognition of it as a debt of that character to the amount remaining, which seems to be equal to \$29,166.77, besides interest, and many times more than the \$100 required by the statute of New York mentioned. As, by the statute, she need only show that she is a creditor, this seems to be sufficient, taken all together, to show that she is such.

The fraudulent transactions were had in 1888 and 1889, some time before this judgment, and she is said not to have been then so a creditor that she could be defrauded by them. The husband, however, appears to have disposed of her property, which went into this judgment in 1888, and if that was the foundation of her claim it was nearly contemporaneous with the transaction. But the testimony of the same witness shows that by the French law the estate of the wife does not become the property of the husband by being reduced to his possession, but remains hers, and is separated, as having been hers all the while. This seems to be so upon the authorities. 2 Kent, Comm. 185. So she is a creditor, against whom the fraud charged would operate and might have been directed.

Lilienthal had a store in New York, of which the defendant Charles Drucklieb had been in charge for a few months, with goods and dues to the amount and value, in all, of about \$15,000, and perhaps much more. These are claimed to have been bought for \$100 and wages at a time when a judgment of \$14,000 against Lilienthal in New York was impending. That the transaction was a sham is apparent, and the various stories of the defendants about how it was carried on make this the more clear. Julius Drucklieb became a partner with Charles in the same store and with the same goods. The amount received by the defendants is not clear. The defendant Charles Drucklieb has, on legal proceedings, been compelled to pay over quite large amounts to other creditors of the plaintiff. He says, in his

testimony, that he expended \$3,100 in litigation about this, and had about \$500 left from the whole, which would leave about \$3,600 of avails of the property converted to his own use. No decree beyond this can safely be made upon the evidence. The case should go to a master to ascertain the amount of property and claims received by the defendants, unless the plaintiff prefers a decree for this amount. Decree for plaintiff.

BROWN et al. v. GROVE et al.

(Circuit Court of Appeals, Fourth Circuit. May 14, 1897.)

No. 211.

1. EQUITY PRACTICE—MASTER—REFERENCE DISCRETIONARY.

Reference to a master to ascertain an amount due is discretionary with the court, and the determination of the amount without such reference is not error.

2. WITNESS—PRIVILEGED COMMUNICATION—ATTORNEY AND CLIENT.

An attorney acting for a firm in completing arrangements for securing it by a trust deed for a line of credit to be allowed on goods to be ordered by the grantor is not disqualified from testifying as to the negotiations leading up to the deed by the fact that his fee for drawing it was paid by the grantor.

3. EVIDENCE—CONTEMPORANEOUS WRITINGS.

Writings contemporaneously executed by the parties to a deed of trust are admissible in evidence in a suit to enforce the trust, for the purpose of supplementing the deed and explaining the real intention of the parties.

4. EQUITY JURISDICTION—COMING INTO EQUITY WITH CLEAN HANDS.

A. agreed to give credit to B., who was financially embarrassed, in consideration of a deed of trust made by B., which, for business reasons, was executed to C., a clerk of A. In a suit to enforce the trust, *held*, that the defense that complainant did not come into equity with clean hands had no application, there being nothing illegitimate in the transaction; and that, in any event, the maxim could not be invoked by B., who had received the benefit of the transaction.

5. LIMITATION OF ACTIONS—DEED OF TRUST.

Under the statute of West Virginia, the period of limitation of actions to enforce a deed of trust given as security is 20 years.

6. SAME—CONTRACT IN WRITING.

Under the statute of limitations of West Virginia (Code, c. 104, § 6), a debt evidenced by contemporaneous memoranda made by each party to a deed of trust to secure the debt, as parts of the contract then made, and explaining and limiting the deed, is a debt evidenced by contract in writing, signed by the party to be charged, and therefore has 10 years to run.

Appeal from the Circuit Court of the United States for the District of West Virginia.

E. G. Smith, for appellant.

John Bassel, for appellees.

Before SIMONTON, Circuit Judge, and HUGHES, District Judge.

SIMONTON, Circuit Judge. This case comes up on appeal from the circuit court of the United States for the district of West Virginia. The bill was filed to enforce a deed of trust in the nature of a mortgage of a lot of land in Clarksburg, W. Va. Smith, Brown & Co. were merchants doing business in the town of Clarksburg.

Their establishment was consumed by fire. They were not insured, and the firm became greatly embarrassed. Wood, Brown & Co. were merchants of Philadelphia, with whom this Clarksburg firm had had much dealing. They came to the assistance of the Clarksburg firm, and agreed, upon security, to sell them goods on credit. The Philadelphia firm did not wish it to be published to the world that they were doing a large business with a firm so much impaired in credit as the Clarksburg firm. And therefore it was agreed between the two firms that the security should be executed to James A. Campbell, the head clerk of the credit department of the Philadelphia firm. The Clarksburg firm, in the impaired condition of their credit, did not wish published to the world the full extent of their liability. For this reason the deed of trust which was taken as security had this recital:

"Whereas, the parties of the first part [Smith, Brown & Co.] have accepted a certain business proposition of James A. Campbell, of the city of Philadelphia, and state of Pennsylvania, by which he, said Campbell, may, in case of accident and misfortune, under liability for the parties of the first part, and the parties of the first part being willing to secure said Campbell against such liability and loss, do for the consideration aforesaid," etc.

This paper is dated 23d of July, 1888, but the transaction was not completed, and the deed was not recorded, until the 13th of October, 1888. The negotiations were conducted by Mr. Bassel, who has as his client the Philadelphia firm. In August, 1888, he received a note from one of the firm of Smith, Brown & Co. in these words:

"Philadelphia, Pa., Aug., 1888.

"In consideration and for a deed of trust this day executed by Smith, Brown & Co. in favor of James A. Campbell, of Wood, Brown & Co., of Philadelphia, to secure said Wood, Brown & Co. against loss by reason of selling goods on open account to said Smith, Brown & Co., we hereby agree to extend to Smith, Brown & Co. a line of credit up to thirty-five hundred dollars, but not to exceed this amount at any one time.

"Mr. Bassel—Dear Sir: We think this about what we will want from Wood, Brown & Co. in the way of a consideration for the deed of trust. You will say to W., B. & Co. it is due S., B. & Co. to have such a paper, and that you hold the deed of trust subject to their orders on receipt of this paper.

"Yours, truly,

S., B. & Co."

Thereupon Mr. Bassel prepared the formal memorandum to be signed by the Philadelphia firm, as follows:

"Philadelphia, Pa., Sept. 18, 1888.

"Whereas, A. G. Smith, John W. Brown, and Beeson H. Brown, composing the firm of Smith, Brown & Co., of Clarksburg, West Virginia, on the 27th day of July, 1888, executed to John Bassel, as trustee, a deed of trust in favor of James A. Campbell; and whereas, the real purpose of said trust was to secure the undersigned, Wood, Brown & Co., against loss by reason of the sale of goods to said Smith, Brown & Co. upon credit, in consideration of the execution of the said deed of trust: We hereby agree to extend to the said Brown & Co. a line of credit to the amount of thirty-five hundred dollars, but not to exceed such sum at any one time.

Wood, Brown & Co."

The deed of trust was then delivered, and recorded in the proper office. The credit was given, and the amount of indebtedness incurred and now unpaid is \$4,466.97. In the meanwhile Wood, Brown & Co. have become insolvent, and have made an assignment for the benefit of *their* creditors, and this bill is filed by the assignee and by

James A. Campbell. The prayer of the bill, as has been stated, is a foreclosure of this deed of trust.

The defendants adopted three lines of defense: First, that the deed on its face declares that it was to indemnify James A. Campbell, and no one else, and that Campbell has sustained no loss whatever through them; second, that the alleged agreement between the two firms was fraudulent and void, and that the complainants do not come into equity with clean hands; third, they plead the statute of limitations. The circuit court overruled all of these objections, and gave judgment for the sale of the property, and for the application of the proceeds of the sale to the ascertained debt, with leave to enter judgment for any deficiency. The case is here on assignment of errors covering these points, and also directed to the order of the court, which was made without any reference to a master, to ascertain the amount due. It is also assigned as error that the court admitted the testimony of Mr. Bassel, who, it is alleged, testified to a privileged communication.

With regard to the course of the court in dispensing with reference, this was a matter wholly within its discretion. A reference is ordered when the court desires aid in coming to a conclusion of fact. But, if such conclusion can be reached without a reference, it need not be ordered. In the case at bar the amount claimed was represented by a short account, in no way complex. It was proved to the satisfaction of the court, and the conclusion was easily reached.

Mr. Bassel was the attorney of Wood, Brown & Co. He was charged with the duty of completing the arrangement with respect to the security they required. Having reached a conclusion as to all the terms of the agreement, he drew the deed of trust. The expense of drawing this deed was put upon the party who was obliged and benefited by the arrangement,—Smith, Brown & Co. They paid for the preparation of the deed \$2.50. This did not disqualify Mr. Bassel from testifying as to the negotiations leading up to the deed, and to the memoranda in writing with regard to it.

The deed was made in favor of James A. Campbell. The evidence of contemporary writings was introduced, showing why the deed was drawn in his name, and showing also the exact relation of Mr. Campbell, in the contemplation of both parties, to the deed. He was the agent of Wood, Brown & Co., and the title to the property was put in his name for their use and protection. These written memoranda, made contemporaneously with the deed, were clearly to explain and fix these ambiguous words used in it: "Whereas, the parties of the first part have accepted a certain business proposition from James A. Campbell." They distinctly show what Campbell's position and agency were, why the deed was made, and whom all parties intended to protect by it. It will not do, therefore, for Smith, Brown & Co. to say that the deed was intended to protect Campbell alone, and that he has suffered no loss. Their own memorandum contradicts this position. There is no attempt here to contradict or vary a written instrument. Writings entered into contemporaneously with the deed are introduced to supplement and explain that which evidently had not been fully expressed in the

written deed. It is clear that Campbell took that beneficial interest in the trust deed solely as agent or representative of Wood, Brown & Co., and solely for their protection. This was the intent and purpose of all parties to the transaction. *Jones v. Indemnity Co.*, 101 U. S. 622.

The appellants press upon the court the application of the maxim, "*Ex turpi causa non oritur actio.*" But there does not appear a case for the application of this wholesome maxim. Who complains of the transaction? There are no creditors before the court. As far as can be seen, no person whosoever, except the appellants, makes any objection to the deed. The parties seeking to shelter themselves behind the maxim intended to prevent fraud are the guilty participants, who, by its use, seek to remain in enjoyment of what they now seek to show are illgotten fruits. See *Jones*, *Mortg.* § 629. Where, however, is the evil-doing in this case? All persons who dealt with Smith, Brown & Co. were informed by the recorded deed that this part of their property was incumbered by a lien. The trustee named in the deed was a well-known citizen of the town in which the deed was recorded. All persons who are interested were put on notice by the deed, and could have their inquiry answered by calling upon him. No man in business is obliged to expose all the details of his business. It is the universal practice for merchants to keep their own counsel, except as to those matters which the law requires to be disclosed. Courts have recognized the validity of mortgages kept from the record until the last moment of danger. *Haas v. Sternbach* (Ill. Sup.) 41 N. E. 51. We see no fraudulent conduct here which can prevent a party from going into a court of equity and asserting his rights.

The last question made by appellants is upon the statute of limitations. The statute does not prevent the enforcement of the deed of trust. It runs for 20 years against such an instrument. *Camden v. Alkire*, 24 W. Va. 674. Nor has the statute barred the debt. It is evidenced, as we have seen, in the contemporaneous memoranda made by each of the parties as parts of the contract then made, explaining and limiting the deed. It is, therefore, a contract by writing, signed by the party to be charged thereby, and it has 10 years to run. Section 6, c. 104, Code W. Va. The decree of the circuit court permitting a decree for any balance that may be found due the complainants after a sale of the property is in accordance with rule 92 in equity. The decree of the circuit court is affirmed.

TALBOT v. PRESS PUB. CO.

(Circuit Court, S. D. New York. May 11, 1897.)

BILL OF EXCEPTIONS—EXTENSION OF TIME—ORDER NUNC PRO TUNC.

The circuit court has power to extend the time for making, filing, and serving a bill of exceptions by an order entered nunc pro tunc as of a date before the expiration of the time allowed for the purpose, made after the expiration of the term at which the case was tried and judgment entered.

Charles L. Kingsley, for plaintiff.
L. G. Reed, for defendant.

LACOMBE, Circuit Judge. This is an application for an order nunc pro tunc as of November 25, 1896, extending plaintiff's time to make, file, and serve a bill of exceptions until May 12th. The case came to trial on October 21, 1896, and verdict was rendered in favor of defendant on October 26, 1896. The court, upon rendition of the verdict, gave plaintiff 30 days in which to make, file, and serve a bill of exceptions. Judgment was entered, and notice of entry and filing was duly served on November 12, 1896. The time to take out writ of error will expire May 12, 1897. The time to make, file, and serve bill of exceptions expired November 25, 1896, and plaintiff's attorneys have neglected to obtain any stipulation or to obtain any order of court extending such time. The counsel for defendant in error interposes no objection to this application in the way of asking terms or conditions, nor does he seek to take any advantage of plaintiff's default, but in behalf of his client submits to the court the question whether, in view of the fact that the term at which the case was tried has long since expired, there is any power in the court to give the relief asked for. There are two jury terms of the circuit court in this district, beginning on the third Monday of October and first Monday of April, respectively. The provisions of section 914, Rev. St. U. S., do not extend to the means of revising a decision once made by the circuit court. The practice upon writs of error is to be regulated by the federal statutes, and the rules and practice of the federal courts. The only regulation of statute as to bills of exceptions is that contained in section 953 of the Revised Statutes, which has no reference to the point here presented.

Reference is made to *Muller v. Ehlers*, 91 U. S. 249; *Bank v. Eldred*, 143 U. S. 293, 12 Sup. Ct. 450; *Morse v. Anderson*, 150 U. S. 156, 14 Sup. Ct. 43; and *Ward v. Cochran*, 150 U. S. 597, 14 Sup. Ct. 230; and it is urged that the court has no power, after a term has expired, to extend the time for making, etc., bill of exceptions, even within the period allowed by statute for suing out a writ of error. Inasmuch as the exceptions were all taken, noted by the judge, and reduced to writing at the trial, and the bill of exceptions is merely the convenient form in which they are reproduced for the court of review, such a hide-bound practice would often work great injustice. The decision in *Chateaugay Ore & Iron Co.*, 128 U. S. 544, 9 Sup. Ct. 150, has recognized a more liberal rule as applicable in this district, where, as the supreme court says, by Mr. Justice Blatchford, "the rules of the circuit court clearly contemplate proceedings to perfect a bill of exceptions within the time limited by those rules, without reference to the expiration of a term." Since those rules expressly contemplate an enlargement of the time by the judge in a proper case, there is no reason why enlargement should not be made in this case, although the trial and judgment term has expired. The time to make, file, and serve bill of exceptions is extended to and including May 12th.

FIRST NAT. BANK OF CHATTANOOGA, TENN., et al., v. RADFORD TRUST CO.

(Circuit Court of Appeals, Sixth Circuit. May 10, 1897.)

No. 456.

1. FEDERAL COURTS—JURISDICTION—CITIZENSHIP OF MORTGAGE TRUSTEE.

Where a trustee under a mortgage made to secure a series of bonds refuses to foreclose after default, any holder of such bonds may file a bill for the benefit of himself and all others, and pray foreclosure. To such a bill the trustee holding the legal title to the mortgaged property is a necessary party, and may be made a defendant when he refuses to file such bill himself.

2. SAME.

Where the bill shows no conflict between such a complainant and the trustee, and where the bill is such a one as the trustee should himself have filed, the trustee will, for purposes of jurisdiction, be ranged on the same side of the controversy as the complainant. But, where the object of the bill filed by a beneficiary is to procure a decree excluding all other bondholders from the equal benefits of the mortgage, the trustee is properly an opposite party to the subject-matter of that controversy, and should, for purposes of jurisdiction, be ranged with the other defendants to the suit.

3. CORPORATE MORTGAGES—REORGANIZATION—SUBSTITUTION OF BONDS—ELECTION.

Mortgage bondholders of an insolvent corporation agreed to accept in lieu of their bonds other mortgage bonds, to be issued by a reorganized company, but upon condition that all other holders of the old bonds should agree to a like exchange. Before all other bondholders had so agreed, they received the new bonds, at the same time retaining the old ones until the assent of all bondholders should be obtained. Such assent was not given, but they thereafter joined with other holders of the new bonds in declaring them matured for default of interest, and in requiring the trustee to institute foreclosure proceedings. *Held*, that this was an election to accept the new bonds and surrender the old, and that they were not thereafter entitled to the security of the old bonds.

4. CORPORATIONS—ASSIGNMENT FOR BENEFIT OF CREDITORS—ASSIGNEE'S SALE—LIABILITY OF PURCHASERS.

A corporation having made an assignment for benefit of creditors, certain of its bondholders bought in a part of its personal property at the assignee's sale. At this time a scheme of reorganization had been devised, by which a new company was to take all the property of the old one and issue securities to its creditors. The purchasers at the sale and the assignee, acting upon the assumption that all creditors would agree to the scheme, turned over the personal property purchased to the new company, the purchasers not paying any part of the purchase price. *Held*, that creditors who never assented to the reorganization were entitled to enforce payment of the purchase price for the purpose of discharging their claims.

5. SAME—ASSENT BY CREDITORS TO REORGANIZATION.

Creditors of a corporation which has made an assignment for benefit of creditors release their rights under the assignment when they consent to a plan of reorganization, and accept bonds of the reorganized company in payment of their claims.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

The Hughes Lumber Company, a corporation organized under the law of Tennessee, and doing a manufacturing business at Chattanooga, issued its interest-bearing bonds, to the extent of \$200,000, secured by a mortgage upon its real estate, machinery, etc., to R. M. Barton, Jr., as trustee. Ten of these bonds, each for \$1,000, were pledged by it to the Radford Trust Company, a corporation organized under the law of the state of Virginia, as collateral

security for an indebtedness of about an equal amount due to it by the Hughes Lumber Company. This indebtedness has not been discharged, and default has been made in the payment of interest on the bonds so held, in consequence of which the principal of the bonds has matured, under a provision of the mortgage. This Barton mortgage, as we shall designate it, was executed October 22, 1890. On the 26th of December, 1890, the same corporation made a deed of general assignment to the defendant M. H. Ward, whereby it conveyed its equity of redemption in the property conveyed to Barton, and all of its other assets of every kind, for the equal benefit of all its creditors. On the same day D. W. Hughes, president of the Hughes Lumber Company, and a large owner of its stock, also made a general deed of assignment to M. H. Ward, whereby he conveyed all of his individual assets for the equal benefit of all his creditors. Subsequently Mr. Hughes proposed a plan for the settlement of the debts of both the Hughes Lumber Company and himself, and a reorganization of the business of the corporation. This plan involved the organization of a new corporation, which should assume the debts of both himself and the old corporation, by giving to such creditors its own mortgage bonds in substitution for the bonds of the Hughes Lumber Company, and in discharge of the Barton mortgage and of the two assignments made to Ward; such bonds to be secured by a first mortgage upon the combined assets of the Hughes Lumber Company and of himself, which for this purpose should be conveyed to the new corporation. The combined indebtedness of the two debtors aggregated about \$250,000. Bonds to this amount, secured as mentioned, were to be exchanged for the bonds of the Hughes Lumber Company, to the extent outstanding, and the surplus applied in the paying off of debts not protected by such bonds, but which were entitled to the security provided by the assignments to Ward. This plan was submitted to a number of creditors, including appellants, who regarded it with favor, and joined in recommending its acceptance by all. Pending communication with creditors, Ward, assignee, brought to public sale the property conveyed to him under the general assignments of the Hughes Lumber Company. At that sale the real estate and the manufacturing plant of the Hughes Lumber Company were sold, subject to the Barton mortgage, for the sum of \$450. A large quantity of lumber and other material belonging to the same corporation, and not embraced in the Barton mortgage, were sold for \$11,880.57. The successful bidder for both properties was J. F. Loomis. The evidence establishes that the purchase was made by Loomis as the agent for appellants, and that their purpose in buying in the property was to promote the scheme of settlement and reorganization which had already been accepted by a large proportion of the creditors interested. It was believed that all would assent finally, and that it was desirable that the property should be kept together, so that when the assent of all was received the property could be conveyed to the new corporation, and the plan carried out. No part of the purchase money was ever paid to Ward, who subsequently, at the instance of Loomis and those for whom he acted, conveyed the property so sold to the Hughes Bros. Manufacturing Company, the new corporation organized under the plan of settlement above detailed. Mr. Loomis' account of the purchase of this property is as follows: "The purchases were made for T. G. Montague, president of the First National Bank, C. E. Stivers, cashier City Savings Bank, and the Loomis & Hart Manufacturing Company. I purchased them as trustee for the above-mentioned parties. I did not pay anything on these purchases. It was the understanding that Mr. Hughes was to make some arrangement with all of his creditors by which they were to take bonds issued on the plant and material, and on Mr. Hughes' individual property. When this arrangement was made, I was to deed back the property to Hughes Bros. If the arrangement was not made, I was then to handle the property for Mr. Montague, president, Mr. Stivers, cashier, and the Loomis & Hart Manufacturing Company. I understood Mr. Hughes had made such an arrangement with his company, and I deeded back the property, except what had been sold, to him, and the net proceeds of all sales that had been made by me." "Q. Did not T. G. Montague, president of the First National Bank, C. E. Stivers, cashier of the City Savings Bank, and the Loomis & Hart Manufacturing Company all consent to your transferring said property back to Hughes Bros. Manufacturing Company, or

Hughes Bros? And is it not also a fact that they knew you were not receiving anything for it, and were they not to take bonds of Hughes Bros. Manufacturing Company for their debts? A. I so understood that these parties all consented to my deeding the property back to Hughes Bros. The Loomis & Hart Manufacturing Company did agree to take bonds of the Hughes Bros. in settlement of their claim. Cannot answer as to other parties." Ward's deposition is not in this record, but, from exhibits and other evidence, it appears that he conveyed this property to D. W. Hughes, or to the Hughes Bros. Manufacturing Company, in promotion of the scheme of settlement, and without receiving the purchase price bid by Mr. Loomis, protecting himself by an indemnifying bond made by Hughes and some of his friends.

The original bill was filed by the Radford Trust Company, as a creditor of both the Hughes Lumber Company and D. W. Hughes, and entitled to the benefits of the Barton mortgage and of both the assignments made to Ward, for the purpose of foreclosing the Barton mortgage and of winding up the assignments to Ward for the benefit of all such creditors as had not waived the benefit of those instruments by accepting the liability of the new corporation in exchange for the obligations of the lumber company. That bill was filed against the Hughes Lumber Company, the Hughes Bros. Manufacturing Company, R. M. Barton, trustee under the mortgage of the Hughes Lumber Company, H. C. Beck, trustee under the mortgage of the Hughes Bros. Manufacturing Company, M. H. Ward, assignee under the two general assignments mentioned, and a number of others liable upon commercial paper transferred to the complainant by the Hughes Lumber Company either for value received, or as collateral for the debts of that corporation to the complainant. September 22, 1893, on application of complainant, a temporary receiver was appointed to take possession of the property embraced in these instruments. This appointment was subsequently made permanent. By an amended bill, filed October 5, 1893, other defendants were brought in; among them being the appellants, the First National Bank of Chattanooga, G. H. Jarnagin, assignee of the City Savings Bank, and the Hart & Loomis Manufacturing Company. After setting out the transactions we have stated, the bill, as amended, avers that, with the exception of complainant, every holder of bonds secured by the Barton mortgage had accepted bonds of the Hughes Bros. Manufacturing Company secured by a mortgage embracing the identical property conveyed to Barton, in addition to other property included in the assignments to Ward, and insists that thereby all such beneficiaries have estopped themselves from claiming any benefit under the Barton mortgage. It further insists that never having accepted bonds of the Hughes Bros. Manufacturing Company, nor assented to the conveyances made by Ward to that company, it is entitled to have the Barton mortgage foreclosed, and the assignments to Ward closed up, and the proceeds, as far as necessary, applied in payment of its debts against the Hughes Lumber Company and against D. W. Hughes. The complainant further insisted that all creditors who had assented to this reorganization scheme, and accepted the new security provided by the mortgage made by the new corporation, had waived the benefit of the general assignment made by the Hughes Lumber Company and D. W. Hughes, and that complainant was entitled to enforce said assignments for its benefit and that of other general creditors who had not agreed to this plan of reorganization. To this end, this amended bill asserted the right of complainant, in behalf of itself and all other creditors who had not accepted the bonds of the corporation, or assented to the acquisition of the property covered by the several conveyances in trust mentioned above, to follow and recover all such property, and compel its application exclusively to the payment of the demands of creditors who had not waived the benefit of the said several trusts, or, if such property could not be found or recovered from those into whose hands it had come, the right to hold Ward liable personally for the value of the property so lost to the trust was asserted, and proper relief prayed. Other facts necessary to an understanding of the case will appear in the opinion.

Upon a final hearing the circuit court decreed as follows: (1) That complainant was entitled to a decree foreclosing the Barton mortgage. (2) That complainant was the only holder of bonds secured under that mortgage who had not accepted the new security provided by the mortgage made by the

Hughes Bros. Manufacturing Company, and was therefore the only beneficiary entitled to look to that security. (3) That general creditors of the Loomis & Hart Company and of D. W. Hughes, who assented to the conveyance by Ward of the property assigned to him, and who had accepted the bonds of the Hughes Bros. Manufacturing Company, thereby waived the benefit of said assignments, and that only such creditors as had not elected to take such bonds as a substitute for their claims were entitled to share in the proceeds arising from the sale of the property so assigned to Ward. (4) That the persons bidding in the property of the Hughes Lumber Company at the sale made by Ward should be required to pay to the receiver the price they agreed to pay, which should be first applied in the payment of the claim of creditors secured by said assignments who had not assented to the reorganization scheme. From this decree the First National Bank of Chattanooga, the Hart & Loomis Manufacturing Company, and G. H. Jarnagin, assignee of the City Savings Bank, have perfected appeals and assigned errors.

Wheeler & McDermot, E. Y. Chapin, E. M. Dodson, and White & Martin, for appellants.

Garnett Andrews and Wm. L. Frierson, for appellee.

Before TAFT and LURTON, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

Before considering the merits, there is a preliminary question for consideration, involving the jurisdiction of the circuit court to pronounce any decree in this cause. The jurisdiction of the court seems never to have been brought to the notice of the court below until after an amended and supplemental bill had been filed by complainant, and the cause about ready for hearing. In considering this question of jurisdiction, we shall therefore consider the status of the cause as it appears upon both the original and amended bills. If the court had jurisdiction at the time a motion was first made to dismiss for want of jurisdiction, and had jurisdiction when it entered the decrees appealed from, it is of no moment, on this record, how long it had had jurisdiction, or at what prior stage of the cause it was acquired. In *Railroad v. Ketchum*, 101 U. S. 289-298, a like objection was made at a late stage of the cause, and the court said:

"For the purposes of this appeal, we need not inquire when the circuit court first got jurisdiction of this suit. It is sufficient if it had jurisdiction when the decree appealed from was rendered. As no objections were made by the parties in the progress of the cause to the right of the court to proceed, and the decree, when rendered, was consented to, it is enough for the purpose of this appeal if the record shows that, when the consent was acted on by the court, jurisdiction was complete. Consent cannot give the courts of the United States jurisdiction, but it may bind the parties, and waive previous errors, if, when the court acts, jurisdiction has been obtained."

The sole complainant in the original bill was the Radford Trust Company, a corporation of the state of Virginia. The defendants were all citizens of the state of Tennessee, or of states other than Virginia. One of these defendants was R. M. Barton, Jr., who was made a defendant as trustee under the mortgage securing the bonds issued by the Hughes Lumber Company, which was a corporation of the state of Tennessee. Barton, the trustee, was also a citizen of Tennessee. The appellants now insist very strenuously that Barton, as trustee, should, for purposes of jurisdiction, be classed on the same

side of the controversy as the complainant, and that, when the parties are thus arranged, we will have a cause where citizens of Tennessee are upon both sides of the case, and the jurisdiction of the circuit court must therefore fail. Where the jurisdiction of the United States court is dependent alone upon diversity of citizenship, the parties should be arranged with reference to the real controversy presented by the pleadings, and not according to the arbitrary arrangement of the pleader. This is well settled in the adjudications of this court. *Pittsburgh, C. & St. L. Ry. Co. v. Baltimore & O. R. Co.*, 22 U. S. App. 359-366, 10 C. C. A. 20, and 61 Fed. 705; *Shipp v. Williams*, 22 U. S. App. 380-385, 10 C. C. A. 247, and 62 Fed. 4; *Salt Co. v. Brigel*, 31 U. S. App. 666, 14 C. C. A. 577, and 67 Fed. 625. But what is the subject-matter of the real controversy presented by the original and amended bills of the complainant? In *Railroad v. Ketchum*, 101 U. S. 289, the court said, touching this classification of the parties with reference to the real controversy, that:

"For the purpose of jurisdiction, the court had power to ascertain the real matter in dispute, and arrange the parties on one side or the other of that dispute. If, in such arrangement, it appeared that those on one side were all citizens of different states from those on the other, jurisdiction might be entertained, and the cause proceeded with."

In the case last cited the bill was a foreclosure suit brought by Ketchum, a holder of bonds, against the mortgagor and the trustees under the mortgage. The complainant and the trustees thus made defendants were citizens of the state of New York. The mortgagor was a corporation of Missouri, and the suit was brought in one of the circuit courts of the United States for the Eastern district of Missouri. The jurisdiction was wholly dependent upon all the parties on one side of the controversy being citizens of different states from those on the other. As the parties were arranged by the pleader, this diversity did not exist, and there was no jurisdiction. It appeared, however, that the trustees were necessary parties, because the legal title to the mortgaged property was in them, and they were made defendants because, doubting their authority, they had declined to institute foreclosure proceedings. There were no averments in the bill indicating any antagonism between the trustees and the beneficiaries under the mortgages. "The complainants," said the court, "commenced the suit to get done just what the trustees, if they had been willing to proceed, might have done. Whatever he did was for the trustees, and in their behalf, and he really had no power to do more than they might have done if they had been so inclined." The court therefore held that there was no antagonism between the complainant and the trustees, who should therefore be arranged on the same side of the real dispute with the complainants, which gave jurisdiction and enabled the court to proceed with the cause. The averment of the amended bill touching the refusal of Barton to foreclose the mortgage made to him was in these words:

"R. M. Barton, Jr., the trustee, not only declined and neglected to advertise and sell the property covered by said trust deed, but complainant avers that he had definitely and positively determined and declined to join as a party bringing said suit; that he had in fact, for reasons personal to himself, and having no reference to this cause, or to giving this court jurisdiction thereof,

positively and definitely determined not to execute the trust, and to have nothing to do as trustee with the matters and trusts created by said deed; that he had reached this determination before he was aware that this suit would be brought, and before his connection therewith; that he did this, not for the purpose of giving this court jurisdiction, but that this conduct would have been the same under any and all circumstances, and, as before stated, for reasons personal to said trustee, and which were, in his judgment, imperative, and conclusive on him."

If the only object of complainant's bill had been to foreclose the Barton mortgage, such an averment as to the reasons moving Barton in his refusal to institute such a proceeding would be insufficient to show any real antagonism between the complainant and himself as trustee, and would bring the case within the facts of *Railroad v. Ketchum* and *Shipp v. Williams*, elsewhere cited, and require that the complainant and Barton should be treated as on the same side of the real controversy, which, in the case supposed, would have been the mere question of the foreclosure of the mortgage,—a controversy wholly with the mortgagor. But complainant's bill, as amended, was not a simple foreclosure bill. It was full of averments attacking the right of any beneficiaries thereunder, save itself, to share in the benefits of the common security; alleging that, with the consent of all other holders of bonds, the mortgaged property had been conveyed to another newly-organized corporation, and bonds of this new corporation, secured by a mortgage on same property, accepted in exchange for those secured by the conveyance to Barton. These averments involved a dispute as to the right of Barton to foreclose the mortgage for the benefit of any beneficiary other than complainant, and involved an insistence that if he did foreclose, or if foreclosure should result from judicial proceedings, the proceeds arising from the sale of the mortgaged property should be paid exclusively to complainant, to the extent necessary to satisfy its bonds. Thus, the controversy was not only as to the foreclosure of the mortgage, but as to the right of complainant to be paid to the exclusion of all others. Clearly, this was a dispute in which Barton, as trustee for all beneficiaries, must stand in antagonism to the exclusive claim set up by a single beneficiary, and should not be treated as upon the same side. The bill was not one which could have been properly prosecuted by him, and complainant cannot be said to be doing just what Barton might have done had he been willing to proceed, nor that what complainant did by filing such a bill was done for the trustee and in his behalf. Neither was the liability of the mortgagor to the complainant unquestioned, for it appears that its right to hold the bonds in its possession, or to proceed against the mortgaged property for their satisfaction, was also disputed. If this contention of the mortgagor should be sustained, the mortgage was satisfied, and the trustee had no power to foreclose. To a bill filed for the purpose of preventing all other holders of bonds from participating in the benefits of a common security, and for the purpose of establishing complainant's right to the bonds it held, and of procuring a decree appropriating that security to its exclusive benefit, the trustee was a necessary party defendant. Though the trustee thus made defendant may have been under no duty to actively participate in a controversy

between beneficiaries, yet his attitude was properly that of a defendant whose right to execute the trust for the equal benefit of all was denied, and made a subject of judicial controversy. Appellants have called attention to the fact that Barton is one of the counsel filing this bill, and this, they say, evidences his friendly attitude to complainant. Barton's attitude as counsel for complainant is clearly one of active antagonism to the rights claimed by all the other beneficiaries, and is one which he could not have assumed in his character as trustee. He was acting with proper judgment in refusing, as trustee, to champion the claims which he may well present, as counsel, after throwing off the responsibilities of trustee.

We come now to the merits of the cause. The principal question arises upon the error assigned to so much of the decree as excludes the First National Bank of Chattanooga and G. H. Jarnagin, assignee of the City Savings Bank of Chattanooga, from participating in the proceeds arising from a foreclosure of the mortgage to Barton. Both of the appellants who complain of this part of the decree were large creditors of the Hughes Lumber Company and of D. W. Hughes. The National Bank held, as collateral security for its debts, bonds of the Hughes Lumber Company aggregating \$75,000; and the City Savings Bank, for a like purpose, held bonds amounting to \$50,000. In the creation and management of these large debts, the National Bank was represented by its president, T. G. Montague, and the City Savings Bank by its cashier, C. E. Stivers. The Hughes Lumber Company was largely owned by its president, D. W. Hughes, who seems to have involved his personal credit in its business, and to have completely controlled the affairs of the corporation. After the execution of the Barton mortgage, and after the general assignments of both the corporation and D. W. Hughes to Ward, as assignee, Hughes made a struggle to extricate himself and his corporation, by the scheme of organizing a new corporation, which should take all the property of the old, and all of his individual estate, and assume all liabilities of himself, as well as of the Hughes Lumber Company. He believed, as did many of the creditors, that the combined property of the corporation and himself would furnish ample security for an issue of \$250,000 in bonds, and that these bonds would be accepted by the holders of the Barton bonds, and other creditors who had only the security afforded by the assignments to Ward in satisfaction of their debts. A meeting of creditors was accordingly held, and this scheme was indorsed. A circular letter was signed by Montague and by Stivers, representing these two banks, and by several other creditors, and was sent to such creditors as had not been present, soliciting their assent to the plan. The great mass of creditors did assent, and agreed to accept the new bonds in satisfaction of their claims, and to surrender the security afforded by the Barton mortgage, and by the assignments to Ward. But before all had assented the new corporation was organized, and Ward, through the active co-operation of these two banks and others, was induced to convey the assets vested in him to the new company. This conveyance was not joined in by Barton, and was therefore subject to the lien of his mortgage upon the real estate and machinery of the Hughes Lumber Company.

A mortgage was placed on the property thus obtained, and the bonds of the new corporation issued, to the extent of \$250,000. Those bonds were at once offered to the creditors of the old company and of D. W. Hughes in substitution for the securities they held, and were accepted by many unconditionally. When Hughes sought to obtain from these two banks the Barton bonds held by them, and to substitute for them the bonds of the new corporation, he was met by the demand that all other holders of such bonds must first agree to the plan of settlement, and that the Barton mortgage should be canceled. To meet this difficulty, it was agreed that the banks should take the new bonds conditionally; the condition being that the old bonds should be retained until all other holders of such bonds had agreed to accept the new security, and the Barton mortgage had been canceled.

It has been argued that these new bonds were accepted and received only as additional security to that afforded by the Barton mortgage and by the assignments to Ward, and were to be received in substitution for the old security only when all beneficiaries had accepted the plan of settlement, and when the Barton mortgage had been canceled, and that they are entitled to the benefit of both securities, the condition upon which they were to surrender one never having been performed. This contention is not supported by the facts and circumstances found in this record, nor can we believe that either Mr. Montague, who acted for the National Bank, or Mr. Stivers, who represented the Savings Bank, mean to have their evidence interpreted as supporting such a proposition. That these appellants should, under any circumstances, obtain an additional security to that afforded them by the Barton mortgage and the Ward deeds of trust, except upon condition that they should surrender the Barton bonds and the benefit of the Ward assignments, is utterly inconsistent with the whole scheme of settlement which had been presented by them. That they were unwilling to give up the Barton bonds until others had done so is quite reasonable. But it is equally clear that, until they did agree to surrender the Barton bonds, they could obtain no title to the bonds of the new corporation. A consideration of the whole evidence leads us to the conclusion that each of these banks accepted these new securities as a substitute for the old bonds, subject to the condition that all other holders of the old issue of bonds should agree to a like exchange of securities, and that the old or Barton bonds were retained until this condition had been complied with. These were the facts as reported by Special Master Ewing, and were the facts as found by the court below.

The document signed by D. W. Hughes under date of June 1, 1891, pledging, among other collaterals, 48 of the bonds of the Hughes Bros. Manufacturing Company to the City Savings Bank to secure the indebtedness which had been theretofore secured by the bonds of the Hughes Lumber Company and other collaterals, is not hostile to this conclusion. The indebtedness secured by the pledge of June 1, 1891, were the same debts theretofore secured by a pledge of the bonds of the Hughes Lumber Company, together with certain shares of stock in an electric lighting company, and by certain notes secured

by a deed of trust upon the individual property of D. W. Hughes. The instrument by which Hughes pledged the bonds of the new corporation also included the shares and notes before pledged, and makes no mention of the old bonds which had been held in pledge theretofore. A fair inference from this omission to pledge the old bonds would be that the new bonds were substituted for the old, the pledge in other respects being identical with the former security held by that bank. The fact that the old bonds were suffered to remain in the possession of the bank after this new pledge alone supports the conclusion that the new bonds were not accepted unconditionally. The condition upon which these banks were to accept the new bonds in exchange for the old has never been complied with. One holder of such bonds never did accept the new bonds, and that holder is the complainant. Unless, therefore, these banks which took the bonds conditionally have done something to change their situation, they may well stand upon their rights as holders of the Barton bonds, and participate with complainant in the proceeds of a foreclosure; for they have obtained no title to the new bonds, and no right to retain them. Clearly, appellants had the power to waive this condition, and might do so by any act which clearly indicated an election to hold and enforce the new bonds. They could not hold both classes of bonds, and could not enforce one mortgage without abandoning the other. While appellants were thus in possession of both sets of bonds, with the right to determine which they would rely upon, the complainant filed its original bill. That bill had for its principal object, as we have heretofore stated, the foreclosure of this Barton mortgage for the exclusive benefit of such holders of bonds as had not elected to accept the bonds of the new corporation in satisfaction thereof, and alleged, on information and belief, that all holders of such bonds, other than complainant, had elected to receive bonds of the new company in satisfaction of their claims. This bill was filed July 4, 1892. On the 1st day of September, 1893, the holders of the bonds issued by the Hughes Bros. Manufacturing Company joined, under a provision of the Beck mortgage, in a declaration maturing the principal of said bonds for nonpayment of interest, and requiring H. C. Beck, the trustee, to take steps at once to foreclose. This instrument was signed by both these appellants, and was duly delivered to the trustee. On the 20th of September, 1893, the First National Bank filed an original bill in a chancery court of the state against the Hughes Bros. Manufacturing Company and H. C. Beck, trustee, for the purpose of foreclosing the mortgage to Beck for the benefit of all holders of bonds secured thereunder. Upon the same day a bill was filed in the same court by Jarnagin, assignee for the City Savings Bank, to foreclose both the mortgages to Barton and Beck; claiming priority for the former, but praying to be allowed the benefits of the latter in case the court should determine that complainant was not entitled to claim under the Barton mortgage. As this last-mentioned bill sought only alternative relief under the Beck mortgage, we do not attach importance to it as evidence of an election to hold the bonds of the Hughes Bros. Manufacturing Company.

No clearer evidence of an intention to claim under the Beck mortgage and as a holder of the bonds of the Hughes Bros. Manufacturing Company could be imagined than was evidenced by joining in the declaration maturing the principal of those bonds, and requiring the trustee to institute foreclosure proceedings. It was an act to which no doubtful meaning could be attached, and was a distinct election to accept the new bonds and surrender the old. It was an assent and an acceptance utterly inconsistent with the subsequent retention of the old bonds, for the title of both banks to the new bonds was dependent upon the surrender of the old bonds, for which they were a substitute. For appellants it is said that this acceptance was made under mistake of fact, and that it was done under the belief that all other holders of old bonds had accepted the new. There is no evidence that they were misled, and no satisfactory evidence that they acted under any mistake of fact, or that they were ignorant of the refusal of the Radford Trust Company to accept the new bonds. It is true that neither of these banks had then been made parties to the bill of complainant, but that bill was pending in a court of record, and the Hughes Lumber Company and Barton, as trustee, were parties. That they were actually ignorant of the pendency of that bill is not affirmatively alleged or shown, and the circumstances were such that the slightest inquiry of the trustee would have resulted in full information. The legal effect of acceptance was known to them, and they are not to be now excused upon the mere suggestion that they acted in ignorance of the attitude of the complainant. The subsequent filing of a bill to foreclose the Beck mortgage by the national bank is only further evidence of acceptance, though the declaration of maturity, with notice to Beck, was in itself conclusive of that fact. Under the circumstances under which appellants held possession of these bonds, they were put to an election. They were obliged to affirm or disaffirm the plan of settlement. They knew all the facts touching that settlement, and it rested with them to determine whether they would accept the new bonds or hold on to the old. The notice to Beck was a conclusive exercise of the right of election, and a waiver of all right to look to the Barton mortgage, or to hold on to the Barton bonds. This election to hold and rely upon the bonds of the Hughes Bros. Manufacturing Company as a substitute for the bonds of the Hughes Lumber Company operated as a payment of the latter bonds, and a release of the security provided by the Barton mortgage. *Central Trust Co. v. Cincinnati, J. & M. Ry. Co.*, 58 Fed. 500. The case of *Robb v. Vos*, 155 U. S. 13, 15 Sup. Ct. 4, is a case where, under circumstances of much greater hardship, a party was held to the consequences of an election. The principles upon which that case rests are those which govern this. *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 435-470, 6 Sup. Ct. 809, also presents a case of the acceptance of bonds secured under a junior mortgage in substitution for bonds issued under an earlier mortgage, where the court held that acceptance worked a cancellation of the earlier mortgage, and held the parties to their agreement. The decree, in this respect, must be affirmed.

The next question is as to so much of the decree as required appellants to pay to the receiver the sum of \$11,889.57, being the amount of the bid made by them, through J. F. Loomis, at the sale by Ward, assignee, of lumber and material included in the general assignment made by the Hughes Lumber Company. As before stated, this material was not covered by the Barton mortgage, and its proceeds were properly distributable among all the creditors of the assignors. The facts show that appellants, through Loomis, as their agent, became the absolute purchasers of this lumber, etc., at the price of \$11,889.57. Loomis says that their understanding with him was that, if the creditors all agreed to the plan of reorganization, the purchase should inure to the equal benefit of all, and the material in that event would be transferred to the new corporation. If that plan fell through, then he says he was to manage the transaction for the exclusive benefit of those he represented. It is evident that, if all interested under this deed of assignment had agreed to accept the proposed arrangement, there would have been no necessity for paying the price of this lumber to Ward or any one else. The acceptance of the obligations of the new corporation in substitution of the benefits provided by this assignment would have operated as a release and satisfaction of this deed of trust. In that event the payment of the price to Ward, and receiving it back again, would have been an idle ceremony. But neither Ward nor appellants waited the acceptance of this plan by all. Upon the supposition that all would assent to the plan, Ward, by direction of D. W. Hughes and appellants, turned this lumber and material over to the new corporation, or to Hughes for the new corporation, without requiring the payment of the purchase money, and without any other consideration than the supposed consent of all concerned. We have already stated the character of the relief sought by the amended bill of the Radford Trust Company by reason of this state of facts. After the appointment of C. E. Stivers as permanent receiver under the bill and amended bill of that corporation, the Rogersville National Bank, a large general creditor of both the Hughes Lumber Company and D. W. Hughes, and one of the defendants brought in by the amended bill of the Radford Trust Company, filed a petition and cross bill in the principal cause, in which, by permission of the court, the receiver joined, setting out the facts concerning this sale of lumber by Ward, and seeking relief on account thereof against Ward personally, and against J. F. Loomis and appellants by reason of their participation with Ward in a breach of trust. Upon all the pleadings and proof, the court below held Ward liable "to account to the nonassenting creditors of the Hughes Lumber Company for the price of the property sold by him for which the purchasers had not paid," but also held that appellants, as purchasers, should be first liable, and Ward only in the event the purchase price was not paid by them. The court further held that the fund thus realized should be distributed among the creditors secured by the assignment of the Hughes Lumber Company who had not accepted the bonds of the Hughes Bros. Manufacturing Company in payment of the claims against the original corporation. We see no error in this decree of which appellants

can complain. They bought this property at the public sale held by Ward as assignee. They agreed to pay for it the sum of \$11,889.57. They have not done so. In reliance upon the supposed willingness of all parties interested, they have suffered the property to pass into the possession of the Hughes Bros. Manufacturing Company. That company has used it up, or otherwise disposed of it. It cannot now be recovered by Ward, or by the creditors entitled to it. That appellants did this in reliance that all parties would accept the bonds of the new corporation for their debts, and thus release the assignee from liability to account for the trust assets, is no defense as against the demands of creditors who did not waive their rights under the assignment to Ward. The liability of appellants for the price agreed to be paid is clear. This purchase price, or the proceeds of the sale, stands in the place of the property assigned, and is properly distributable among such creditors as have not waived their right to enforce this assignment. The great majority of the creditors secured under this general assignment have accepted the bonds of the new corporation, and rely upon the mortgage made by the new corporation as a substitute for the Barton mortgage and the assignment to Ward. They thereby elected to take a security inconsistent with that first provided. The effect of this exchange of obligations and securities was to release this assignment, as far as they were interested therein. This left it in force, however, as to all who refused to accept the plan of settlement. The principle involved is precisely that which controlled the decision in regard to the release of the Barton mortgage. There is no room for distinguishing between the effect of such an election as a release of the assignment to Ward, and an election on like facts which we hold to operate as a release of the Barton mortgage. Complainants now hold the bonds of the Hughes Bros. Manufacturing Company, secured by a mortgage upon its plant and realty, as security for the payment of their debts. The acceptance of these bonds operated as a release of the assignment to Ward, as well as a release of the mortgage to Barton. The suggestion that appellants are entitled to relief as against the Hughes Bros. Manufacturing Company, and to priority of satisfaction out of the mortgaged property of that corporation, by reason of its use of this lumber without paying for same, is a question not made in any pleading, or raised by any assignment of error. Touching it we express no opinion, as it should not be decided until presented in some proper pleading, to the end that other creditors of that corporation may be heard. The decree of the circuit court must be affirmed.

FIRST NAT. BANK OF CEREDO et al. v. SOCIETY FOR SAVINGS et al.

(Circuit Court of Appeals, Fourth Circuit. May 14, 1897.)

No. 221.

1. JURISDICTION OF FEDERAL CIRCUIT COURTS—MANDAMUS TO LEVY TAX—INJUNCTION.

A federal circuit court issued a mandamus requiring the county court to levy a tax to pay a judgment against the county. Certain inhabitants of the town filed a bill in a state court to enjoin the levy on property in the town, claiming that such property was not subject to the claim upon which the judgment was based. This injunction suit was then removed by defendants to the federal court. *Held*, that the latter court had jurisdiction thereof, as it involved the enforcement of a judgment of a federal court acting under the federal laws and constitution.

2. COUNTIES—INVALID ROAD IMPROVEMENT BONDS—JUDGMENT FOR MONEY HAD AND RECEIVED—EXEMPTION OF TOWN PROPERTY.

A town charter exempted the inhabitants from county road taxes. Bonds issued and sold by the county for road improvements were subsequently declared invalid, but a judgment was rendered against the county as for money had and received, for the amount paid in by the purchasers of the bonds. To enforce this judgment, a mandamus was issued requiring the levy of a tax to pay the judgment, whereupon certain inhabitants of the town sought to enjoin the levy as to their property. *Held*, that the exemption in the charter did not avail owners of town property, as the judgment was against the whole county for money which it was bound to return to the judgment creditors.

Appeal from the Circuit Court of the United States for the District of West Virginia.

John H. Holt, for appellants.

Frank B. Enslow, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and HUGHES, District Judge.

SIMONTON, Circuit Judge. This case comes up on appeal from the circuit court of the United States for the district of West Virginia. The bill was filed originally in the circuit court for Wayne county, state of West Virginia. The complainants are citizens and taxpayers of the town of Ceredo, situated in Wayne county, and the defendants are the Society for Savings, a corporation of the state of Ohio, the county court of Wayne county, and the sheriff of that county. The prayer of the bill is for an injunction against these defendants forbidding them from levying a tax upon the taxable property within the town of Ceredo, in obedience to the exigency of a writ of mandamus issued out of the circuit court of the United States for the district of West Virginia, and directed to the said county court, instructing it to levy a tax on the taxable property of the county for the purpose of paying a judgment of the federal court against the county.

The facts of the case are these: The town of Ceredo was incorporated by an act of the legislature of West Virginia passed the 23d of February, 1866. By the twenty-eighth section of this act it is declared that the said town and taxable persons and property therein

shall be exempt from all expense and liability for the construction or repair of roads or bridges within said county, but outside the corporate limits of said town, provided, however, that the said town shall keep its streets and alleys in good order, and provide for its own poor. This proviso has been fulfilled by the authorities of the said town from the date of the incorporation to this time. Between the years 1880 and 1884 the county court of Wayne county issued certain coupon bonds of the county for the purpose of constructing and repairing bridges and roads in the county. The whole issue was taken up by the Society for Savings, and the money therefor paid into the treasury of the county. The question of the issue of these bonds was never submitted to a vote of the people of the county, and their validity was attacked on that ground. The circuit court of the United States for the district of West Virginia, upon the case made, held that the bonds were illegal, null, and void; but the court further held that, inasmuch as the county received from the Society for Savings the money for the bonds *ex æquo et bono*, the society was entitled, at the hands of the county, to the return of the money as for money had and received. The case having been taken to the supreme court of the United States, this decision of the circuit court was affirmed by a divided court. Judgment was entered accordingly in the circuit court, and a mandamus was sued out directed to the county court to levy a tax on the taxable property of the county for the purpose of paying this judgment. The county court was proceeding to obey this mandamus, and thereupon the complainants filed their bill in the state court seeking an injunction against the levy upon so much of the taxable property of the county as was within the corporate limits of the town of Ceredo. They rely upon the exemption in the charter of the town above quoted. The cause having been removed into this court, they set up the same exemption, and they also deny the jurisdiction of the court.

As this second ground lies at the threshold it will be considered first. No motion to remand the cause has ever been made. This delay would defeat the right to remand in some instances. *French v. Hay*, 22 Wall. 244. But, as the objection goes to the jurisdiction of the court, it must be met and decided. The objection is that the complainants and the county court, as well as the sheriff of Wayne county, defendants, are all citizens of the state of West Virginia, and, there being no separable controversy, this court has no jurisdiction. But the proceeding is brought to enjoin a mandamus issued out of the circuit court of the United States. Mandamus is the remedy that court must adopt for the collection of a judgment against the municipal corporation. *Riggs v. Johnson Co.*, 6 Wall. 166; *Cass Co. v. Johnston*, 95 U. S. 360; *U. S. v. New Orleans*, 98 U. S. 381; *Smith v. Bourbon Co.*, 127 U. S. 105, 8 Sup. Ct. 1043. This proceeding is in the nature of an execution. The rights of the parties to the judgment in respect of its subject-matter are fixed by its rendition. *City of Chanute v. Trader*, 132 U. S. 210, 10 Sup. Ct. 67. This being so, the proceeding in the state court involves the enforcement of a judgment of the United States circuit court, acting under the constitution and laws of the United States, and it is, therefore, a question

arising under that constitution and those laws, and so within the jurisdiction of the federal court.

The other objection is this: The judgment is a liability created by the county court for the purpose of building and repairing the roads and bridges of the county outside the limits of the town of Ceredo, and from such liability the town is exempted by its charter. No mandamus to aid in the collection of the judgment against a municipal corporation can be limited in its mandate only by what the judgment itself declares. *Harshman v. Knox Co.*, 122 U. S. 306, 7 Sup. Ct. 1171. The rights of the parties to the judgment in respect to the subject-matter are, as has been said, fixed by its rendition. *City of Chanute v. Trader*, *supra*. The judgment in the enforcement of which the mandamus operates as an execution is against the county of Wayne,—the whole county. The subject-matter of the judgment is money of the Society for Savings in the hands of the county, which, *ex æquo et bono*, does not belong to the county, but which the county must return to the Society for Savings. It is not money applicable to the construction and repair of roads and bridges. It is money not disposable by the county at all. The only connection the county has with it is the duty and obligation to return it. Under these circumstances, the exemptions in the charter of the town cannot avail to protect the town of Ceredo from its share in the liability of the county,—a liability adjudged against the county without qualification. It has been urged at the bar that this exemption in the charter of the town of Ceredo has been repealed by chapter 43 of the Code of West Virginia. On this point no opinion is expressed. Nor is any opinion expressed upon the right of the town of Ceredo in some other proceeding to adjust such equities as may exist between it and the remainder of the county. It is enough to say that on the case made here the complainants below (appellants here) are not entitled to the injunction prayed for. The decree of the circuit court is affirmed.

ERSKINE et al. v. FOREST OIL CO.

(Circuit Court, W. D. Pennsylvania. December 12, 1895.)

1. EQUITY JURISDICTION—BILL TO RECOVER OIL WELLS—LEGAL REMEDIES.

In Pennsylvania, equity has no jurisdiction of a bill to restrain the operation of oil wells, or the taking of oil therefrom, where the complainant's title is purely legal, the respondent is solvent, and there are neither complicated accounts nor such irreparable injury as warrants interference by injunction. The substantial purpose of such a bill being to recover possession of the wells, the remedy by ejectment, aided by writ of estrepement under the state statutes, is full and adequate.

2. SAME—DISCOVERY.

Discovery is not, ordinarily, an independent ground of equitable relief, and where a bill presents no other ground for interference equity will not take jurisdiction merely because discovery is prayed for.

Knox & Read and J. H. Beal, for complainants.
R. W. Cummins, for defendant.

BUFFINGTON, District Judge. On December 18, 1894, Eliza Erskine, a citizen of the state of Ohio, filed this bill in equity against the Forest Oil Company, a corporation of the state of Pennsylvania, setting forth, *inter alia*, that William Crawford died in 1846, and by his will bequeathed a certain farm in Washington county, Pa., to his son Matthew Crawford and to his children; that Matthew died on September 30, 1894, and the complainant was one of his 13 children; and that since his death the respondent company entered on said farm, and took possession of four producing oil wells, and of the oil since produced therefrom. The bill prayed first for an injunction to restrain respondent from entering on the premises, from interfering with the wells, from carrying away the oil or removing any machinery, tools, or fixtures from the premises. It also prayed for a receiver, for an account, discovery, and general relief. The contention of complainant is that by the will Matthew Crawford took an estate for life only, with remainder to his then and after born children. The answer alleged the will vested no estate whatever in the children, but did vest the fee in Matthew; that on the death of his father, Matthew accepted the devise, entered into and retained sole and exclusive possession of the farm until March 20, 1892, when the Woodland Oil Company entered thereon to operate for gas and oil, as assignee of a lease made by Matthew Crawford on December 4, 1890, for it and 33 acres adjoining, to T. J. Vandergrift, in consideration of \$500 cash and one-eighth of the oil to be produced thereon for three years, or "as much longer as oil and gas is found in paying quantities thereon"; that Matthew Crawford, at the time of giving the lease, claimed to be the sole and absolute owner of the premises; that the company began drilling a well about March 20, 1892, and obtained oil in paying quantities about June 24, 1892; that between then and November 8, 1894, it drilled three other wells, all of which produced and are likely to produce oil for some time; that in said operations it had expended \$30,000; that Matthew Crawford, up to the time of his death, received his one-eighth royalty; that on November 27, 1894, the Woodland Company assigned the leasehold to the respondent company; that since the death of Matthew Crawford the royalty has been run to a suspense account in the pipe line, because the heirs or devisees of Matthew Crawford could not agree to whom it was coming. It also alleged complainant had full knowledge of the lease and the operations thereunder, that she never made any objections, that the bill shows no case for equity, and prays such benefit as though the bill were demurred to. On April 22, 1895, petitions for intervention as parties complainant were filed by five other children of Matthew Crawford and the children of a sixth one, deceased, and the same day, on motion of complainants' counsel, no objection being made by respondent, it was ordered "that the said petitioners, and each of them, have leave, and leave is hereby granted to them, to intervene in this suit for their own interests and the interests of those whom they represent, and to that end to appear in the suit in the same manner and with like

effect as if they were named in the original bill as plaintiffs having or claiming an interest in the matter therein in controversy."

Assuming, for present purposes, that, by the will of his father, Matthew Crawford took a life estate in the land, and his children took in remainder, and assuming the jurisdiction of the court is not ousted by the intervention of the additional parties, whose residence or citizenship is not stated, and who represent separate undivided interests in the land other than that of Mrs. Erskine, the original complainant, the paramount question still remains, is the case one of equitable jurisdiction? Assuming the complainants took in remainder the undivided seven-thirteenths of the land, yet the filing of the bill found the respondent in sole, exclusive, and adverse possession of it under claim of title, and such possession dating back to a time prior to the right of entry of complainants, and the alleged title having its origin in the grant of the holder of a prior freehold estate, namely, Matthew Crawford, the life tenant. While the bill does not, in words, pray to acquire possession of the wells, yet in substance and effect that is its purpose. It seeks to restrain respondent from operating the wells or taking the oil, and these acts are, where oil and gas are concerned, the essential attributes of possession. The supreme court of Pennsylvania, in the case of *Gas Co. v. DeWitt*, 130 Pa. St. 250, 18 Atl. 724, after discussing the peculiar character of gas and oil and their production, say: "The one who controls the gas [the subject-matter of the case before it]—has it in his grasp, so to speak—is the one who has possession in the legal as well as in the ordinary sense of the word." A bill, then, which in substance would deprive one in possession of everything which constitutes possession, whatever it is in name, is in fact one to divest possession, or what is known as an "ejectment bill." In *Messimer's Appeal*, 92 Pa. St. 169, a bill was filed by parties claiming an undivided fourth in an oil lease and well against parties in possession. The respondent admitted complainants' title to an undivided eighth, and denied it as to the other eighth. Complainants did not ask to restrain respondent from operating the well, but prayed for a receiver and an accounting. In sustaining a decree dismissing the bill for want of grounds of equitable relief, the court say: "The case presented on bill and answer is simply the ordinary case of property claimed by one party (plaintiff) in the possession of another party (defendant). It is a mere ejectment bill, and there is nothing to give a court of equity jurisdiction." Such conclusion is in accord with other Pennsylvania cases. See *Long's Appeal*, 92 Pa. St. 179; *Coal Co. v. Snowden*, 42 Pa. St. 488; *Gloninger v. Hazard*, Id. 389. In the federal courts the line between law and equity, and consequently between legal and equitable rights and remedies, has been sharply defined, and strictly observed. The provision of the constitution vesting judicial powers "in cases in law and equity * * * between citizens of different states" recognizes the distinction. A constitutional amendment insures the right of trial by jury "in suits at common law when the value in controversy shall exceed twenty dollars," and the sixteenth section of the judiciary act of 1789 provides "that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, ade-

quate, and complete remedy may be had at law." And to such length have these provisions been extended that it has been held (*Allen v. Car Co.*, 139 U. S. 662, 11 Sup. Ct. 682): "If the court, in looking at the proofs, found none of the matters which would make a proper case for equity, it would be the duty of the court to recognize the fact, and give it effect, though not raised by the pleadings nor suggested by counsel." And rightly so, for we are here dealing with the constitutional right of the citizen, and, as was said by Mr. Justice Campbell in *Hipp v. Babin*, 19 How. 278, "whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

Applying that principle to the case in hand, what have we? There can be no doubt that the title claimed by Mrs. Erskine is a purely legal one. There is no trust relation between her and the respondent. She need call to her aid no equitable principles to establish or enforce her title. If it exists, it is created wholly and solely by a written instrument accessible to all parties. Being purely legal, as distinguished from equitable, it can be established and enforced in a court of law. Nor are any special grounds for equity interference shown; there are no complicated accounts; and, moreover, the liability to account at all is incidental to and dependent upon the prior question of title. Discovery is prayed for in the bill. But, apart from the fact that the proofs disclose no call for such relief, it is to be noted that ordinarily discovery is not an independent ground of relief, but is incidental to and dependent on other grounds. *Hare*, Disc. §§ 6-8, and *Story*, Eq. Pl. § 331. Nor can the bill be sustained on the ground of avoiding a multiplicity of actions. Certain it is the original complainant was entitled to maintain ejectment for her undivided interest, and the act of April 13, 1807 (1 *Brightly's Purd. Dig.* p. 636, § 4), provides for the joinder of tenants in common in actions of ejectment in this state. Nor is the taking of the oil from the wells, under the facts of this case, to be adjudged such an irreparable injury as in some cases might warrant the interference of a court of equity by injunction. The respondent is concededly solvent, and the proofs tend to show that by the taking out of the oil on this tract it is prevented from being drawn away and taken out by other wells on adjoining lands. Moreover, in pending actions of ejectment the Pennsylvania statutes provide, by writ of estrepement, for all protection of land in litigation from spoliation.

After careful consideration, we are of opinion complainants' title is wholly a legal one, that ample remedy exists at law, that there are no special facts or circumstances in this case calling for the exercise of equitable jurisdiction, and that the bill is an ejectment one. With a disposition on our part to, if possible, retain jurisdiction to dispose of the case by construing the will, and end the controversy between the parties, we are unable to do so. The cases of *Hipp v. Babin*, 19 How. 278, *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, and others that might be referred to, block the way to a federal court assuming jurisdiction of what is in substance and real purpose an eject-

ment bill. If our conclusion in this regard is correct, the construction of the will of William Crawford must be passed upon in another case, and the propriety of our abstaining from any expression of our views thereon is apparent. A decree will be prepared dismissing this bill for want of jurisdiction, and without prejudice.

HAYDEN v. CHEMICAL NAT. BANK.

(Circuit Court, S. D. New York. May 15, 1897.)

NATIONAL BANKS—INSOLVENCY—REMITTANCES.

Remittances made by a national bank to its correspondents, in the ordinary course of business, before the commission of any act of insolvency, are not void under Rev. St. § 5242, though the bank is in fact insolvent at the time, and is closed by the bank examiner before the remittances are actually received by the correspondent banks.

Edward Winslow Paige, for plaintiff.

George H. Yeaman, for defendant.

WHEELER, District Judge. The Revised Statutes (section 5242) provide, in relation to national banks:

"Sec. 5242. All transfers of the notes, bonds, bills of exchange, or other evidences of debt, owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void."

The Capital National Bank of Lincoln, Neb., had an account of remittances and drafts with the defendant in New York, varying from day to day. January 18, 1893, the account on the books of the defendant was overdrawn \$84,486.19. On that day the Schuster-Hax National Bank of St. Joseph, Mo., remitted by mail \$2,000 to the defendant for the credit of the Capital National Bank. On the 19th the Packers' National Bank of South Omaha, Neb., remitted to the defendant \$5,000 for the credit and advice of the Capital National Bank, and the Capital National Bank remitted a package of 15 items of various sizes amounting to \$815.79, another of 32 amounting to \$2,935.60, and the account on the books of the defendant stood overdrawn \$40,807.43. On the 20th the Capital National Bank remitted a package of 27 items amounting to \$735, and probably on the 21st it remitted another similar package amounting to \$833.64, and the account stood on the books of the defendant overdrawn \$25,515.32. On the 22d, Sunday, the bank examiner took possession of the Capital National Bank and it went into liquidation. On the 23d the defendant received the remittances of \$2,000 of the 18th, and of \$5,000, \$815.79, and \$2,935.60 of the 19th, and of \$735 of the 20th, which it credited to the Capital National Bank, and it received notice by telegraph from the bank examiner of the suspen-

sion; and on the 24th it received the remittance of \$833.64, which it likewise credited, and which left the account overdrawn \$13,317.94. The plaintiff is the receiver of the Capital National Bank, and this suit is brought to recover the amount of these remittances received by the defendant on the 23d, \$11,486.39, and that received on the 24th, \$833.64, as having been transferred by that bank contrary to the statute.

That the Capital National Bank had been insolvent for a long time next before these remittances is amply made to appear, and, if the prohibition had been made to turn upon insolvency, these transfers would unquestionably be void, and the defendant accountable for the proceeds; but the transfers would be as unquestionably good except for the statute, and only those made after an act of insolvency, or in contemplation thereof, are by that avoided. Till after these remittances the Capital National Bank was carrying on its business of banking in due course, without any act of insolvency shown to have been committed, and they were a part of that business, which was stopped by the bank examiner because of the bank's state of insolvency, and not because of any act arising from that state. Ultimately, but for this interposition, the bank must have been driven to such acts, but how soon cannot now be told. The transfers were complete when the remittances were mailed to the defendant, and must be considered as having been made in due course, and in continuation, of lawful business, and not in contemplation of committing any act of insolvency. These transactions were like the ordinary business of such a bank, done over the counter in the usual way, and for character they are to be compared with the transactions of such business, which seem to be valid. *Roberts v. Hill*, 23 Blatchf. 312, 24 Fed. 571.

The answer prays that, should an account be ordered, the plaintiff be decreed to pay to the defendant the amount due from the Capital National Bank, and such a decree is insisted upon in argument. That prayer in the answer would probably be insufficient for any affirmative relief to the defendant, but, whether so or not, the defendant is not entitled to anything from the plaintiff but its dividend, which cannot be decreed now. Bill dismissed.

BOSTON & M. R. R. et al. v. GRAVES et al.

(Circuit Court, S. D. New York. May 25, 1897.)

ABATEMENT AND SURVIVAL OF ACTIONS—CORPORATIONS—MISCONDUCT OF OFFICERS.

The liability imposed by the statutes of Maryland (Code Pub. Gen. Laws, art. 23, §§ 87, 89) on the directors and officers of a corporation who declare dividends rendering the corporation insolvent or impairing its capital, or who make loans to stockholders, is not a liability for wrongs to property rights and interests, such that the cause of action therefor survives against the representatives of a deceased director or officer, under the statutes of New York (2 Rev. St. N. Y. p. 447, § 1).

John S. Melcher, for plaintiffs.

William B. Hornblower, for defendants.

WHEELER, District Judge. The Code of Public General Laws of Maryland provides (article 23, § 67):

"If the trustees, managers or directors of any such corporation shall declare and pay any dividend when the corporation is insolvent, or any dividend the payment of which would render it insolvent, or would diminish the amount of the capital stock, they shall be jointly and severally liable for all the debts of the corporation then existing, and also for all that shall thereafter be contracted while they shall respectively continue in office, even although the whole amount of the capital of said corporation has been paid in."

And section 69:

"No loan of money shall be made by any such corporation to any stockholder therein; and if any such loan shall be made to any stockholder the officer or officers who shall make it, or who shall assent thereto, shall be jointly and severally liable for all the debts of the corporation contracted before the making of the said loan to the extent of double the amount of the said loan."

The laws of the state of New York provide (2 Rev. St. p. 447, § 1) that actions survive:

"(1) For wrongs done to the property rights or interests of another, for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or, after his death, by his executors or administrators, against such wrongdoer, and after his death against his executors or administrators, in the same manner and with the like effect in all respects as actions founded upon contracts."

And by Code Civ. Proc. § 1837:

"An action may be maintained as prescribed in this article against the surviving husband or wife of a decedent, and the next of kin of an intestate, or the next of kin or legatees of a testator, to recover to the extent of the assets paid or distributed to them for a debt of the decedent upon which an action might have been maintained against the executor or administrator."

And by section 1843:

"The heirs of an intestate and the heirs and devisees of a testator are respectively liable for the debts of a decedent arising by simple contract or by specialty to the extent of the estate; interest and right in the real property which descended to them from or was effectually devised to them by the decedent."

The bill in this case sets forth the formation and existence of such a corporation at Baltimore, by the name of the American Casualty Insurance & Security Company of Baltimore City; that Henry W. Slocum, Sr., of Brooklyn, N. Y., was a stockholder in and director of that corporation; that as such director, with other directors, he violated section 67 of that article of the Code of Maryland by declaring a dividend when the corporation was insolvent, and section 69 by making loans to stockholders to a large amount, and afterwards died, leaving a will by which he devised a large amount of real estate, and bequeathed a large amount of personal estate, to the defendant Henry W. Slocum, Jr., who has received the same by distribution under the will; that the orators are creditors of the corporation, and bring this bill in behalf of themselves and all other creditors against Henry W. Slocum, Jr., among others, to reach the property of the testator now so held by him. The case has now been heard on his demurrer to the bill, and the question is whether, under these laws of New York, where this suit is brought, the cause of action survives against the executors of his testator, and can be enforced

against him, so as to reach this property, real and personal, received by him under the will. Under these statutes of New York, no actions survive except such as are for wrongs to property rights and interests. Neither of these sections of that article of the Maryland Code extend to or cover any wrong done to any property of the plaintiffs, or would give them any right of recovery against Henry W. Slocum, Sr., for anything else than his personal conduct, as director, in the management of the corporation, without reference to any amount of the property of the corporation to be affected, or making the right of recovery proportional to the amount. The cause of action is of entirely a personal character, depending entirely upon the personal conduct of the director, as such, in creating the liability. The consequences of this conduct may effect a right of recovery which would result in property to the plaintiffs, but the action is not founded upon any such effect to any other property than such as may be acquired by such a recovery. In such cases, under similar statutes, the cause of action would not seem to survive. *Read v. Hatch*, 19 Pick. 47; *Winhall v. Sawyer's Estate*, 45 Vt. 466; *Zabriskie v. Smith*, 13 N. Y. 322; *Stokes v. Stickney*, 96 N. Y. 323; *Hegerich v. Keddle*, 99 N. Y. 258, 1 N. E. 787; and *Witters v. Foster*, 23 Blatchf. 457, 26 Fed. 737. Upon these authorities, without attempting to cite all, or nearly all, of those that bear upon this question, the bill, which sets out no other ground of action against Henry W. Slocum, Jr., seems to be insufficient. Demurrer sustained.

FISHER et al. v. GRAVES et al.

(Circuit Court, S. D. New York. May 25, 1897.)

CORPORATIONS—LIABILITY OF DIRECTORS.

A director of a corporation is not liable for the misconduct of co-directors, not participated in by him as a wrongdoer, and a bill which seeks to fix upon a director liability for negligent acts of the board, but does not charge him personally with any neglect, charging only neglect by the board of directors, without mentioning him, and alleging that information showing the character of their acts was accessible to all the directors, is insufficient.

Camillus G. Kidder, for plaintiffs.

William B. Hornblower, for defendants.

WHEELER, District Judge. This suit is like that of *Railroad Co. v. Graves*, 80 Fed. 588, as to the making of loans to stockholders of the American Casualty Insurance & Security Company of Baltimore City, except that the plaintiffs are alleged to be so receivers and assignees of the property and rights of action of the corporation as to represent it; and the bill also alleges great loss to the corporation by reason of these loans, and:

"Seventeenth. That the said loans, and each thereof, were not only illegal, and in direct contravention of the statutes of said state, and expressly prohibited by the charter of said corporation, as has been hereinbefore set forth, but the same constituted investments of the corporate funds which were un-

suitable to its business, unreasonably hazardous, insufficiently secured, and such as no ordinarily prudent man, endeavoring conscientiously to discharge his duties as director of a corporation, would or could have sanctioned or approved, and that the facts with respect thereto, and establishing the impropriety, in a commercial sense, thereof, were either directly known to, or were readily accessible to, all of said directors, including said defendants and said Henry W. Slocum, and could have been ascertained by them by the exercise of such reasonable vigilance and activity as was imperatively demanded of them by their obvious obligation as such directors."

This case has also now been heard upon the demurrer of the defendant Henry W. Slocum, Jr.

The same considerations by which the cause of action in that case, upon the statute quoted there, did not survive, apply also here; and for the same reason the cause of action, so far as created by the statutes, is also held not to survive here. But, upon the allegations here, a wrong to the property of the corporation by negligence of some of the directors in making the loans resulting in loss is alleged; and the question here is whether such a wrong is so alleged, as to the director Henry W. Slocum, Sr., as to survive against his estate, and be chargeable upon his estate and property distributed to the defendant Henry W. Slocum, Jr. This part is like a common-law action for the negligence of this director. At common law one director does not seem to be liable for the misconduct of co-directors not participated in, as a wrongdoer, by him. *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924. In that case, Mr. Chief Justice Fuller said:

"They cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention, or in neglecting to use proper care in the appointment of agents."

The allegation against the director Henry W. Slocum, Sr., quoted from the bill, does not charge him personally with any neglect in either of these respects, but merely charges neglect by the directors, without mentioning him, and, as to him, says they were either known to, or readily accessible to, all of the directors, including him, and could have been ascertained by them by the exercise of such reasonable vigilance and activity as was demanded of them by their obligation as directors. This form of allegation does not even charge knowledge, but only that the facts could have been ascertained by the exercise of reasonable vigilance. This seems to be far short of any allegation of such negligence on his part as would make him liable. Therefore the bill alleges nothing as to this part of the case calling for any answer by the defendant Henry W. Slocum, Jr. **Demurrer sustained.**

LOUDON v. SPELLMAN.

(Circuit Court of Appeals, Eighth Circuit. April 12, 1897.)

No. 773.

1. TAX SALES—FORFEITURES—REDEMPTION FROM STATE.

The statute of Arkansas (Sand. & H. Dig. § 4596) relating to redemption of lands forfeited for nonpayment of taxes, by application to the commissioner of state lands, applies only to lands which remain in the hands of the state, and not to those which have been sold or donated by the state.

2. SAME—REDEMPTION FROM DONEE OR PURCHASER.

The statute of Arkansas (Sand. & H. Dig. § 2595) providing that no action shall be maintained for the recovery of lands forfeited for nonpayment of taxes against a purchaser or donee of the state, without a previous affidavit of tender to such person of the amount of taxes paid and the value of improvements made by him, does not apply where a bill in equity is filed for the redemption of lands by one claiming an undivided share thereof. In such a case a tender is impracticable, and the right must be determined upon equitable principles.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

Charles Cummings Collins and C. S. Collins, for appellant.
Samuel R. Allen, for appellee.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge. The bill of complaint in substance alleges that complainant is the owner in fee of an undivided five-ninths of the tract of 80 acres of land described in the bill, deriving his title from his grandfather, who died testate in 1841, and through the complainant's mother, who was one of the devisees under the will of the grandfather, and heir of another devisee, and who died in 1873, when the complainant was less than two years old. The bill also avers the sale of the land to the state of Arkansas, June 10, 1873, for the delinquent taxes of 1872, amounting, with penalty, to \$43.20, which sale is alleged to have been void, because it included a tax for interest on levee bonds, assessed at 16 cents per acre, instead of being assessed upon a valuation of the land, as required by the constitution of the state of Arkansas, and because of irregularities stated. It avers also that the county clerk, after expiration of the period of redemption, certified the tract to the state land commissioner, who placed the same on record, and offered it for sale or donation, as the property of the state, and that on December 18, 1875, one J. Redwood procured a certificate of donation of said tract from the land commissioner, and made proof of improvements, and obtained a donation deed of the tract in due form; and that after his death his heirs transferred their title and the possession of the tract to defendant, who has since been in possession of the land; that complainant arrived at full age on the 22d day of November, 1892, and that he had no means of knowing the amount of taxes that may be due the defendant, in order to make tender of the same; and he prays that he may be permitted to

pay such taxes as may be due the defendant, and that he may be allowed rent, and have writ of possession, and that the donation deed may be declared a cloud on his title, and removed as such, and for general relief. A general demurrer to the bill, alleging want of equity, and that complainant has an adequate remedy at law, and that the bill does not show that complainant had filed with the clerk of the court an affidavit of tender to the defendant of all taxes, interest, and the value of improvements, was sustained by the circuit court, on the ground that complainant had a complete and adequate remedy at law by applying to the commissioner of state lands to redeem the lands in controversy, under the provisions of section 4596 of Sandels & Hill's Digest, which reads as follows:

"All lands and town or city lots, or parts thereof, which have been or may hereafter be forfeited to the state for non-payment of taxes, which belong to minors, femmes covert, persons of unsound mind, and persons in confinement at the date of forfeiture, may be redeemed by such persons by application to the commissioner of state lands within the limitation now prescribed by law, and upon the terms and in the manner now provided by law, or that may hereafter be prescribed by law."

Section 6615 of the same Digest provides that redemption from tax sales may be made by minors, insane persons, etc., within two years after the expiration of such a disability. Section 2595 of the same Digest provides that no person shall maintain an action for the recovery of any lands, or for the possession thereof, against a person holding such lands under a purchase at a tax sale, or purchase from the state of land forfeited for the nonpayment of taxes, or person holding the land under a donation deed from the state, unless before issuing the writ he shall file in the office of the clerk of the court in which the suit is brought an affidavit setting forth that the claimant has tendered to the person holding such land, his agent or legal representative, the amount of taxes first paid for said lands, with interest thereon from the date of payment thereof, and all subsequent taxes paid by the purchaser, with interest thereon, and the value of all improvements made on such land by the purchaser, his heirs, assigns, or tenants, after the expiration of the period allowed for the redemption of lands sold for taxes, and that the same have been refused. From the reading of these several provisions of the Arkansas statutes, it seems quite clear that the complainant could not have redeemed the land in controversy by applying to the commissioner of state lands, under the provisions of section 4596 of Sandels & Hill's Digest, above quoted, and that such section only applies to the case of lands which remain forfeited to the state for nonpayment of taxes. In such case only the state is interested in the matter of the delinquent taxes, and consequent forfeiture, and the land commissioner, on behalf of the state, can certify the redemption on the terms prescribed by law. But when such lands have been purchased from or donated by the state, the state ceases to be interested in the matter of the delinquent taxes, and only the purchaser or donee, or persons holding under and through him, have such interest; and section 2595 then applies. The state land commissioner has no longer jurisdiction, nor any data upon which to act. He cannot determine upon the value of improvements, for instance, nor issue any process to put the redemptioner in possession

of the land. The complainant therefore had no remedy in this case by means of application to the state land commissioner.

This is a bill to redeem, and a redemption of land through the intervention of a court is equitable in its nature, its effect being, ordinarily, to divest an outstanding legal title, upon the payment of what is due to the holder of such title. In Arkansas a donation deed is *prima facie* evidence of good title in the donee. *Radcliffe v. Scruggs*, 46 Ark. 96. And the plaintiff's suit to redeem is an affirmation of the tax title, and an election to defeat it by complying with the law governing such case, and the right of minors to redeem, may, in that state, be enforced in equity. *Bender v. Bean*, 52 Ark. 132, 12 S. W. 180, 241. The most serious question is whether the bill to redeem can be maintained without filing the affidavit of tender provided for by section 2595, Sand. & H. Dig., above referred to. The language of that section forbids the maintenance of an action to recover the lands, or for the possession thereof, without filing such affidavits of tender. The theory seems to be that such tender of itself effects the redemption, so that the redemptioner may thereupon maintain an action of ejectment, and he is not allowed to maintain that kind of action without such affidavit of tender. The section does not, by its terms, forbid the maintenance of a suit to redeem. And the supreme court of Arkansas holds that suits to redeem may be maintained, where that right remains because of the minority of the plaintiff, in cases where actions by the same plaintiffs for the recovery of the land have failed. *Sims v. Cumby*, 53 Ark. 418, 14 S. W. 623; *Anthony v. Manlove*, 53 Ark. 423, 14 S. W. 624. Even if such tender could be held requisite in ordinary cases, where the redemptioner claimed the entire land, and would become entitled to the whole upon paying the amount of all taxes, costs, interest, and the value of improvements, it would be impracticable, in a case like this, where the complainant claims only an undivided five-ninths of the land, and has the right to redeem only that five-ninths, and there is no existing right of redemption in the owners of the other four-ninths interest. He ought not to be compelled to pay the whole amount of such taxes, interest, and costs, and the entire value of all the improvements, as a condition to the exercise of his right to redeem his undivided partial interest in the land. Neither could he take from the defendant, by such redemption, his right to the four-ninths, in respect to which there is no outstanding right of redemption, and to which the complainant has no claim of title. And if it be a fact, as alleged, that the original tax sale was void because of including taxes not levied in accordance with the provisions of the constitution, that may effect the liability of the complainant to pay amounts which are in the nature of penalties. *Douglass v. Flynn*, 43 Ark. 398. Section 2595 of said Digest is not applicable to a case of this kind. It must be settled upon principles of equity, making practicable the existing right of redemption, and adapted to the unusual circumstances of the case. The decree appealed from is reversed, with costs, and the cause remanded for further proceedings.

HOGG v. HOAG et al.

(Circuit Court, S. D. New York. March 8, 1897.)

TRUSTS—DISPUTE AS TO CONTINUANCE—APPOINTMENT OF RECEIVER.

When there is a dispute among the parties to a suit as to the continued existence of a trust, the court will not appoint a new trustee, on a preliminary motion, though all parties concede the need for some one to protect the trust property, but will reserve that question for the final hearing; but it will appoint a receiver to hold and protect personalty pending the suit, and, where there is real property out of the jurisdiction, and all persons interested are parties, will direct the heirs of a deceased trustee to convey to such receiver, leaving it to the court in the jurisdiction where the land lies to determine whether the receiver thereby acquires sufficient title to manage and protect the property.

Charles W. Gauld, Arthur C. Rounds, Charles Bulkley Hubbell, and William L. Snyder, for plaintiff.

William Pinkney Whyts, for defendants.

LACOMBE, Circuit Judge. The decision of this motion lies within a much narrower compass than the argument. The situation is this: A trust was created by written agreement of individuals. By virtue of such trust, one Coe, now deceased, held certain property, real and personal. The personal property is in this district; the real estate is in Oregon. The legal title to such real estate at Coe's death was in him. All parties interested in such trust, or in its continuance, or in its funds, are parties to this suit. Complainant asked the court to appoint a trustee to continue the administration of the trust. Defendants resisted the application, contended that the trust terminated on the death of Coe, and that the property should be distributed to those entitled to it. This court refused to pass upon the question whether or not the trust had terminated, upon preliminary application, reserving it for final hearing. The personal property in this district, however, was in the possession of the executors of Coe, who wished to be relieved from its custody. An order was therefore made appointing a receiver of such property, to hold the same until termination of the suit. It now appears that the real estate in Oregon needs some one to conserve it pending this litigation; that portions of it have been, or are about to be, sold for taxes; and that portions of it could be rented if some one had authority so to do. The Oregon courts seem powerless to act, for the reason that nearly all the parties reside elsewhere, and no suit has been brought there. The receiver's appointment here gives him no title to the Oregon lands. Inasmuch as no statute of Oregon to the contrary is shown, it may be assumed that the legal title to the real estate there passed to Coe's children, to be held by them until a new trustee might be appointed, or the property turned over to the beneficiaries. The children of Coe do not wish to be burdened with this property, and there is no reason why they should be. No new trustee should be appointed until it is determined at final hearing whether or not there is any trust to administer, but in the meanwhile there should be some one authorized to look after the prop-

erty. It is suggested that a conveyance by the children of Coe to the receiver will give him sufficient authority, which would be recognized in Oregon. If it be the law in Oregon that the heirs at law of a deceased trustee succeed to the legal title of real estate held by him, and that, upon their declination to act, the court, all parties being present, may, by proper decrees, effect a conveyance of the trust estate to a new trustee, it would seem that the court would have abundant authority to place such estate in the hands of a temporary trustee, to wit, its receiver, until it determined whether a permanent new trustee should or should not be appointed. If, on the contrary, as complainant contends, it be the law of Oregon that the legal title to such real estate as a decedent may die seised of does not pass to his heirs when impressed with a trust, or that upon their declining to act as trustees it ceases to be in such heirs, and is thenceforth in nubibus, undoubtedly such conveyance from the heirs of Coe to the receiver will give him nothing. But it is not thought that this difficulty will be found to exist. Certainly this court should do what it can towards preserving the trust funds, and whether its orders and the conveyances under them will give the receiver sufficient authority in Oregon to hold and manage the real estate must eventually be decided by the courts in the state where the land is situated. The heirs of Coe therefore are directed to convey to the receiver, as prayed in the petition.

Complainant concedes the desirability of having some one appointed to look after the Oregon real estate, and, since he has not moved in that state, he evidently assumes that this court has such power of appointment. The fundamental difficulty with his practice, however, is that he expects this court to decide the main question in dispute upon affidavits on preliminary hearing, to hold that there is an existing trust, and to appoint a trustee, whereas it is the uniform practice in this district not to decide such questions on motion, but to reserve them for final hearing on pleadings and proofs, the court meanwhile merely preserving the status quo by injunction, receiver, or otherwise. Motion granted in the main action.

NIBLACK v. OOSLER.

(Circuit Court of Appeals, Sixth Circuit. May 4, 1897.)

1. BANKS AND BANKING—SPECIAL DEPOSIT—NEGLIGENT ALTERATION OF CERTIFICATE.

A bank, on receiving certain notes as a special deposit, issued a certificate for the amount thereof, made out on a printed form, from which the words "in current funds" were erased, and "in certain notes" substituted. The certificate was marked "Special deposit." Having been transferred, this certificate was sent by the holder to the bank for payment. The notes had not then been collected, and the teller was directed by the cashier to return the certificate; but, as the signature was torn, he was instructed to prepare and transmit a duplicate certificate. In doing so, he carelessly omitted to change the printed form by erasing "in current funds," and substituting "in certain notes." *Held*, that there was no ground for a claim that the second certificate was given in payment for the first; that it was

only a substitute for it; and that the receiver of the bank was only required to surrender to the holder the notes constituting the special deposit, for which the original was issued. 74 Fed. 1000, affirmed.

2 SAME—KNOWLEDGE OF CASHIER IMPUTABLE TO BANK.

Knowledge by a member of a firm of the true consideration of a certificate of deposit, which the firm discounted at a bank in payment of individual notes of one of its members, and which had been negligently altered in making out a duplicate certificate, *held* to be imputable to the bank, where the other member of the firm was its president, and, as such, acted as the sole representative of the bank in accepting the certificate. 74 Fed. 1000, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

This is a bill in equity filed by W. O. Niblack, receiver of the Columbia National Bank, against S. S. Cosler, as assignee, under a general assignment of the Valley Bank. The Valley Bank is a partnership doing business at Spring Valley, Ohio, under the partnership name of the Valley Bank. The object of the bill is to compel an allowance by its assignee of two certificates of deposit issued by the Valley Bank. The first of these certificates is known in the record as "Exhibit A," and is in the following words and figures:

"No. 112. The Valley Bank, Spring Valley, Ohio. \$4,175.

"Dec. 17, 1892.

"Dwiggins, Starbuck & Co. have deposited in this bank forty-one hundred and seventy-five — no/100 dollars, payable to the order of themselves — in current funds on the return of this certificate properly indorsed, with interest at 4 per cent. per annum if left 6 months. No interest after 12 months unless renewed.

"\$4,175.00.

S. S. Cosler, Teller."

The said certificate is indorsed as follows:

"Face	\$4,175 00
Int. at 4 per cent., Dec. 17—92, to May 11—93, 145 days.....	67 28
Total, 5—11—93	\$4,242 28
Oct. 28—93, balance.....	\$1,225 48
Suspense	620 28
	<hr/>
	\$1,855 71
Balance due	\$2,386 55

"Dwiggins, Starbuck & Co."

The second certificate is known as "Exhibit B," and is in words and figures as follows:

"No. 106. The Valley Bank, Spring Valley, Ohio. \$5,150.

"Feby. 1, 1893.

"United States Loan & Trust Co. has deposited in this bank fifty-one hundred and fifty and — no/100 dollars, payable to the order of self — in current funds on the return of this certificate properly indorsed, 6 months after date, with interest at — per cent. per annum, if left — months. No interest after 12 months unless renewed.

"\$5,150.00.

S. S. Cosler, Teller."

Indorsed:

"Without recourse. United States Loan & Trust Co., Harry M. Green, Secy."

The certificate which we shall designate as "Exhibit A" is not the original one issued by the Valley Bank, but is a duplicate, issued April 19, 1893, as a substitute for an original certificate issued December 17, 1892. The original

was issued at the request of a firm doing a banking business at Chicago, under the firm name of Dwiggins, Starbuck & Co. The consideration upon which it was issued was certain notes deposited in the Valley Bank, in which Dwiggins, Starbuck & Co. owned a one-half interest. The words "payable in current funds," found in the certificate as it now appears, were crossed out of the form used in filling out the original, and the words "payable in certain notes" substituted. The original also contained the words "special deposit." This original certificate was indorsed by Dwiggins, Starbuck & Co. to the Columbia National Bank, and the proceeds passed to their credit. Subsequently that bank charged it to the account of the Valley Bank, and sent it in for payment April 19, 1893. Payment was refused, as the notes in which it was payable had not been collected, and Mr. Cosler, the bank teller, was instructed by Mr. Puckett, the cashier, to return it. In opening the letter in which this certificate was inclosed, the teller accidentally detached the signature from the certificate, and was directed to issue a similar certificate, and send it to the Columbia Bank in place of the one defaced. In the execution of this simple direction, Mr. Cosler omitted to make the substituted certificate payable "in certain notes," as was the original, and omitted to mark it as a "special deposit." The certificate, in form as heretofore set out, was returned to the Columbia National Bank. These instructions were given the teller by Mr. Puckett, the cashier, over the telephone, and the latter never knew of this change in its terms until after the demand for payment in current funds was made by the receiver subsequently appointed to wind up the Chicago bank.

The history of Exhibit B is much the same. On February 2, 1893, Dwiggins, Starbuck & Co. sent to the Valley Bank \$5,000 par value of bonds issued by a corporation doing business in Chicago as the United States Loan & Trust Company. These bonds were called "income bonds," and were supposed to be based upon shares in country banks owned by the trust company. These bonds were remitted with the request that a certificate of deposit be issued for them. By direction of the cashier, the teller issued a certificate for \$5,150, being the par value of these bonds, with accrued interest. That certificate was made "payable in certain bonds," and was plainly marked as a "special deposit." The certificate was made payable to the order of Dwiggins, Starbuck & Co., and was remitted to that firm through the mail. On the 4th of February, 1893, it was returned to the Valley Bank by letter requesting that it would send "a similar one, but to the order of the United States Loan & Trust Company," and that it should be dated February 1st, instead of February 2d. Mr. Puckett, the cashier, was consulted by the teller, and instructed over the telephone to comply with this request, and issue another certificate similar to the one returned except in the particulars mentioned. The teller repeated the blunder he had made in renewing Exhibit A, and omitted to strike out the words "payable in current funds," and to insert in place the words "payable in certain bonds"; and for the second time he neglected to write on the certificate the words "special deposit." Instead of sending a similar certificate as requested, he sent the one set out in the earlier part of this statement of facts. This substituted certificate was indorsed without recourse by the United States Loan & Trust Company, and was discounted by the Columbia National Bank on February 8, 1893, which now claims as an innocent purchaser for value, without notice of the real consideration or of the circumstances we have detailed as to the issuance of the substituted certificate. The notes upon which Exhibit A was issued are uncollectible, and probably worthless. The so-called "income bonds" have never been sold by the Valley Bank, and are probably of no real value. The defendant below averred its readiness and willingness to take up these certificates in the notes and bonds in which, according to its contract, they were payable, and denied that the Columbia National Bank was entitled to the status and rights of an innocent purchaser for value. The Columbia National Bank failed in May, 1893. At that time it held for collection, on account of the Valley Bank, checks on other banks aggregating \$620.28, which were subsequently collected by its receiver. There was to the credit of the Valley Bank \$1,225.43, as shown by its books. Both these sums were credited on Exhibit A by the receiver, who seeks to recover only the balance after such credits. The defendant, by cross bill, prays that the complainant, as receiver, be required to pay to him the sum of \$620.28, as

a collection made after the Columbia Bank had been closed, and to allow the dividend due upon its claim for \$1,225.43, as a depositor. The circuit court held that the complainant was not an innocent purchaser for value of either of said certificates, and that it was not entitled to an order for the payment thereof, and granted the relief sought by the cross bill.

Harvey Scribner, for appellant.

Charles Darlington and Edward Colston, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

After making the foregoing statement of facts, the opinion of the court was delivered by LURTON, Circuit Judge.

Neither of the original certificates was payable in money, and neither was evidence of a deposit of money. One on its face was "payable in certain notes," and the other in "certain bonds," and both bore evidence of being issued for a "special deposit." Neither embodied a contract negotiable in character, and one taking them as originally issued could not claim the protection accorded one who takes negotiable paper before maturity for value, and without notice of defenses. When the first certificate was indorsed to the Columbia National Bank, it received it as a special contract, redeemable or payable in "certain notes," and not payable in money. No question of innocent purchaser could arise upon such paper, and it is wholly immaterial whether the bank had any knowledge outside the terms of the paper itself. It acquired no greater rights against the Valley Bank than existed in favor of the payee named in the certificate. The contention of appellant that the certificate which it now holds was issued in payment of the original certificate is without support in the facts. It was issued as a mere substitute for the original, which had been accidentally spoliated. The only consideration for the certificate now held was the one originally issued. That was redeemable in "certain notes." There was no new agreement between the parties, and no consideration for an agreement to pay in current funds. The change in the contract was made without the knowledge, consent, or intention of the Valley Bank, and was wholly due to the gross carelessness of the clerk who prepared and issued it. Under these facts, the complainant cannot be regarded as a purchaser without notice. It is therefore subject to any defense which could have been made against the original. This certificate was redeemable in the notes deposited by Dwiggins, Starbuck & Co. Those notes are held subject to the order of complainant, having never been collected or otherwise disposed of. The decree of the circuit court as to the certificate dated December 17, 1892, must be affirmed.

The rights of the complainant upon the certificate dated February 1, 1893, depend upon a different state of facts. That certificate, in its present shape and form, was discounted by the Columbia National Bank February 8, 1893. The officer who acted for the bank in discounting it was Zimri Dwiggins, its president. Dwiggins was one of the owners of the Valley Bank, and was a member of the firm of Dwiggins, Starbuck & Co., who procured the issuance of

both the original and the substituted certificates. He was also the president of the United States Loan & Trust Company, to whom the certificate was payable. Dwiggins' knowledge of the actual terms upon which the Valley Bank had issued this certificate is clearly established. That he knew of the mistake made by the teller in making the duplicate of the original certificate is not shown; but that he knew that income bonds had been deposited upon which this certificate was issued, and that the certificate was redeemable in such bonds, unless in the meantime they had been sold by the Valley Bank, is clearly shown, and is not denied by Dwiggins.

This brings us to the question as to whether the Columbia National Bank is chargeable with the knowledge of Dwiggins. We think it is. Dwiggins acted for the bank in discounting this certificate, and, unless there is something else in the case, the bank, upon well-settled principles of the law of agency, is chargeable with the notice which its agent had as to the contract under which this certificate was redeemable. The contention made by counsel for appellant is that Dwiggins was interested for himself in obtaining the discount of this paper, and that he therefore acted for himself in causing its discount by the bank, and that notice to him under such circumstances is not to be imputed to the bank, even though the bank obtained its title through him as its sole agent. The general rule that a principal is held to know all that his agent knows in a transaction in which the agent acts for him has its exceptions. One of these exceptions is that the agent's knowledge will not be imputed to the principal where the legal effect of what the agent did was to cheat the principal for his own benefit. This exception has been many times noticed and applied, and was the subject of elaborate consideration by this court in *Read v. Doak*, 22 U. S. App. 669, 12 C. C. A. 643, and 65 Fed. 341, and in *Wilson v. Pauly*, 37 U. S. App. 642-651, 18 C. C. A. 475, and 72 Fed. 129. But it is unnecessary to consider the application of this principle to this case, for the reason that the facts do not show that Dwiggins was acting for himself or for any firm or corporation in which he had an interest. The assumption that this certificate was discounted for the benefit of Dwiggins, Starbuck & Co., in which firm Dwiggins was interested, is based upon the mere form in which entries were made upon the books of the bank. It was agreed by counsel for both parties that the books of the Columbia National Bank show that on the 8th of February, 1893, the United States Loan & Trust Company deposited, among other certificates, the one now under consideration, and received credit for the same upon the books of the bank, and upon same day drew its check upon the bank to the order of Zimri Dwiggins, president of the bank, for an amount which covered the proceeds of this certificate, and that the amount so drawn out by the United States Loan & Trust Company was placed to the credit of Dwiggins, Starbuck & Co. No explanation of these entries is made, although both Mr. Dwiggins and Mr. Starbuck testify as witnesses for the complainant that the income bonds deposited with the Valley Bank, and for which this certificate was

issued, were owned by J. M. Starbuck individually, or in part by J. M. Starbuck, and the rest by his brother, W. H. Starbuck, and that the certificate was issued to the United States Loan & Trust Company as a mere matter of form, and to add to its credit. Both these witnesses likewise testify that both J. H. and W. H. Starbuck were individually indebted to the Columbia National Bank by individual notes unsecured by collateral or otherwise, and that this certificate was accepted by the bank in payment of the individual indebtedness of J. H. Starbuck to the Columbia National Bank. Dwiggins says he thought the certificate better paper than the individual note of Starbuck, and therefore accepted it in place of such paper for the bank. This transaction seems to have been completed in connection with other certificates discounted at same time by the bank, and the form of book entry may have been adopted as a consequence. But, whatever the form of book entry, the actual fact was that this certificate, though issued to the United States Loan & Trust Company and at the request of Dwiggins, Starbuck & Co., was the property of J. H. Starbuck or of J. H. and W. H. Starbuck, and was indorsed to the Columbia National Bank, and applied in payment or liquidation of the individual indebtedness of J. H. Starbuck to that bank. Thus, Dwiggins acted alone for the bank in taking this certificate, and in applying it upon the individual indebtedness of Starbuck; and the general rule imputing to a principal the knowledge of his agent, who acted for him in a particular transaction, has full force and application to this case. The suggestion that Dwiggins was one of the partnership owning the Valley Bank, and was therefore acting for himself in discounting the certificate of the Valley Bank, is not well taken. This certificate was not discounted for the Valley Bank. It was no party to the transaction by which the Columbia National Bank acquired its title. The decree of the circuit court upon the matters involved by the cross bill was correct, and the decree of the court is in all respects affirmed.

BLODGETT et al. v. NORTHWESTERN EL. R. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. May 24, 1897.)

No. 324.

ELEVATED STREET RAILWAYS—DAMAGE TO ABUTTING OWNERS—INJUNCTION.

Where the fee of a city street is in the municipality, the damage suffered by an owner of abutting property through the construction of an elevated railroad in the street is merely consequential, and, the owner having an adequate remedy at law for the damage suffered, if any, equity will not interfere by injunction to restrain the construction of the railroad on the ground that the ordinance authorizing it is illegal. *Doane v. Railroad Co.* (Ill. Sup.) 46 N. E. 520, followed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

John H. Hanline, for appellants.

John P. Wilson, for appellees.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge. The appeal in this case is taken from an order of the circuit court sustaining a demurrer to the bill, and dismissing the same for want of equity. The bill was filed by property owners abutting Fifth avenue, in the city of Chicago, to enjoin the construction of an elevated railroad on that street in front of the appellants' property. The point in controversy involves the question of the right of an owner of abutting lots to enjoin the construction of an elevated railroad upon a public street to be used for public purposes, on the ground that the ordinance authorizing such construction was void for want of a sufficient petition of property owners, as required by the statute of the state of Illinois. The circuit court sustained a demurrer to the bill, and refused to grant an injunction. As this is a question of local law appertaining to real estate, we are of opinion that the question should be controlled by the decisions of state courts of Illinois, and the decision of the court below seems to be fully sustained by the decision both of the appellate and supreme courts as well as the circuit courts of the state. The case of John W. Doane v. Lake Street Elevated Railroad Company, in the circuit court for the county of Cook, presented the precise question presented here, and has been decided in the supreme court since this appeal was taken. 46 N. E. 520. The circuit court sustained a demurrer to the bill for want of equity, and the appellate court affirmed the decree, and the case was appealed to the supreme court of the state. The case is not distinguishable from the one at bar. The court, in deciding the appeal, says:

"The question for decision is, do the facts well pleaded in this bill entitle the complainant to the injunction prayed for? It is conceded that the common council of the city of Chicago is, by the provisions of our statute, given exclusive control and supervision of its streets, the fee of which is vested in the municipality. While they are held in trust for the public use, and can only be appropriated to the purposes for which they were dedicated, it is the settled law of this state that permitting street railroads to be placed therein is not subjecting them to an unlawful use. It has often been so decided by this court as to surface roads, and no good reason has been suggested, and none, we think, can be offered, for making a distinction in this regard between elevated and surface roads. The road in question, if constructed in conformity with the requirements of the ordinance, will certainly obstruct travel upon the loop or street less, and be less hazardous to the public, than would be a surface road. The pillars upon which the superstructure is to be built, which it is claimed will exclude the public from a part of the street, are but a necessary part of the road, as much so as are the rails and other parts of tracks constructed upon the ground, or as are trolley posts placed in the street for operating an electric road by the trolley system. It is true that all these things do to some extent interfere with the use of the street by ordinary vehicles, but the inconvenience is one which must be borne for the benefit resulting to the public from the better modes of travel thus afforded."

Various Illinois cases are cited as authority that the remedy is by action at law for damages. *Moses v. Railroad Co.*, 21 Ill. 516; *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, 156 Ill. 270, 40 N. E. 1008; *Murphy v. City of Chicago*, 29 Ill. 279; *Stetson v. Railroad Co.*, 75 Ill. 74; *Patterson v. Railway Co.*, 75 Ill. 588; *Railroad Co. v. McGinnis*, 79 Ill. 269; *Railroad Co. v. Schertz*, 84 Ill. 135;

Insurance Co. v. Heiss, 141 Ill. 35, 31 N. E. 138. See 46 N. E. 520. Proceeding, the court further says:

"The same doctrine is recognized in *Corcoran v. Railroad Co.*, 149 Ill. 291, 37 N. E. 68; *White v. Railroad Co.*, 154 Ill. 626, 39 N. E. 270. We said in *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, supra, where the fee of the street is in the city, such damages as the owner may suffer from the laying of a railroad track in the street are merely consequential, so far, at least, as they affect the property abutting on the street. In such case, as there is no physical taking of the land, injunction will not lie to enjoin the taking, the remedy being an action at law for damages. The real ground upon which relief by injunction is denied in such cases is that, the use of the street being within the purposes for which it is laid out, and therefore a proper use, the right to occupy is properly a question between the defendant and the municipality having the control of its streets and charged with the duty of keeping them free from unlawful obstructions, or between the defendant and the public generally, the individual being left to his action for damages for an injury resulting to his property. He has no standing in equity on account of public injury, or for the purpose of inflicting punishment upon the defendant for its wrongful acts. He can only invoke that jurisdiction in order to protect his property from threatened injury. His injury is a depreciation of the property which is capable of being estimated in money, and recoverable in an action at law; therefore a court of equity will not interfere by injunction. The principle is that, the abutting property owners having a complete remedy at law, courts of equity will not, upon his allegation that the ordinance authorizing the construction is illegal, enjoin the defendant from proceeding until the question of illegality can be litigated and determined, but remit him to his action at law; and this, it seems to us, is a just and reasonable rule, the enforcement of which will protect the rights of all parties interested. To hold otherwise would be to render impracticable the building and operation of street-car lines under our statute. While such improvements are owned and operated by private individuals or corporations, the use of the streets is public, and not private, and upon that theory alone they are permitted to be constructed in the streets, and it will not be denied that in large and populous communities they are of great public utility, if not a public necessity. While, therefore, the private owner is entitled to have all his property rights fully protected, that right should be accorded him, if possible, by a remedy which will not unnecessarily injure others, and render impossible the construction and operation of necessary facilities for public travel. A moment's reflection will, we think, convince any one that if every abutting owner not consenting may enjoin street-railway companies from building their lines in streets upon the ground that the consent of the city has not been legally obtained, because of facts alleged which do not appear upon the face of the proceedings, the building and operation of all such lines will become practically impossible. In a case like this the work would necessarily be stopped until titles to abutting property could be adjudicated and settled, the powers of agents, etc., determined, and the motives which may have prompted owners to give their consent inquired into. After this had been done, which, in the ordinary course of litigation, would require many months, or even years, of time, if the facts should be found in favor of the validity of the ordinance, the work may proceed as to this complainant, he still being entitled to his action for damages. The decision, however, would settle the validity of the ordinance between him and the defendant and no one else. Any number of other owners may, in succession, procure injunctions on the same or similar grounds, and prosecute them to a like final determination. Manifestly, neither persons nor corporations would hazard capital in an enterprise subject to such uncertainty and delay. There is a certain, adequate, and complete remedy at the suit of the public whenever there is a threatened or actual unlawful obstruction of streets and highways, and, as we think, an equally certain, adequate, and exclusive remedy to the abutting owner for all his damages, present and prospective."

We think these adjudged cases of the supreme court of Illinois are controlling upon this court, and the decree of the circuit court is therefore affirmed.

JOUROLMON et al. v. EWING et al.¹

(Circuit Court of Appeals, Sixth Circuit. May 10, 1897.)

No. 381.

1. INTEREST—AGREEMENT OF PARTIES—PURCHASE MONEY OF LAND.

Where a note for purchase money of lands provides for the payment of interest from the date of the contract of sale, and the vendee was given possession in which he has not been disturbed, interest runs from that date, not from the time when a good title is made; and a condition that any parcels of the land in litigation, or adversely owned or possessed, shall not be paid for until the title is cleared, simply postpones the time of payment, without affecting the amount.

2. SAME.

The general rule is that, where there is an express stipulation in regard to the payment of interest, it will be regarded as a part of the contract, and enforced accordingly; but where there is no such stipulation, and interest is treated as damages, it will be awarded or denied, according to the equity of the circumstances.

Appeal from the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

Henderson & Jourolmon and Webb & McClung, for appellants.
Geo. W. Easley and Pritchard & Sizer, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge. The Tennessee Coal, Lumber & Tan-Bark Company on the 8th day of November, 1889, being then the owner of a large tract of lands lying in Morgan county, Tenn., the title to some parcels of which rested under clouds arising from the claims of other parties, and having in contemplation the purchase of certain other inlying parcels, entered into a contract with the East Tennessee Land Company for the sale to the last-named company of all of the said lands for the agreed price of \$10 per acre, amounting in the whole to the sum of \$125,000. A part of the purchase price was paid down, and it was stipulated in the contract that the balance should be paid in installments, with interest from the date thereof. It was further provided in the contract that the parties should meet at Knoxville on the following 15th day of January for the purpose of executing the deed and the notes to be given for the deferred payments. At the last-mentioned date the parties met as agreed, and in execution of the contract a deed was executed for the whole of the above-mentioned tract by the Tennessee Coal, Lumber & Tan-Bark Company to the East Tennessee Land Company, in which certain other parties joined as grantors, who held the legal title to, or had claims upon, certain parcels of the lands sold. This deed, after acknowledging the receipt of the sum of \$12,000, which had already been paid, stated that the further consideration of the deed was \$113,000, to be paid in three installments, evidenced by notes for that amount, and due as follows: The first, for \$31,000, due April 15, 1890; the second, for \$41,000, due July 15, 1890; and the third, for \$41,000, due January 15, 1891,—each bearing interest from November

¹ Rehearing denied July 6, 1897.

8, 1889, to secure the payment whereof a specific lien was retained on the property thereby conveyed, and granted, bargained, sold, and conveyed the lands therein described, with covenants of seisin and of right to convey, of freedom from incumbrances, to warrant and defend the title, and for further assurance. The warranty of the Tennessee Coal, Lumber & Tan-Bark Company extended to all of the lands conveyed. The warranty of the other grantors was limited to the particular parcels in which they respectively claimed the title or some interest therein. The notes of the East Tennessee Land Company for the deferred payments mentioned in the deed were at the same time executed and delivered. These notes were alike in form, except in respect of the amounts and the dates when payable, which corresponded with the amounts and dates specified in the deed. One of the notes is here copied:

"\$41,000.

Knoxville, Tenn., January 15, 1890.

"On or before the 15th day of July, 1890, the East Tennessee Land Company promises to pay to the order of the Tennessee Coal, Lumber and Tan-Bark Company forty-one thousand dollars, with interest from November 8, 1889, value received in deed bearing date January 15, 1890, from the Tennessee Coal, Lumber and Tan-Bark Company and others to the East Tennessee Land Company, conveying four tracts of land in Morgan county, Tennessee, known as 'Entries Numbers 1,969, 1,968, 1,959, 2,314,' and this note is secured by lien expressly retained in, and is subject to all equities of, said deed; but this note is based on a purchase price of ten dollars per acre, as recited in said deed, and is given for one-third of the purchase money, less six hundred and sixty-six and sixty-six one-hundredths dollars (paid in cash previously to the execution of the said deed, and credited on second payment), under contract dated November 8th, 1889, that said land is to be paid for in three payments, and any abatement or increase in purchase money that may be brought about by determination of acreage by more careful surveys shall apply proportionately to each note, and any overpayment shall apply on the note next falling due.

"Land adversely owned, or in litigation, or in adverse possession, shall not be paid for until such adverse claims be removed of record.

"East Tennessee Land Company,

"By Frederick Gates, General Manager."

These notes were subsequently assigned by the Tennessee Coal, Lumber & Tan-Bark Company to Leon Jourolmon and Hu. L. McClung, the petitioners herein, as trustees. The parties who represented the East Tennessee Land Company in this purchase were Frederick Gates and J. W. Scott. These persons were cognizant of the state of the title of the lands conveyed; Scott being a practical surveyor and abstractor of titles, living in the county of Morgan, in which the lands were located. It was well known to these parties that the title to some parts of these lands was in litigation, and that, with respect to others, the title was yet to be acquired by the Tennessee Coal, Lumber & Tan-Bark Company; and it was understood that the title to all the lands covered by the deed of the Tennessee Coal, Lumber & Tan-Bark Company, which was not then perfect, was to be cleared of adverse claims, or bought in, and it was therefore stipulated in the three purchase-money notes that the "land adversely owned, or in litigation, or in adverse possession, shall not be paid for until such adverse claims be removed of record." Possession was at once delivered of all the lands, and the Tennessee Coal, Lumber & Tan-Bark Company proceeded to acquire and perfect the title to such as it

did not already hold by complete title, and no question is made now with respect to the validity and completeness of the title to all the lands covered by the deed. In November, 1893, Ferdinand Schumacher and others, general creditors of the East Tennessee Land Company, filed their bill in the court below for the purpose of winding up the East Tennessee Land Company as an insolvent incorporation; and in March, 1894, the Central Trust Company of New York also filed in the same court its bill against the East Tennessee Land Company for the purpose of foreclosing a mortgage which had been given by the last-named company to the said Central Trust Company to secure certain bonds which it had issued. These two causes were, by an order of the court, consolidated under the style of "The Central Trust Company of New York v. The East Tennessee Land Company," and all the creditors of the East Tennessee Land Company were directed to come in by petition and file their claims. On June 11, 1894, Jourlomon and McClung, as trustees, filed their petition in the consolidated case, setting forth the above-stated purchase and sale of lands, the execution of the three notes given for the purchase money, and the assignment thereof to them; that certain payments had been made, but that the balance still remained due. They prayed a reference to ascertain the balance due, and for a decree establishing the balance as a first lien upon the lands sold. On the same date (June 11, 1894), W. H. Russell and A. A. Hopkins, who had been appointed receivers in the consolidated case, and to whose office the defendant has succeeded, also filed a petition, and therein admitted that there was still a large balance of purchase money due upon the notes given by the East Tennessee Land Company to the tan-bark company, for the payment of which an express lien had been retained by the vendor; and they further stated that they had entered into a contract with the state of Tennessee by which they had agreed to sell to it, for the price of \$80,000, a large portion of the lands which the East Tennessee Land Company had purchased from the Tennessee Coal, Lumber & Tan-Bark Company; and they prayed that their contract of sale be confirmed, and that the title to land so sold to the state of Tennessee should be vested in the state, free of the original vendor's lien, and that an account should be taken between the East Tennessee Land Company and its vendor of the amount still due. Such a reference was ordered, and a special master appointed, who proceeded on the reference and made his report. The matter was recommitted for the purpose of making certain special inquiries, and again further recommitted for a like purpose. It is unnecessary to enter into the particular matters involved in these references, further than to say that the principal source of difficulty, and the one which is involved in the controversy here, was created by the objection raised by counsel for the receivers of the East Tennessee Land Company upon the question as to the date from which the petitioners were entitled to recover interest upon their notes; the position taken by the petitioners being that interest should be computed according to the terms of the notes (that is to say, from the 8th day of November, 1889); the receivers, on the other hand, contending that the petitioners were not entitled to claim interest upon the purchase price in respect of the

several tracts until the title thereto was cleared up and made acceptable. This position counsel for the receivers has all along maintained, and still maintains. He insisted before the master and before the court that, this being a proceeding in a court of equity, the complainants were not entitled, as standing in the place of vendors in this respect, to recover interest on the purchase price of land, the title to which was not marketable, and that they could not claim to assert a lien for the interest accruing prior to the date when it was made such. The special master held substantially in accordance with the receivers' contention. The petitioners excepted to the master's conclusion in this respect, and insisted upon their exception when the matter was brought on for final hearing before the court. The court adopted the conclusions of the master, overruled the petitioners' exceptions, and entered a decree upon the basis of the master's report, for the sum of \$7,372.48, which was declared to constitute a prior lien upon the fund derived from the sale of the lands by the East Tennessee Land Company to the state of Tennessee. We gather from the record that there is sufficient already in the hands of the court, or yet to come into it, from the sale of the lands to the state, to pay any sum which the court may adjudge to be due as the balance of the money due on the purchase by the East Tennessee Land Company. From the decree establishing the balance due to be the sum of \$7,372.48, the petitioners have appealed to this court, and assign for error the disallowance of interest upon those portions of the purchase money which were due for lands to which the Tennessee Coal, Lumber & Tan-Bark Company had not good title at the date of the contract, and, as to those, so limits the interest as to run from the date when a good title was shown. The details of the proceedings taken to perfect the titles of these several parcels, and the situation in which the titles to them, respectively, rested, need not be stated, as the question involved is a general one, and is independent of the special facts which existed with respect to each or any of them.

It is the general rule that, where one party recovers judgment against another for a sum of money due upon a contract wherein there is no stipulation in regard to interest, the court will award interest at the legal rate from the time when the money became due and payable. In such a case the interest is awarded as damages consequent upon the breach of the defendant in failing to perform his obligation. The judgment in respect to that branch of the damages does not rest directly upon the obligation itself, but stands upon the footing of those damages which in other cases are found to be the result of the defendant's fault. Consequently the rule has its exceptions, and as in other cases where there are reasons founded on the conduct of the plaintiff, or other special circumstances existing in the case, and the justice of the situation requires it, interest will be denied. This exception prevails both in courts of law and equity. Thus, in the case of *Redfield v. Iron Co.*, 110 U. S. 174, 3 Sup. Ct. 570, which was an action to recover money alleged to have been illegally exacted for customs dues, and where the plaintiff had been guilty of laches in prosecuting his claim, it was held that, although he was entitled to recover the money illegally exacted, he should not be

awarded interest during the period while his laches continued. In delivering the judgment of the court, Mr. Justice Matthews said:

"Interest is given on money demands as damages for delay in payment, being just compensation to the plaintiff for a default on the part of his debtor. Where it is reserved expressly in the contract, or is implied by the nature of the promise, it becomes part of the debt, and is recoverable as of right; but, when it is given as damages, it is often matter of discretion. In cases like the present, of recoveries for excessive duties paid under protest, it was held in *Erskine v. Van Arsdale*, 15 Wall. 75, that the jury might add interest, the plaintiff ordinarily being entitled to it from the time of the illegal exaction. But where interest is recoverable, not as part of the contract, but by way of damages, if the plaintiff has been guilty of laches, in unreasonably delaying the prosecution of his claim, it may be properly withheld. *Bann v. Dalzell*, 3 Car. & P. 376; *Newel v. Keith*, 11 Vt. 214; *Express Co. v. Milton*, 11 Bush, 49."

The passage above quoted was repeated with approval by the supreme court in giving judgment in *Redfield v. Bartels*, 139 U. S. 694, 701, 11 Sup. Ct. 683. And in *U. S. v. Sanborn*, 135 U. S. 271, 10 Sup. Ct. 812, the supreme court, having this subject under discussion, said:

"In *Redfield v. Iron Co.*, 110 U. S. 174, 3 Sup. Ct. 570, the question was whether the plaintiff was entitled, under the circumstances of that case, to recover interest; the action being against a collector to recover damages for an illegal exaction of customs dues. The court, after observing that interest is recoverable as of right, when reserved expressly in the contract, or when implied by the nature of the promise, said: 'But where interest is recoverable, not as part of the contract, but by way of damages, if the plaintiff has been guilty of laches, in unreasonably delaying the prosecution of his claim, it may be properly withheld.'"

And the court, applying the rule, held that the government was precluded from recovering interest upon a sum which had been paid to the defendant under a misapprehension of the secretary of the treasury, where there had been a long delay in the assertion of the right to recover the money, and no showing of any reason or excuse for the delay. In the case of *Erskine v. Van Arsdale*, 15 Wall. 75, which was cited by the court in *Redfield v. Iron Co.*, 110 U. S. 174, 3 Sup. Ct. 570, it was held that interest might properly be awarded by way of damages from the time of the illegal exaction; the facts not showing that any fault could be imputed to the plaintiff. These cases afford pertinent illustrations of the general rule, and of the exception to it, in cases where the question of interest arises upon the assessment of consequential damages; and they indicate the grounds in general upon which, in such cases, interest should be awarded or withheld. And see *M'Cormick v. Crall*, 6 Watts, 207, 212. But the question of interest in case of suit brought upon a contract wherein the payment of interest is made the subject of express stipulation, and is thereby made part of the obligation, stands upon a different ground. In such a case it is made a matter of agreement between the parties. They are supposed to have considered all the circumstances bearing upon the propriety of their stipulation, and this term of the contract is as binding as any other. The courts have no just right or authority to annul the agreement which the parties have, in contemplation of the circumstances in which they were dealing, seen fit to make. The distinction is clearly stated in the passages above cited from the opinion of the court in *Redfield v. Iron Co.*, supra, and in *U. S. v. Sanborn*, supra. To this general

rule there are also exceptions, though they are few in number, and rest upon very special reasons. Thus, a court of equity, in suits for the specific performance of contracts, will sometimes grant such relief only upon condition of an abatement of interest, where the peculiar facts are such as to make it equitable that that should be done. The relief is in the discretion of the court, and it may attach such a condition to granting it as, upon grounds broader than strict law, the equitable facts indicate as just. Another exception is one recognized by the supreme court of the United States in *Brown v. Hiatts*, 15 Wall. 177, where it was held, in a suit brought by a citizen of one of the Confederate states against a citizen of a loyal state, that interest on a loan, although stipulated in the contract, which matured after the commencement of the war, ceased to run during the subsequent continuance of the war; this upon the ground that by the laws of war the payment of the principal debt was interdicted, and the legal duty of the defendant was therefore to withhold the debt, instead of paying it. The present case comes under the last of the general rules above stated, and is not within any recognized exception to it. The East Tennessee Land Company expressly agreed, not only to pay the principal of its notes, but also to pay the interest thereon from the date of the original contract, November 8, 1889. The court has no more right to disregard this agreement upon the subject of interest than it would have to abate a part of the principal debt if the facts had been proven which showed that the price paid for the land was improvident. In the case of *Koshkonong v. Burton*, 104 U. S. 668, a suit was brought in the circuit court of the United States in Wisconsin to recover the amount due on certain bonds, with interest coupons attached, issued by the defendant township, a municipal corporation of that state. At the time when the bonds were issued the law of Wisconsin was such that the holder was entitled to recover interest upon the respective coupons from the date of their maturity. Afterwards the legislature of the state passed a statute which provided that:

"In the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded, nor shall interest thereon be construed to bear interest, unless an agreement to that effect is clearly expressed in writing." Gen. Laws 1868, pp. 62, 63.

And it was objected by the township that therefore interest could not be recovered upon the coupons; but it was held by the court that, in view of the then existing law, the agreement, when made, became a fixed stipulation, and part of the contract, and that the statute was invalid in so far as it impaired the binding effect of the agreement in respect of the interest, and directed judgment to be entered upon the basis of the law existing at the date of the issue of the bonds.

We therefore conclude that the court erred in respect of the rule which it applied, and that this being a suit upon a contract, the validity of which was not questioned, and it not being claimed that the contract in any wise misrepresents the agreement of the parties, the court had no alternative but to give it effect according to its terms. The stipulation found at the end of the notes, that "land adversely owned, or in litigation, or in adverse possession, shall not

be paid for until such adverse claims be removed of record," in no wise changes the construction properly to be given to the contract in respect to the payment of interest. It simply postponed the payment of principal and interest alike until the condition should happen, and did not affect the amount which should ultimately be paid. It appears that possession of the lands described in the deed of the Tennessee Coal, Lumber & Tan-Bark Company was immediately delivered to the East Tennessee Land Company, the grantee therein, and that the latter company thereafter had undisturbed possession thereof. It is manifest upon the agreement of the parties that the perfecting of the title to some of the lands was to take place afterwards. The parties knew all this, and made their agreement about interest with reference to it. So far as we can see, nothing has happened which the parties did not contemplate, and the grantee in the deed has got what it contracted for, and according to the expected method. The doctrine is well established that where the grantee has been put in possession of land conveyed with covenants of warranty, and has not been ousted or otherwise disturbed in his possession, he cannot refuse payment of the purchase price according to his agreement by showing that some third person had title adverse to his grantor, even though he did not know of such adverse claim at the time he took his deed, if no fraud was practiced on him. Mr. Justice Nelson, in delivering the judgment of the supreme court in *Patton v. Taylor*, 7 How. 133, 159, stated the law to be:

"That a purchaser, in the undisturbed possession of the land, will not be relieved against the payment of the purchase money on the mere ground of defect of title, there being no fraud or misrepresentation, and that in such a case he must seek his remedy at law on the covenants in his deed."

And this is the settled rule of law in Tennessee, the state where the land is, and whose laws control the conveyance of it; the rule in that state being that:

"When the purchaser of land has taken a deed with covenants of general warranty, under which he has been let into possession, he cannot, in the absence of fraud, before eviction, on the ground merely of defect of title in the vendor, claim in equity to have the contract rescinded, or to resist the payment of, or have refunded, the purchase money. He must in such case be left to his remedy at law on the covenants of warranty in his deed." *Barnett v. Clark*, 5 Sneed, 435; *Merriman v. Norman*, 9 Heisk. 269; *Cohen v. Woollard*, 2 Tenn. Ch. 686; *White v. Ewing*, 37 U. S. App. 365, 368, 18 C. C. A. 296, and 69 Fed. 451.

Much less could he disavow his obligation if he knew at the time of taking his deed of such adverse claim, and the deed was in fact made upon the understanding between the grantor and the grantee that the grantor was to buy in the outstanding claim or title, which, when acquired, would inure to the grantee under the covenants of his deed. From these considerations it follows that the decree of the circuit court must be reversed and the cause remanded, with directions to enter a decree for the amount of the balance found to be due upon the three notes, of \$31,000, \$41,000, and \$41,000, respectively, with interest to be computed from the 8th day of November, 1889.

WESTERLY WATERWORKS CO. v. TOWN OF WESTERLY.**SEAMEN'S FRIEND SOC. v. SAME.**

(Circuit Court, D. Rhode Island. April 25, 1897.)

1. MUNICIPAL CORPORATIONS—TOWN COUNCILS.

Towns and the town councils thereof, in Rhode Island, are distinct bodies, with distinct powers.

2. SAME—GRANT OF WATERWORKS FRANCHISE.

Under section 32, c. 425, Pub. Laws R. I., providing that the town council of any town may grant the right to lay water pipes in the highways, and may consent to the erection and maintenance of reservoirs upon such terms as they may deem proper, including the power to exempt the works from taxation, a town council has no power to grant an exclusive right to construct waterworks in the town.

3. SAME—EXCLUSIVE RIGHTS—ERECTION OF COMPETING WORKS BY TOWN.

Nor does a town council, by giving to a company the use of the highways so long as the inhabitants shall be reasonably supplied with water, and exempting it from taxation for 25 years, and exacting an obligation to supply water to the town and to sell its works to the town, exclude the town from the right to construct waterworks of its own.

4. SAME.

Whether a town, under section 1, c. 285, Pub. Laws R. I., has power to grant an exclusive franchise to construct waterworks, or to preclude itself by contract from competing with a company holding the right to construct such works, *quære*.

5. SAME—CONTRACT—RATIFICATION.

When a town council has granted to a company a right to lay water pipes in the town upon certain conditions, the facts that subsequently, for several years, while the company is erecting its plant and conducting its business, the town takes no action relating to it, and that it then, at town meetings, the notices for which contain no mention of a proposed ratification of a contract between the company and the town, passes resolutions looking to the purchase of the waterworks by the town "under the agreement between said town and" the company, do not amount to a ratification on the part of the town of a supposed contract with the company for an exclusive right on its part or for the abstention of the town from constructing waterworks of its own.

James M. Ripley, W. B. Vincent, and Joseph C. Ely, for Westerly Waterworks Co.

William C. Loring and Ralph W. Boyden, for Seamen's Friend Soc.
Francis Colwell, Walter H. Barney, and A. B. Crafts, for Town of Westerly.

Before COLT, Circuit Judge, and BROWN, District Judge.

BROWN, District Judge. Although these cases are before the court upon motions to dissolve the temporary injunctions, yet as the merits have been exhaustively argued, and as counsel for all parties have requested our decision upon the main questions which determine the substantial rights, we accede to such request and decide the motions accordingly.

The first inquiry is, has the corporation known as the "Westerly Waterworks" any rights which are impaired or threatened by the vote of the town of Westerly in town meeting, on April 11, 1895, directing the town council to contract for and construct waterworks for the town? Or, to state the inquiry in another form,

does the town's action impair any obligation of contract to the benefit whereof said waterworks company is entitled?

The company bases its claim of right to preclude the town from constructing waterworks—First, upon a vote of the town council dated June 29, 1885; second, upon acts of the town which are claimed to have the effect of an adoption and ratification of the act of the town council.

In determining what rights were derived from the town council, we have first to find what rights the town council had power to bestow. The authority of the town council is purely statutory, and the effectiveness of its grants and contracts is to be measured by its powers. Whatever may be the language which the members of the town council employ in their votes, however liberal may be their expressions in conferring rights and privileges, only such language can influence our decision as conforms to powers conferred by law. The sole powers possessed by the town council, under which the company can derive the right which it claims, are set forth in Pub. Laws R. I. c. 425:

"Sec. 32. The town council of any town, or the city council of any city, may grant to any person or corporation the right to lay water pipes in any of the public highways of such town or city for the supplying the inhabitants of such town or city with water, and may consent to the erection, construction, and the right to maintain a reservoir or reservoirs within said town or city, for such time and upon such terms and conditions as they may deem proper, including therein the power and authority to exempt such pipes and reservoirs, and the lands and works connected therewith, from taxation."

The meaning of this law has been expounded by the supreme court of the state of Rhode Island in the case of *Smith v. Town of Westerly* 19 R. I. 33, 35 Atl. 526; and although this decision may not be absolutely binding upon this court, since the rights of the company accrued prior to the decision, and since it was upon a controversy between different parties, and because it is not a final decision, being only on demurrer, yet as the latest utterance of that learned court, and as a thorough discussion and learned exposition of principles supporting the conclusion of the court, we regard it as of the greatest weight, as did the district judge sitting in this court. See *Westerly Waterworks v. Town of Westerly*, 75 Fed. 181. Upon the reasoning of the state decision, and the authorities therein cited, as well as upon our independent investigation, we arrive at the same conclusion as was reached by that court, and, following the prior view of this court, find that under chapter 425 the town council had no power to grant to the Westerly Waterworks exclusive rights.

As in the arguments and briefs there has been a somewhat indiscriminate use of the terms "town" and "town council," and as certain propositions have been enunciated concerning the town which are true only of the town council, and concerning the town council which are true only of the town, it will clear the further discussion of the case to point out that the town and town council are distinct bodies with distinct powers. The reasons for distinguishing between acts of the town and of the town council are substantial, and the differences between the two bodies are not nominal, nor are arguments based upon such differences fairly subject to the criticism that they involve only technical matters of mere form. On the contrary, they

involve important questions of public right. As is said by Mr. Dillon in his book upon Municipal Corporations (4th Ed. § 28):

"In the New England town proper the citizens administer the general affairs in person at the stated corporate town meetings, and through officers elected by themselves. * * * The New England town is especially interesting as affording, perhaps, an example of as pure a democracy as anywhere exists. All of the qualified inhabitants meet and act directly upon and manage, or direct the management of, their own local concerns. Each citizen has a vote and an equal voice. This form of government was adopted at a very early period, and is firmly adhered to and deeply cherished by the people of the New England states. * * *

The principle of direct participation by the inhabitants, in matters involving important expenditures of money and public improvements, has been constantly recognized in the state of Rhode Island. In the language of the statutes (Gen. Laws, c. 36, § 1): "The inhabitants of every town shall continue to be a body corporate," etc. In the case of *Smart v. Town of Johnston*, 17 R. I. 778, 24 Atl. 830, it was said of the powers of town councils in establishing highways, what might also have been said in relation to the granting of the privilege of laying water pipes in the highways, and of constructing and maintaining reservoirs:

"Town councils are not the agents nor the servants of the various towns which they represent, in the ordinary and legal meaning of that term, in the laying out of highways, but they are public officials forming an important part of the government, and clothed with certain well-defined powers, and charged with certain well-defined duties, by the statute law of the state."

The power conferred by chapter 425, Pub. Laws R. I., using the language of the court in the above case, "is conferred exclusively upon the town council, and over their action in the matter the town has no control, and cannot be held responsible, at any rate, for their unauthorized acts." To permit the town council, without previous authority, to act for the town in matters vested only in the town, is to deprive the town inhabitants of their right as corporators to regulate the affairs of the town in the corporate meeting. By electing persons as members of a town council, the inhabitants express their views of their qualifications to act in matters limited by statute. The scope of their duties is important in determining the qualifications of candidates for election. To permit persons chosen for certain duties to bind the town in matters not contemplated by the inhabitants as within the powers of the officers is in principle and practice dangerous.

The rights of the public, the rights of the town, are to be scrupulously regarded; and, though franchises to corporations are to be carefully protected, the source of such privileges must be traced either to the direct act of the legislature, or to the authorized act of the agent acting clearly within the powers delegated by the legislature in express terms. Grants of exclusive rights such as the town council attempted to confer must rest upon the clearest language and upon the most definite authority, and persons dealing with public servants are strictly and justly held to the obligation to inform themselves as to the rights which they may acquire in so doing. All persons contracting with a municipal corporation must at their peril inquire into

the power of the corporation or of its officers to make the contract. Dill. Mun. Corp. (4th Ed.) § 447; *Farnsworth v. Pawtucket*, 13 R. I. 85-88.

This rule is for the public protection, and there can be no case wherein it should be more strictly applied than one involving the grant of an exclusive franchise. Employing the language of the argument of the learned counsel for the Seamen's Friend Society:

"The reason why a municipal body cannot make a valid grant of an exclusive franchise of that kind is because it ties the hands of the public in making internal improvements when that time arrives when, in the discretion of the public, an internal improvement should be made,—because it ties the hands of the public in its legislative powers."

So far as the acts of the town council are concerned, therefore, we can attach no force to the contention of the complainants that they have been misled, and have made a large investment upon the faith of the acts of the town, and that it is unjust and inequitable, and in the eye of the law a hardship, that they should be deprived of their supposed exclusive rights. It is neither unjust nor inequitable that their rights should be determined by legal principles established in favor of the public.

As it is assumed in the opinion of the learned district judge granting the temporary injunctions that a valid contract exists, even if an exclusive right has not been granted; as this is assumed by counsel for the waterworks and for the Seamen's Friend Society; and as the origin and exact nature of that contract are somewhat obscure, after the concession that exclusive rights were not conferred upon the company,—it becomes necessary to dwell upon this point. Our primary inquiry is rather as to what rights the company has than as to whether they arise from a "contract," using the term in the sense of an agreement between competent parties, or from the so-called "contract" arising between the legislature and the company from the direct or indirect grant of a franchise. We therefore ask what rights accrued to the company, and what obligations were imposed upon the town, either by contract or by grant, immediately upon the passage by the town council of the vote of June 29, 1885, and the acceptance by the company of the conditions of this grant, and before any act of the town in its corporate capacity? The company acquired a right to the use of the highways and public grounds to be enjoyed as long as the inhabitants shall be reasonably supplied with water by the company, and a right to exemption from taxation for 25 years. It incurred an obligation to supply water to the town and to the inhabitants, and an obligation to sell its waterworks to the town. The obligations were imposed upon the town to permit the use of the streets and to exempt the company from taxation. The town also acquired a right to buy the property of the company, and to insist upon the furnishing of a proper water supply. The suggestion that because the town council imposed a duty upon the company to supply water, as a condition of the privilege of laying its pipes, etc., it also imposed a duty upon the town to take water only from the company, is not supported by an examination of the language of the resolution, and the force of such a suggestion is destroyed by our finding that the council

could not confer exclusive rights. These rights of the company were subject to whatever competition might be authorized by the state, town council, or town, including the competition of the town itself, and it should be carefully observed that the rights of the town were lawfully acquired, not through its own act, but through the act of the town council as agent of the legislature and not as agent of the town. It is manifest that upon the state of rights and obligations then existing there was no legal obstacle to prevent the town from instituting waterworks of its own. The company was under the obligation to sell its works to the town; but, as was conceded upon the brief of the Seamen's Friend Society, and as must be decided upon an examination of the resolution, limited by the force of law from a grant of exclusive rights to a grant of rights not exclusive, the town was under no obligation to purchase the works of the company. It merely had an option to do so. The town was free to refuse to buy and free to compete, although its competition might be disastrous to the company.

Although the company is bound to furnish water for the town hall and drinking fountains, the town, under any view, whether the grant was exclusive or not, is not bound to receive it. The town is under no obligation to pay for it, and therefore does no wrong to the company in supplying itself with water for these purposes, since it rather relieves the company of a burden than deprives it of a right. The inhabitants of the town are free to use the company's water or not. The public is entitled to the full benefit of competition. It may take its water from any other source or from any other company, or supply itself by its own works. It should be borne in mind that we are still discussing the question as to the rights derived from the town council. From our prior conclusion that the council could not confer exclusive rights, it of course follows that it could not exclude the inhabitants of the town or the town itself. It does not obviate the objection to the exclusiveness of the grant to show simply that the company cannot lawfully exclude every person or corporation while conceding that the town is excluded. The full force of our finding that the town council has no power to make an exclusive grant must be accepted, and this finding means that the town council can exclude no person or corporation upon whom the legislature, or the present or future town council as agent of the legislature, may confer like rights. Nor can the town council by its grant or contract exclude the town from exercising its rights. In favor of whom exists the principle that towns or town councils, unless expressly authorized by the legislature, cannot confer exclusive privileges? In favor of the public, in favor of the inhabitants of the town; and the chief beneficiary of the legal rule cannot be held to be excepted from it without rendering the rule an absurdity in terms and in substance. Failing to find in the act of the council, unaccompanied by any acts of the town in its corporate capacity, a sufficient basis for the injunctions, and finding that up to this point the complainants' case is without substantial foundation, we approach the second branch of the case.

Our second inquiry is, has the town itself conferred upon the company a right to exclude the town from competition? This in-

quiry presents two important questions: First. Has the town the power to exclude itself? Second. If it has such power, has the power been exercised?

Chapter 285 of the Public Laws of Rhode Island is the only statute which, in our opinion, is entitled to serious consideration upon the question of the power of the town. Chapter 975, passed May 29, 1891, 5 years and 11 months after the resolution of June 29, 1885, was not in the contemplation of the parties, and there was at no time an acceptance by the company of rights or franchises under that statute, or a submission to the conditions thereof. The learned district judge also adopted this view of the statute. Though we have considered this statute carefully, we call it up at this point merely to dismiss it as having no weight. The material portions of chapter 285 are as follows:

"Section 1. Whenever the electors of any town, qualified to vote upon questions of taxation or involving the expenditure of money, shall have voted, at a town meeting called for that purpose, to provide a water supply for the inhabitants of such town, or for some part thereof; or whenever any town shall enter or shall have entered into any contract with any person or corporation to furnish such town with such a water supply (a contract which towns are hereby authorized to make) then such town, or the person or corporation bound to fulfill such contract, as the case may be, may take, condemn, hold, use and permanently appropriate any land, water, rights of water and of way necessary and proper to be used in furnishing or enlarging any such water supply, including sites and materials for dams, reservoirs, pumping stations, and for coal houses, with right of way thereto, and right of way for water pipes along and across public highways and through private lands, and including also lands covered or to be flowed by water, or to be in any other way used in furnishing, enlarging or maintaining any such water supply. And if any change in any highway shall be required for the accommodation of such water supply, then such town, person or corporation may alter the grade of such highway or construct a bridge therein, under direction of the town council of the town where such change is made, and as far as may be needful, first giving bond with surety satisfactory to a justice of the supreme court, if requested, conditioned to reimburse such town for every expense and damage occasioned by such change of grade or other change in such highway."

An important difference exists between this statute (chapter 285) and chapter 425, previously considered. The town is authorized by this statute to contract with any person or corporation for a water supply "for the inhabitants of such town, or for some part thereof." This is obviously a different power from that of the town council, under chapter 425, to grant permission to lay pipes and to vend water subject to indefinite competition. There is a serious question whether the prohibition of exclusive grants does not attach to this statute as well as to chapter 425. In reference to the decision of the supreme court of Rhode Island in *Smith v. Town of Westerly*, 19 R. I. 33, 35 Atl. 526, the learned district judge in his decision in this court says:

"The complainants here argue that Pub. Laws, c. 285, authorize 'any contract,' and therefore cover a contract for an exclusive franchise; that the grant is authorized by chapter 425, and that the acts of the town council, subsequent to the passage of chapter 975, amount to a ratification of the contract; and that, if a grant is ratified, it must be held to be ratified as an entirety. I cannot agree with this argument. It is true that it does not explicitly appear in the decision of the supreme court that the force and effect of chapter 285 in

this regard was there decided; but the court do say, in terms, 'that the only authority to make said contract [i. e. the contract for an exclusive right] on the part of the town council is conferred by Pub. Laws, c. 425.' It is to be observed, also, that there is strong authority for the proposition, that general powers such as are here granted do not include the power to grant exclusive rights."

Although such doubt exists, we think there is great force and weight of reason in the contention of the plaintiffs that chapter 285 does confer upon the town the power to make a binding agreement with the company for a full supply of water for the town and its inhabitants, and, as a part of such contract, to give to the company, as reasonable security for compensation for its original outlay, an agreement that the town will not, during the period of 25 years, compete with the company so long as it furnishes a proper and adequate supply of water of a suitable quality, where such an agreement is accompanied by an agreement upon the part of the company that it will sell to the town its property at a fair price, to be fixed by arbitration. The reasonableness of such a contract might, however, be questioned if the town were called upon to pay a sum to compensate the company for a loss of an exclusive franchise in addition to the value of its works. To bind the town to pay the company the value of an exclusive franchise might be said to amount to conferring an exclusive franchise. By retaining the right to recall the powers granted to the company upon repayment to it of the amount of its investment, the objection that the hands of the public are tied, and that its discretionary powers as to making further improvements are impaired, is obviated, at least to a great extent. The contract, then, cannot, in strictness, be called an exclusive contract, since the exclusiveness is only upon a reasonable condition. We think, therefore, that a sound distinction can be made between a grant or a contract which absolutely excludes all competition, and one which merely excludes the competition of the town until it shall make due compensation to the company. And there is authority for such a distinction in the cases cited for the complainants. *Walla Walla Water Co. v. City of Walla Walla*, 60 Fed. 957; *Fergus Falls Water Co. v. Fergus Falls*, 65 Fed. 586; *Illinois Trust & Savings Bank v. City of Arkansas City*, 22 C. C. A. 171, 76 Fed. 271.

It appears, however, upon examination of the case of *Walla Walla Co. v. City of Walla Walla*, 60 Fed. 957, that the city in explicit terms agreed not to erect, maintain, or become interested in any other waterworks, save under conditions not material to this decision, and it is also stated that the city had bound itself to take over the plant and render just compensation whenever it did elect to furnish water by means of works owned by it. In the present case there is no express agreement that the town will not compete, nor that in case it should elect to compete it will purchase the works. Such agreement must be deduced from construction, and, in view of the rule that all doubt in the construction must be resolved against the company and in favor of the public, there is great difficulty in inferring such agreement. If the grant of an exclusive franchise is unlawful, the natural course would be to

reject the word "exclusive" entirely, whereupon the language would confer merely such rights as might have been granted by the town council, i. e. rights not exclusive. Even then we encounter the doubt suggested by the decision of the supreme court of Rhode Island whether the town had any authority to make such a contract or to confer any privileges in the highways, since such power is vested in the town council, and, by force of the maxim, "*Expressio unius est exclusio alterius*," withheld from the town. If the word "exclusive" be entirely stricken out, the only support for complainants' right to preclude the town is the argument that, because the town agreed that the company might be permitted to supply water, therefore the town agreed to accept it, and not to take it elsewhere or supply itself. But this argument leads to such a conclusion that we must reject it. The company is bound, if bound at all, to supply water, not for 25 years, but to supply it "at all times," and this would lead us to a perpetual contract, and a perpetual contract would not be within the class of contracts which upon any theory the town is authorized to make. It is only by retaining the word "exclusive" that we can find an intention of the town to preclude itself from competition; that is to say, upon the theory of the argument of the complainants, the town had no power to grant exclusive rights, and so far as unlawful such language must be rejected, but so far as lawful it may be retained. The contract for exclusive rights necessarily covers the exclusion of the town. The town had a right to contract not to compete for a reasonable time, and an intention so to contract is a necessary implication, from the use of the word "exclusive." In other words, we must reject the word "exclusive" as a word of grant, and retain it as a word of contract, but limiting its application to the town, though it was used as applicable to the town and to all others. Then from the fact that the town, according to this construction, has agreed not to compete, we infer an agreement imposing upon it the obligation to buy the company's works if it does compete.

Admitting the existence of a contract, we have grave doubts whether complainants can support their claims by the terms of that contract or by any fair or reasonable construction of its language. Without, however, deciding the proper construction to be placed on the contract when the exact limits of the legal powers of the town under chapter 285 are determined, and without finally deciding the question of power in the town to agree to preclude itself from competition, we will for our present purposes assume the existence of such power as a necessary basis for an examination of the question: Has the power in fact been exercised by the town itself? Has the town adopted or ratified the action of the council by corporate action in town meeting or otherwise, or by acquiescence?

As we have previously said, the claim of the complainant company that upon the faith of the town's action it has made a large investment cannot be substantiated by the admitted facts of the case. The investment was made upon the faith of the action of the town council, and we cannot, without a violation of im-

portant legal principles, and without establishing a dangerous precedent, overlook this fundamental distinction. When we are dealing with questions of franchises or contracts wholly or partly exclusive of public rights, we must adhere to the requirement of clear and express legislative authority. To base such exclusive rights upon a grant or contract of a body without authority, and then to ratify or confirm such grant or contract by the mere silence of the public, or by uncertain and ambiguous expressions, or by acts which may be interpreted either as acquiescence or as mere sufferance, is to establish a new source of grants in derogation of public right. If the written laws promulgated by the legislature, and expressed in definite terms, are to be construed strictly in favor of the public; if, to use the language of Mr. Justice Brewer in *Jackson Co. Horse R. Co. v. Interstate Rapid-Transit Ry. Co.*, 24 Fed. 306, "doubts as to what is granted are resolved in favor of the grantor, or, as often epigrammatically said, a doubt destroys a grant,"—then it must also be true that the same principles are to be applied when we come to interpret the significance of the words, of the acts, and even of the mere silence, of the town.

But, foregoing for the moment the strict application of these principles, let us consider the conduct of the town, and interpret it as we would interpret an act of ordinary business life. There is, first, silence for more than five years. So far as appears of record, from June 29, 1885, to December 1, 1890, no action was taken by a town meeting based upon the existence of said contract, and not until June 2, 1891, did the town vote to take action relative to the purchase of the plant. There was no action by the water company or by the town which developed a controversy as to whether or not the company had an exclusive right, or a right exclusive to the extent of precluding the town. The company proceeded in the exercise of its undoubted and undisputed rights to erect its plant, which was completed in November, 1886. If by silence the town recognized anything, it was the mere right of the complainant waterworks company to do what it was doing, and that it was proceeding under a privilege conferred upon it by the town council under direct legislative authority, over which the town had no control. *Smart v. Town of Johnston*, 17 R. I. 778, 24 Atl. 830, *ubi supra*.

Nor is there in the use of water by the town for its town hall and drinking fountains any satisfactory or unambiguous evidence of the town's intent to adopt or make a contract under chapter 285. The furnishing of a certain quantity of water for public use was required by the town council as a condition of the grant of the use of the public highways, etc., and, by accepting the benefit of a reasonable condition imposed under chapter 425, the town cannot be said to have acted under chapter 285. The silence of the town, therefore, cannot be held to amount to an adoption or ratification of the act of the town council. We must look, therefore, to the votes of the town.

The first vote, passed June 2, 1891, is as follows:

"Resolved, that the town council be, and they are hereby, instructed to notify the Westerly Waterworks Company in writing that the town desires to purchase the property of the Westerly Waterworks Company, and they are further instructed to take all necessary action in accordance with the provisions of the franchise of the said Westerly Waterworks Company, to ascertain at what price the Westerly Waterworks can be purchased."

The second vote, passed April 11, 1895, is as follows:

"Resolved, that the town council of the town of Westerly be, and it is hereby, requested to agree, if possible, with the Westerly Waterworks, of said town, upon a third referee, under the agreement between said town and said Westerly Waterworks, and, in case no such agreement can be arrived at within thirty days from the date of this meeting, the said town council is hereby directed to contract for and construct waterworks for said town, not to exceed in cost the sum of one hundred and fifty thousand dollars (\$150,000)."

Counsel for complainants urge that, by claiming the benefit of the so-called contract which the town council made for its benefit, the town adopts the contract as its own. This point was before the supreme court of Rhode Island in the Smith-Westerly suit, and decided adversely to complainants' contention in the following language:

"Doubtless this vote may properly be said to have amounted to the recognition of the existence of the contract in question, in so far, at any rate, as it confers upon the town the right to purchase the waterworks which had been constructed by virtue thereof. But, even assuming that it was a recognition of the contract in its entirety, still it does not amount to an adoption or ratification thereof by the town."

We adopt the view of the supreme court of Rhode Island as to the effect of these resolutions. In fact, there is some degree of force in the claim of counsel for the defendant that the second vote of the town meeting was rather an express denial of the company's right to prevent the town from building waterworks than an adoption of a previous contract which prohibited it to do so. The presumption is rather that the town recognized the existing state of legal rights of the company than that it conferred upon the company new rights. The votes looking to the purchase of the waterworks property are said by the counsel for complainants to be a claim of the chief benefit of the contract, and therefore an adoption of it. But this was a benefit to which it had a right both by the terms of the company's charter and by the *intra vires* act of the town council. It was a right which it derived from the legislature directly through the charter of the company, and indirectly through the town council. It existed independently of any action of the town. The resolution of June 2, 1891, instructs the town council "to take all necessary action in accordance with the provisions of the franchise of said Westerly Waterworks Company to ascertain at what price the Westerly Waterworks can be purchased." The action of April 11, 1895, refers to the agreement between said town and the company, but looks merely to the fixing of a price. These resolutions are quite as consistent with the desire to buy off a mere claimant, and to end a dispute, as with a recognition of the rights claimed, and the language is altogether too uncertain in its import and in its reference to amount

to a concession to the company of important rights which it did not in fact then possess.

This attempt to have a price fixed at which the town might buy or not buy, as it chose, is not, in our opinion, equivalent to the adoption or ratification of any contract, and effected no change in the status of the company's rights. We have carefully examined the numerous cases cited by complainant to the point of ratification, and find that each of them involves facts very different from those here presented. The subjects of ratifying a contract, of confirming doubtful rights, of precluding the town from its then existing rights, are in no wise involved in the purposes of the town meetings nor in their acts. The warning of the town meeting of April 11th clearly shows this. The rule applicable to ratification by a town of unauthorized acts is clearly stated in the opinion of Mr. Justice Gray in *Town of Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 135, 137, 7 Sup. Ct. 865, 872, 873:

"Any ratification of an act previously unauthorized must, in order to bind the principal, be with full knowledge of all the material facts. *Owings v. Hull*, 9 Pet. 607; *Bennecke v. Insurance Co.*, 105 U. S. 355. And no estoppel in pais can be created, except by conduct which the person setting up the estoppel has the right to rely upon, and does in fact rely and act upon. *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10; *Scovill v. Thayer*, 105 U. S. 143; *Brant v. Iron Co.*, 93 U. S. 326." "The vote of those who attend a town meeting being of no validity against the town or its inhabitants, unless the object of the vote is set forth in the notice or warning of the meeting, the town can no more ratify an act afterwards than authorize it beforehand, except by vote passed pursuant to a previous notice specifying the object. Without the indispensable prerequisite of such a notice, those present at a town meeting have no greater power to bind the town indirectly or by estoppel than they have to bind it directly by an original vote. *Marsh v. Fulton Co.*, 10 Wall. 676; *Davies Co. v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897; *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. 1121; *Pratt v. Swanton*, 15 Vt. 147; *Lander v. School Dist.*, 33 Me. 239; *American Tube Works v. Boston Mach. Co.*, 139 Mass. 5, 29 N. E. 63. * * * Upon the whole case there was no proof of original authority, or of subsequent ratification, or estoppel, to bind the defendant town, —none of original authority, for want of any vote passed pursuant to due notice in the warning; none of ratification, for the same reason, as well as because it was not shown that the acts proved were done with intent to ratify the acts of the treasurer in issuing the notes sued on, or with knowledge of all the material facts attending their issue; none of estoppel, because there was no evidence of any acts of the town, which plaintiff had a legal right to rely upon, or did in fact rely upon, in taking these notes."

Furthermore, as, in our view, the whole basis of complainants' case is reduced to these resolutions, and to a doubtful construction of their intent and significance; and as upon this construction they seek to establish a contract doubtful in its terms, and, upon their contention, in derogation of public right,—we should feel compelled, even if we were not fully satisfied of the right of the town to construct its works, to solve that doubt in favor of the town by the application of the rule, thoroughly established by decisions of the supreme court of the United States, that doubt must be solved in favor of the public:

"By a familiar rule, every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public, because an intention, on the part of the government, to grant to

private persons, or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed or necessarily to be implied in the terms of the grant, and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee; and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544-548; *Dubuque & P. R. R. v. Litchfield*, 23 How. 66, 88, 89; *Slidell v. Grandjean*, 111 U. S. 412, 437, 438, 4 Sup. Ct. 475." *Central Transp. Co. v. Pullman's Palace-Car Co.*, 139 U. S. 24, 49, 11 Sup. Ct. 478, 484.

But in the present case we think that there are no reasonable grounds for doubt. The company's rights are derived only from the town council, and the company has only such rights as the town council could confer.

As we find that the waterworks corporation had no rights which would be impaired by the building of town waterworks, it becomes immaterial to decide the point made by the defendant that the vote of the town council passed April 11, 1895, was not a "law," within the meaning of the constitutional inhibition of state laws impairing the obligation of contracts, though we find strong support for the complainants' contention in the authorities cited upon their briefs. To the claim of the complainants that the charter of the company recognizes and validates its exclusive privilege, we are unable, upon examination of the charter, to give any weight. We agree with and adopt the language of the state court in the *Smith-Westerly Case* upon this point: "An examination of said charter, however, fails to show any ratification or adoption of said contract, or any reference thereto." What have been termed the "equities" of this case have been presented to us by counsel for the complainants, and the hardship to the company and to the stockholders which will result from a denial of their claims has been urged as a matter relevant to a determination of the legal rights. While we may regard with sympathy the failure of enterprises to meet the expectations of their promoters, we cannot permit such sympathy to cause us to depart from rules of law which impose limitations upon the powers of public officials and municipal corporations. Recognizing the limitations imposed upon corporations and individuals by the national and state constitutions, and by the laws which the people enact through their representatives in the national and state legislatures, it is the duty of the federal courts to support the state courts by a full recognition of their right and duty to maintain in their respective jurisdictions the rights of the public against claims in derogation thereof based upon an uncertain and doubtful construction of acts of the legislature or of agents or officers acting under powers delegated to them by the legislature. In the case of *Hamilton Gas-Light & Coke Co. v. Hamilton City*, 146 U. S. 258, 13 Sup. Ct. 90, it was strongly argued by counsel, as it has been urged in this case, that not competition, but confiscation, was sought (see pages 263, 264), but the court met such suggestions in the following language:

"The statutes in force when the plaintiff became a corporation did not compel the city to use the gaslight furnished by the plaintiff. The city was empowered to contract with the company for lighting streets, lanes, squares, and public places within its limits, but it was under no legal obligation to make a contract of that character, although it could regulate, by ordinance, the price to be charged for gaslight supplied by the plaintiff and used by the city or its inhabitants. It may be that the stockholders of the plaintiff supposed, at the time it became incorporated, and when they made their original investment, that the city would never do what evidently is contemplated by the ordinance of 1889. And it may be that the erection and maintenance of gas works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of the parties. As said by this court in *Curtis v. Whitney*, 13 Wall. 68, 70: 'Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation.' If parties wish to guard against contingencies of that kind, they must do so by such clear and explicit language as will take their contracts out of the established rule that public grants, susceptible of two constructions, must receive the one most favorable to the public."

The court, also, citing the language of *Turnpike Co. v. State*, 3 Wall. 210, says:

"No exclusive privileges had been conferred upon it, either in express terms or by necessary implication; and hence whatever may have been the general injurious effects and consequences to the company, from the construction and operation of the rival road, they are simply misfortunes which may excite our sympathies, but are not the subject of legal redress."

Our conclusion is fortified by the decision of the supreme court of Rhode Island upon the vital questions existing in the present cases. Giving full weight to the arguments presented by the complainants concerning the status of that case, as a controversy, prearranged to secure a decision for ulterior purposes, we are yet of the opinion that the views of the learned court upon the main questions are free from any influence resulting from that aspect of the case, and are sound interpretations of statute law. Though we reach our conclusion by a somewhat different path, and upon our independent judgment, assisted, though not controlled, by that learned court, yet we fully concur in the findings of law which have led them, as ourselves, to find that the defendant has a complete right to proceed to the construction of waterworks; and we find that in so doing it will impair no right nor obligation of contract to the benefit whereof the complainants are entitled. The preliminary injunctions, therefore, will be dissolved.

NOTE. For previous decision in this case, see *Westerly Waterworks v. Town of Westerly*, 75 Fed. 181.

**CENTRAL TRUST CO. OF NEW YORK v. EAST TENNESSEE, V. & G.
R. CO. et al.**

(Circuit Court of Appeals, Sixth Circuit. May 4, 1897.)

No. 413.

1. **RAILROADS—DIVERSION OF INCOME—LIABILITY OF MORTGAGEES TO REFUND.**
Junior mortgage creditors of an insolvent railroad company are not liable to make good a diversion of a portion of the income by the receiver to the payment of interest on prior mortgages.

2. **SAME.**

The doctrine that income wrongfully applied by a receiver to the payment of interest on mortgages, or the improvement of the property of the corporation, must be restored, cannot be applied where it is impossible to ascertain whether these expenditures have been made out of the income, or out of money borrowed.

3. **SAME—APPLICATION OF INCOME TO PAYMENT OF PRE-EXISTING DEBTS.**

Pre-existing debts of a railroad company for necessary operating expenses will not be a first charge on the income of a receivership, unless contracted within a reasonable period prior to the appointment of the receiver. The determination of this period is in the sound discretion of the court having jurisdiction of the accounts; and a limitation of six months, so imposed, will not be disturbed on appeal.

4. **SAME—CLAIM FOR ADVERTISING MATTER.**

A claim for advertising matter furnished to a railroad company prior to the appointment of a receiver is not entitled to rank as a debt for materials necessary to the operation of the road.

Appeals of W. B. Belknap & Co., E. A. Kinsey & Co., Matthews, Northrup & Co., and Westinghouse Air-Brake Co., Parties by Intervention, from the Circuit Court of the United States for the Eastern District of Tennessee.

This is an appeal, by the several interveners mentioned above, from a decree of the circuit court refusing to allow payment of their several claims out of the corpus of the property of the railroad company in preference to the mortgages foreclosed in the principal case. The East Tennessee, Virginia & Georgia Railroad Company is an insolvent railroad corporation, whose entire property was originally placed in the hands of receivers, June 24, 1892, under a bill filed in the circuit court by Samuel Thomas, who was a large general creditor. Subsequently two foreclosure bills were filed in the same court for the purpose of foreclosing two junior mortgages, subject to the lien of certain other and senior mortgages. The original receivership was extended to these foreclosure suits, and the three causes consolidated under the style of the Central Trust Company of New York against the East Tennessee, Virginia & Georgia Railroad Company et al. Under the final decree of foreclosure the railroad and all of its properties and appurtenances have been sold, subject to certain underlying mortgages, and were purchased by the Southern Railway Company. The income of the several receiverships has been exhausted in the payment of operating expenses, preferential claims, and interest upon underlying mortgages, paid to prevent default and premature maturity of the debts thereby secured. The proceeds of the foreclosure sale were insufficient to pay off the mortgage debts, and have been applied towards the payment of the bonds secured by the foreclosed mortgages; but the purchaser, by the terms of the decree of sale, is obligated to pay, in addition to its bid, all such other amounts as shall be necessary to pay off and discharge such claims against the receivers, or against the railroad company, as shall be determined to be entitled to preference over the foreclosed mortgages. The appellants are creditors of the railroad company, who by intervention have asserted claims for materials and supplies furnished to the railroad company before the appointment of the receivers, but who have been denied preference over the mortgages in payment. Their

claims to priority are asserted—First, because they say their accounts are for materials and supplies used in the operation of the said railroad, and furnished within a short time prior to the appointment of receivers; second, they assert that the net earnings of the railroad company were not applied to the payment of the income debts, but were diverted to the payment of interest upon mortgage debts, and in the improvement of the mortgaged property. For this reason they insist that they are entitled to be paid out of the corpus of the mortgaged property to the extent of such diversion of income. The circuit court refused priority to the claims preferred by W. B. Belknap & Co., E. A. Kinsey & Co., and the Westinghouse Air-Brake Company, upon the ground that their several claims were not for materials and supplies furnished within the time prescribed by the order appointing the receivers. The claim of Matthews, Northrup & Co. was for advertising matter. This claim was rejected by the court below upon the ground that such advertising matter was not a claim of the class entitled to preference. So far as these claims were asserted upon the ground of a diversion of income to the payment of interest, or in improving the mortgaged property, the report of the special commissioner that there had been no such diversion was concurred in by the court.

W. C. Herron, for appellants.

Henry Hudson, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The question as to whether there was a diversion of the current income by the railroad company to the payment of interest on the foreclosed mortgage debts, or in the permanent improvement of the mortgaged property, was principally one of fact, and was referred to a special commissioner, who reported that there had been no such diversion. The exceptions to this finding were considered by the court below, and overruled. We think it was not error to exclude from consideration income applied to the payment of interest on the senior mortgages. The junior mortgagees did not receive the income so paid, even if it was technically a diversion, and cannot be called on to reimburse the fund applicable to the payment of the debts of the income for such diversion. *St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. Ry. Co.*, 125 U. S. 658, 8 Sup. Ct. 1011. This doctrine of a diversion of income, and the liability of mortgagees to restore the income thus diverted, was first formulated in *Fosdick v. Schall*, 99 U. S. 235. Speaking of the ground upon which the mortgagees may be postponed in favor of creditors who had a right to look to the application of current income in payment of their debts, Chief Justice Waite, at page 254, said:

"Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows, therefore, that, if there has been in reality no diversion, there can be no restoration, and that the amount of the restoration should be made to depend upon the amount of the diversion."

During the period of time covered by the purchase of the materials and supplies embraced in the several claims of appellants, the net earnings were probably insufficient to justify the payment of interest on the foreclosed mortgage debts, and to make certain

improvements shown to have been made during that time. But it is also shown that, during the same period, money was borrowed on open account, more than sufficient to equal the diversion complained of, which went into a common treasury, from which operating expenses, preferential claims, interest, and improvements were paid, without any definite showing as to whether the borrowed money was applied to the payment of interest and improvements, or to current income debts. Under this system of bookkeeping, the addition of borrowed money to the income arising from operation showed a substantial surplus after payment of the great mass of income debts, and all disbursements on account of interest upon the two mortgages foreclosed, as well as upon improvements in the roadway. Prior to the period covered by the maturity of appellants' claims, there was a surplus of gross earnings over all operating expenses; but it cannot be contended that the company was under any obligation to future creditors to accumulate a surplus to meet possible deficiencies in the income to meet future income debts, or that it was improper to apply such surplus in payment of interest. *St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. Ry. Co.*, 125 U. S. 658-675, 8 Sup. Ct. 1011. Whatever diversion there may have been of income to payment of debts or liabilities, not properly debts of the income, seems to have been more than reimbursed by the money borrowed. The burden is upon complainants to show that there has been a misappropriation of earnings to the improvement of the mortgaged property, or to the payment of interest, before the mortgagees can be justly called upon to reimburse the fund applicable to debts of the income in consequence of such diversion. If interest was paid or improvements made out of borrowed money, then there was no diversion; or if made out of gross earnings, and the latter was reimbursed by borrowed money, the diversion was made good. The abstracts showing income from all sources and disbursements upon all accounts are somewhat complicated, in consequence of the mode of bookkeeping adopted. The commissioner and court below concurred in reporting that there was no diversion shown. In the absence of very cogent evidence of mistake of fact, or of some error of law, the finding of fact by the commissioner must be accepted as final. *Emil Kiewert Co. v. Juneau*, 24 C. C. A. 294, 78 Fed. 708; *Kimberly v. Arms*, 129 U. S. 512-524, 9 Sup. Ct. 355; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894; *Turley v. Turley*, 85 Tenn. 256, 1 S. W. 891. But, independently of any diversion of current income, there is a class of debts, incurred in maintaining the operation of a railway, which, under special circumstances, and subject to very positive limitations, has been held to outrank, in priority of payment, contract liens. In *Miltenerberger v. Railway Co.*, 106 U. S. 286-311, 1 Sup. Ct. 140, 162, it appeared that the receiver had claimed credit for certain claims paid by him for materials and supplies furnished and purchased before his appointment by the railroad company, upon the ground that "the creditors threatened not to furnish any more supplies on credit unless they were paid the arrears." The payments were allowed, the court saying:

"It cannot be affirmed that no items which accrued before the appointment of a receiver can be allowed in any case. Many circumstances may exist which make it necessary, and indispensable to the business of the road and the preservation of the property, for the receiver to pay pre-existing debts, of certain classes, out of the earnings of the receivership, or even the corpus of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands, *prima facie*, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interest both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs, and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result in case of nonpayment,—the general consequence involving largely, also, the interests and accommodation of travel and traffic,—may well place such payments in the category of payments to preserve the mortgaged property, in a large sense, by maintaining the good will and integrity of the enterprise, and entitle them to be made a first lien."

In *Burnham v. Bowen*, 111 U. S. 776-781, 4 Sup. Ct. 675, it appeared that there had been no diversion of income, and that an arrearage of debt for materials and supplies was due to the insufficiency of the income to pay necessary operating expenses. The court allowed the claim out of the income earned by the receivers, upon the ground that it "was incurred to keep the road running, and thus preserve the security of the bond creditors." "Under these circumstances," said the court, "we think the debt was a charge, in equity, on the continuing income,—as well that which came into the hands of the court after the receiver was appointed as that before. When, therefore, the court took the earnings of the receivership, and applied them to the payment of the fixed charges on the railroad structures, thus increasing the security of the bondholders at the expense of the labor and supply creditors, there was such a diversion of what is denominated in *Fosdick v. Schall* the 'current debt fund' as to make it proper to require the mortgagees to pay back. So far as current expense creditors are concerned, the court should use the income of the receivership in the way the company would have been bound in equity and good conscience to use it if no change in the possession had been made. This rule is in strict accordance with the decision in *Fosdick v. Schall*, which we see no reason to modify in any particular." The liberality with which this equity was extended by some of the circuit courts in favor of general creditors induced the supreme court, in *Kneeland v. Trust Co.*, 136 U. S. 89-97, 10 Sup. Ct. 950, 953, to call attention to the necessity of preserving the general priority of contract liens over all but a limited class of claims. Through Mr. Justice Brewer, the court said:

"The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because, in a few specified and limited cases, this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a

court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which by the rulings of this court have been declared to have an equitable priority. No one is bound to sell to a railroad company, or to work for it; and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens. *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. Ry. Co.*, 125 U. S. 658, 673, 8 Sup. Ct. 1011, 1017."

In the subsequent case of *Thomas v. Car Co.*, 149 U. S. 95-117, 13 Sup. Ct. 824, 831, the observations touching the sacredness of contract obligations which we have quoted from *Kneeland v. Trust Co.* were reaffirmed, and a claim for rental of cars was disallowed as a preferential debt, the court saying:

"The case of a corporation for the manufacture and sale of cars, dealing with a railroad company whose road is subject to a mortgage securing outstanding bonds, is very different from that of workmen and employes, or of those who furnish, from day to day, supplies necessary for the maintenance of the road. Such a company must be regarded as contracting upon the responsibility of the railroad company, and not in reliance upon the interposition of a court of equity."

From these cases it may be deduced that in respect of railroad mortgages there is an implied agreement that all proper operating expenses of such companies, while under control of the mortgagors, are to be paid out of current receipts, and that any diversion of such income by which current operating expenses are left unpaid is a misappropriation of the income, and upon a proper showing the mortgagees receiving the benefit will be required to reimburse the fund applicable to the payment of these "debts of the income," to the extent of the diversion. It may further be deduced that, independently of any diversion, the necessary operating expenses of a mortgaged railroad, constituting a first charge upon the income while under the control of the mortgagor, will continue to be a charge upon the income under a receivership, and, if necessary, upon the corpus of the property. This latter equity is supposed to arise from the nature of the public duties resting upon such companies, and upon the necessity of such expenditures in preserving the property as a going concern for the ultimate benefit of the mortgage creditors. The debts entitled to displace contract liens must, in the nature of this latter-mentioned equity, be such as were incurred in the necessary operating expenses, and constitute but a limited class, fairly defined by the cases we have cited. Debts of this class must be such as were created shortly before the

receivership, and contracted under circumstances reasonably indicating a reliance upon a proper application of the current income to their payment. In the case of *Bound v. Railway Co.*, 8 U. S. App. 461, 7 C. C. A. 322, and 58 Fed. 473, such a creditor was held to have impliedly waived his right to look to the income earned pending an agreed credit of eight months, with privilege of renewal. The supreme court has not definitely laid down any limit within which such debts must have been created to entitle them to outrank mortgage liens in payment. In the case of *Miltenberger v. Railway Co.*, elsewhere cited, a limit of 90 days was adopted, while in the cases of *Trust Co. v. Souther*, 107 U. S. 591, 2 Sup. Ct. 295, and *United States Trust Co. v. Wabash W. Ry. Co.*, 150 U. S. 287, 14 Sup. Ct. 86, a limit of 6 months was not disapproved. In other cases, under special circumstances, claims originating more than 6 months prior to the receivership have been allowed priority. *Hale v. Frost*, 99 U. S. 389; *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675. It is to be observed that in neither of these latter-mentioned cases was there any general order touching the payment of such claims. The practice upon the circuits has varied in this matter of a time limit upon these preferential claims, and the circuit courts of appeals have shown no unanimity in fixing upon such a limitation. In the Fourth circuit it has been ruled that they must have been incurred within a "reasonable time" before the appointment of a receiver, and a claim was allowed priority under a very peculiar receivership, which was created from 9 to 11 months before. It must be admitted that the rule of "a reasonable time" furnishes no sure guide, and leaves the whole matter open to the discretion of the court. The same court, in *Boston Safe-Deposit & Trust Co. v. Richmond & D. R. Co.*, 8 U. S. App. 547, 10 C. C. A. 323, and 62 Fed. 205, adopted a limitation of 90 days, in an opinion by Chief Justice Fuller. In *Railroad Co. v. Lamont*, 32 U. S. App. 480, 16 C. C. A. 364, and 69 Fed. 23, the court of appeals for the Eighth circuit held the time limit no bar, and allowed a claim which in part originated some three years before the receivership. In the Seventh circuit, we have the authority of Mr. Justice Harlan for saying that a limitation of six months has been regarded as a proper limitation upon such claims. The precise grounds upon which such a rule rests are so well stated by the learned justice that we quote and adopt his reasoning, as reported in *Thomas v. Railroad Co.*, 36 Fed. 808. The justice, on this subject, said:

"The general rule that has obtained in this circuit for many years, though not fully or expressly formulated in any published decision, has been not to charge the income of mortgaged property accruing during a receivership, or the proceeds of sale of such property, with general debts for labor, supplies, and equipment, back of the six months immediately preceding the appointment of a receiver. While the court has not, perhaps, committed itself against applying a different and more liberal rule when the special circumstances or equities of the case demand such a course, the general rule is as just stated; and I am unwilling, in this case, and at this late day, to depart from it. Besides, I am of opinion that, under the circumstances that usually attend the administration of railroad property by the courts through receivers, the rule stated is a wise and salutary one. It would not do to charge the income of

mortgaged railroad property, managed by a receiver, or the property itself, with every debt incurred in all its previous history for labor, supplies, or equipment. As was said in *Fosdick v. Schall*, the business of all railroad companies is, to a greater or less extent, done on credit. Those who perform labor, or furnish supplies and equipment, usually expect and contract to be paid within a reasonable time; and they do not ordinarily perform labor, or furnish supplies or equipment, after the railroad company has failed to pay within such time for what has been previously done or furnished. Expenses incurred within such reasonable time constitute what are called 'current expenses,' which ought, if possible, to be paid out of the receipts during the same period. When, therefore, debts of that character remain unsettled, or are not put in suit, for such a time as would be deemed unreasonable, it may be fairly presumed that the creditors have ceased to look to current receipts for payment, and have accepted the position of general creditors, who, as such, would have no claim for indemnity upon any special part of the income."

In this circuit a six-months rule has been almost universally imposed, and a large number of insolvent railroad companies have been wound up, and their property distributed among creditors, under general orders so limiting the payment of such claims. In this case the receivers were appointed by Jackson, circuit judge (afterwards Mr. Justice Jackson), who made an order in these words:

"In these causes, upon the petition of Charles McGhee and Henry Fink, receivers, etc., it is ordered that they are hereby authorized and directed to pay off the pay rolls of the respondent for the month of June, 1892, and other unpaid wages, due to employes, accruing not more than five months prior to 1st day of June, 1892; also, to pay to the parties entitled all amounts appearing to their credit for cross-ties, wood, fuel, materials, and supplies furnished the respondent within five months prior to said 1st day of June for the purpose of carrying on its operations; making payments as aforesaid out of any moneys coming into their hands as receivers as hereafter arising out of the operation of said road, and at such times and in such amounts as, in their discretion, may be properly done in the proper management and direction of said railroad committed to their charge."

As these receivers were appointed June 24, 1892, it will be noticed that this limitation was practically one of six months; January 1, 1892, being fixed as a date more convenient to adjust such claims than one falling so near the end of a month and of a year as a date precisely six months before the receivership. The appellants present no special circumstances which will justify a departure from this general order, under which all such claims have been settled, and we feel altogether indisposed to arbitrarily extend a limit imposed in the sound discretion of the circuit court.

For appellants, it is further insisted that the order made by Judge Jackson should be construed as applying to the time when their claims accrued, and that, in respect of at least parts of one or more of their claims, the supplies were furnished upon a credit of either 30 or 60 days, and did not fall due until after January 1, 1892. The order plainly limited the receivers to the payment of claims for supplies "furnished" on or after January 1, 1892. The order can bear but one construction. The time of delivery by the seller to the railroad company is the time when they were "furnished." In each instance where this contention is now made, the items constituting the claims were delivered to a carrier, consigned to the railroad company, prior to January 1, 1892. The date of such delivery fixes the date when they were "furnished." A part of

the claim presented by Matthews, Northrup & Co. is for advertising matter furnished after January 1, 1892. This was disallowed upon the ground that advertising could not be regarded as a material or supply used in the operation of the railroad. No precedent for the allowance of a claim for advertising is furnished us. The only instance to which attention has been called where such a claim has been made for advertising matter is in the case of Poland v. Railway Co., 52 Vt. 144. The claim was disallowed, as not being supplies or materials furnished for the operation of the road. We are indisposed, under the admonitions of the supreme court concerning the disposition of certain courts to extend this rule, to apply it to supplies which cannot be regarded as in any sense tending to preserve the mortgaged property for the bond creditors, or adding to the value of their security. The several decrees appealed from must be, and accordingly are, affirmed.

LIBERTY PERPETUAL BUILDING & LOAN CO. et al. v. M. A. FURBUSH & SON MACH. CO. et al.

(Circuit Court of Appeals, Fourth Circuit. May 5, 1897.)

No. 204.

LABORERS' LIENS—RECORDING OF CLAIMS—STRICT COMPLIANCE WITH STATUTE.

To acquire a laborer's lien, under Code Va. §§ 2485-2487, as amended by Acts 1891-92, p. 362, the requirement that the claims must be filed in the clerk's office within 90 days after the wages become due must be strictly complied with, and the record must show the fact of compliance. Therefore the mere recording of labor tickets within 90 days from their date, with nothing to show that the wages were due on the day the tickets were dated, gives no lien; nor can the record be supplemented by parol evidence on this point after suit brought to enforce the lien.

Brawley, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

Martin P. Burks, for appellants.

S. V. Southall, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

GOFF, Circuit Judge. In disposing of the questions raised by this appeal, it will not be necessary to refer to all the facts disclosed by the record. The bill was filed by the M. A. Furbush & Son Machine Company, a corporation created by the laws of the state of New Jersey, and a citizen of that state, and Charles A. Furbush, a citizen of the state of Pennsylvania, against the Liberty Woolen Mills and the Liberty Woolen Manufacturing Company, corporations created by the laws of the state of Virginia, and certain trustees under a mortgage made by said Liberty Woolen Mills Company,—all citizens of the state of Virginia. The bill alleges: That the Liberty Woolen Mills in June, 1884, being indebted to M. A. Furbush & Son in the sum of \$14,813.77, in order to secure the same,

executed a mortgage upon its machinery and fixtures, situated in the mill building of that company, at Liberty, Va., which mortgage was duly admitted to record in the proper office on the 25th day of June, 1884. That on April 11, 1889, all the property of said Liberty Woolen Mills, real and personal, was sold by said company, for the sum of \$17,000, to William H. McGhee, T. D. Berry, S. M. Bolling, S. Griffin, and J. S. Campbell, who purchased with notice of said mortgage made to secure the debt to the M. A. Furbush & Son Machine Company. That on April 12, 1889, an agreement was entered into between said purchasers and the Furbush & Son Company as follows: That \$5,600 of the coupon bonds of the Liberty Woolen Mills (secured by mortgage upon all the real and personal property of that company, dated June 1, 1885, duly of record), which had been theretofore pledged by said company as security for a debt due by it to the People's National Bank of Lynchburg, Va., should be redeemed by said purchasers within 30 days, and turned over to the Furbush & Son Company as a cash credit on the debt so secured to them by mortgage, which was done; that the purchasers should execute to the Liberty Woolen Mills four bonds, for an amount, in the aggregate, of the residue of the debt due said Furbush & Son Company, which were to be assigned to that company as collateral and additional security for the debt so due it, which also was done. It was further set forth that at the time the bill was filed the balance due the Furbush & Son Company on their said debt was \$3,597.66, with interest thereon, as well as the \$5,600 of coupon bonds before mentioned; that the purchasers of the property of the Liberty Woolen Mills formed a joint-stock company for the purpose of operating the plant so purchased by them, and that it was duly chartered under the law as the Liberty Woolen Manufacturing Company, the old company, with the assent of the purchasers, conveying the property directly to the new organization; that the Liberty Woolen Mills defaulted in the payment of the coupons due December, 1894, on the bonds secured by the mortgage of June 1, 1885, and was still in default when this suit was filed; that the Liberty Woolen Mills Company was insolvent, and that its property would not sell for enough to pay the costs of sale, and the debts secured by the mortgages referred to. The prayer was for the foreclosure of the mortgages, and the application of the proceeds of sale to the payment of the debts of said company; for an accounting; for the appointment of a receiver, if found necessary; and for general relief. Some of the defendants filed separate demurrers to the bill, for reasons not necessary to be now set forth, which were overruled; and thereupon they filed their answers, to which the complainants replied generally, and the cause came on to be heard, the bill having been taken for confessed as to the Liberty Woolen Mills and the Liberty Woolen Manufacturing Company. A decree was passed referring the cause to a master, with instructions to report an account of all the liens upon the property in the bill mentioned, giving their respective amounts, and their order as to priority. The complainants then filed an amended bill, simply making additional defendants, the Liberty Perpetual Build

ing & Loan Company being one of them. Said last-named company in its answer claimed that, as assignee, it held liens on the property in the bill described, for labor furnished the Liberty Woolen Manufacturing Company, amounting to \$3,180.51, which it insisted were first liens on said property, having preference over the mortgages in the bill set forth. The master to whom the cause was referred, after due notice to the parties, proceeded to execute the order of reference, and returned his report, to which certain exceptions were filed,—among others, that of the Liberty Perpetual Building & Loan Company, because the master had failed to state its debt as a lien on the property sought to be sold, having preference over the liens of the mortgages. Said company, as assignee of the laborers to whom they were originally given by the Liberty Woolen Manufacturing Company, owned “labor tickets” amounting to the sum of \$3,180.51, which, it claimed, held the position of a paramount lien on the property described in the bill, by virtue of the laws of the state of Virginia. It appears from the master’s report, and the evidence filed therewith, that these claims were in the form of notes given by the Liberty Woolen Manufacturing Company, dated at various times in the year 1894, payable 60 days after date to the order of the laborers employed by said company, and assigned by them, by indorsement thereon, to the Liberty Perpetual Building & Loan Company. Priority for these debts was claimed under sections 2485, 2486, and 2487 of the Code of Virginia, which are here quoted in full as follows:

“Sec. 2485. Lien of Employees,” etc., “of All Transportation Companies,” etc., “on Franchise and Property of Company. All conductors, brakemen, engineers, firemen, captains, stewards, pilots, clerks, depot or office agents, storekeepers, mechanics or laborers, and all persons furnishing railroad iron, engines, cars, fuel and all other supplies necessary to the operation of any railway, canal, or other transportation company, or of any mining or manufacturing company, chartered under or by the laws of this state, or doing business within its limits, shall have a prior lien on the franchise, gross earnings, and on all the real and personal property of said company which is used in operating the same, to the extent of the moneys due them by said company for such wages or supplies; and no mortgage, deed of trust, sale, hypothecation, or conveyance, executed since the twenty-first day of March, eighteen hundred and seventy-seven, shall defeat or take precedence over said lien; provided, that if any person entitled to a lien, as well under section twenty-four hundred and seventy-five as under this section, shall perfect his lien given by either section, he shall not be entitled to the benefit of the other.

“Sec. 2486. How Perfected; How Enforced. No person shall be entitled to the lien given by the preceding section unless he shall, within six months after his claim has fallen due, file in the clerk’s office of the court of the county or corporation in which is located the chief office in this state of the company against which the claim is, or in the clerk’s office of the chancery court of the city of Richmond, when such office is in said city, a memorandum of the amount and consideration of his claim, verified by affidavit, which memorandum the said clerk shall forthwith record in the deed book and index the same in the name of the said claimant and also in the name of the company against which the claim is. Any such lien may be enforced in a court of equity.

“Sec. 2487. Assignee’s Rights. Any assignee of such claim may file the memorandum and make the oath required by the preceding section, and shall have the same rights as his assignor.”

By an act of the general assembly of Virginia, chapter 224, Acts 1891–92, p. 362, § 2486, as quoted, was amended so as to require the

memorandum of the amount and consideration of the claim to be filed in the clerk's office within 90 days after the claim has fallen due. Par. 9. The court below overruled the exceptions of the Liberty Perpetual Building & Loan Company to the master's report, and decreed that the claims held by it were not liens having priority over the mortgages mentioned in the bill, but subordinate thereto. This action of that court is the only error assigned in the appeal we are now considering.

The court below founded its decree on its findings that the Virginia legislation referred to was, so far as it related to liens for wages due the employes of manufacturing companies, unconstitutional and void (citing *Fidelity Ins. & Safe-Deposit Co. v. Shenandoah Iron Co.*, 42 Fed. 372, 376), and that in any event the laborers of the Liberty Woolen Manufacturing Company could have no lien, except upon the property of that company, which the court held was simply the equity of redemption; in other words, the property of the Liberty Woolen Mills, subject to the mortgages executed by that company upon the same. In the view that we take of this case, it will not be necessary to pass upon these questions, for the reason that, under the terms of the sections of the Code referred to, the claims relied upon by the appellant were not liens upon the property mentioned, even if said Liberty Woolen Manufacturing Company had held it free from all incumbrances, and if there had been no doubt as to the constitutionality of the legislation now called in question. The debts secured by the mortgages were incurred, and the liens claimed by the complainants were created, some time before the organization of the Liberty Perpetual Building & Loan Company, by which the laborers were employed through whom, by assignment of their demands for money due them for wages, the appellant claims a lien on the franchise, gross earnings, and on all the real and personal property of that company. If such a lien exists on said property in favor of the appellant, it is one unknown to the common law, as well as to the courts of equity, and can be sustained only under the provisions of the Virginia Code before mentioned. Being thus dependent entirely on the statute, and as it, if recognized, deprives liens prior in date of their previously conceded preference, it can only be successfully asserted after the terms and conditions prescribed by the Code have been fully complied with. This legislation, while commendable in character, is far reaching in its results, and those claiming its benefits will be required to show that they have strictly observed the obligations imposed upon them by its provisions. This is absolutely essential, in order to properly protect, not only those who are honestly entitled to the benefits secured by the statute, but also for the protection of the owners of property, and the security of purchasers thereof, as well as for the preservation of the liens created by other provisions of law, in which the general public, as well as the owners thereof, are concerned. The sum claimed by the appellant (in the aggregate, \$3,180.51) is made up of many small amounts, shown by the "labor tickets" given for labor performed by different persons for said company, duly assigned, all of which are similar in charac-

ter, differing only in the dates, names of the parties to whom payable, and the amounts due, and one of which, taken at random from the large number filed, reads as follows:

"No. 4093.

Bedford City, Va., May 12, 1894.

"Sixty days after date, we promise to pay to Bettie Harris or order two 60-100 dollars, for labor, in accordance with the laws of the state of Virginia.

"Liberty Woolen Manuf'g Co.,

"\$2.60-100.

By George L. Ewart, B'kpr."

These tickets were assigned to the Liberty Perpetual Building & Loan Company by the parties to whom they were issued, and that company at different times, and within 90 days after the dates of said tickets, presented them to the clerk of the county court of Bedford county, Va., and they were admitted to record. With each set of tickets so presented was a memorandum of the amount and date of each one, to which was attached the affidavit of the cashier of said company that the notes listed had been issued by the Liberty Woolen Manufacturing Company for services rendered it by its laborers; that they were unpaid, and had been assigned to, and were then held by, his said company,—which memorandum was admitted to record with the notes or tickets. When the appellant presented its claims to the master, objection was made by the complainants to the allowance of the sum due on said labor tickets, because the provisions of the law under which the lien was claimed had not been complied with, and that, therefore, they did not constitute a lien on the property in controversy. The master, though he disallowed the priority of these claims for other reasons, was not impressed with this objection, nor did the court below pass upon it, but disposed of the questions raised on other grounds. Still, before the decree appealed from can be reversed, the appellant must show, not only that the court below was in error in its rulings and its decree, but also that the labor claims in question are liens on said property,—in other words, that the requirements of the Code cited had been strictly observed. Do the records of the office of the clerk of the county court of Bedford county show that a lien has attached to the property in the bill mentioned, by the action of the appellant under the provisions of the law applicable thereto? It will be remembered that it is only the laborers of "any railway, canal, or other transportation company, or of any mining or manufacturing company," who are entitled to "have a prior lien on the franchise, gross earnings, and on all the real and personal property," of such companies, "which is used in operating the same, to the extent of the moneys due them by said company for such wages"; and also must it be kept in mind that such laborers are not entitled to such lien unless they have, within 90 days after their claims have fallen due, filed in the clerk's office of the court of the county or corporation in which is located the chief office in the state of Virginia of the company against which the claim is, a memorandum of the amount and consideration of their claims, verified by affidavit, which memorandum is to be recorded in the deed book, and indexed in the name of the claimant and also in the name of such company. The legislature evidently intended that all these

provisions should be respected by those desiring to avail themselves of the benefits provided for in the legislation now under consideration. The intention was that the mere inspection of a record, to be found at a particular place, should disclose all the information necessary in order to enable those interested therein to determine as to the existence of liens on the property of certain companies. If the claims of such laborers are assigned, the assignee, in order to perfect the lien, must observe the provisions of the statute in the same manner and to the same extent as was required of the assignor. It nowhere appears in the memorandum in said clerk's office, filed for record by the appellant as assignee, that the respective assignors had been employed as laborers by the Liberty Woolen Manufacturing Company, nor is it shown therefrom that said company was of the character that its laborers were entitled to secure their wages by lien; and the insistence that it is presumed to be a manufacturing company, from its name, is without force. Nor is the real and personal property on which a lien was claimed to exist even referred to, let alone designated; and this in the face of the statute, which is evidently intended to permit such companies to own both real and personal property, to which the lien provided for shall not attach. Nor does it appear that the memorandum mentioned was filed with the clerk within 90 days after the claims for labor fell due. And, from all that we can see from such record, there is nothing to show when the labor was performed; and it may be, or not, that the claims for the same had been due more than 90 days when the tickets which are the items of the aggregate of appellant's demand were given to the laborers who assigned them. It may be that the memorandum required to be filed with the clerk for record need not necessarily contain all the information that we have just indicated was omitted from the statement filed by the appellant relative to the claims assigned to it, but we think it would be "the better practice so to do," as has been indicated in the opinions of the courts of last resort in several states, construing statutes similar in character. But we are clearly of the opinion that, because the said record fails to show that the memorandum of the amount and consideration of the claims was filed with the clerk within 90 days after the wages of the laborers were due, no lien attached to the property of said Liberty Woolen Manufacturing Company by the recordation of said memorandum, and that the court below did not err in decreeing against the appellant concerning the same. We do not mean to be understood as saying that the Liberty Woolen Manufacturing Company gave said tickets to its laborers in payment for labor rendered some time theretofore, but we do say that it is not disclosed by said record when the labor represented by such tickets had been performed,—whether the wages were due on the days the tickets were dated, or a week or a year previous thereto. The appellant, realizing that the record was defective, attempted to supply the omitted information by examining a number of witnesses before the master for the purpose of showing that, as a matter of fact, the 90 days allowed by the statute from the time the claim became due to the period when the mem-

orandum was filed with the clerk had not expired. But that fact cannot be shown by parol evidence after suit has been brought, but it must appear from the record, so that all who examine and read it can see, not only what is claimed, but also that the law has been complied with. The statute does not contemplate that the company may give its note, due 60 days or 1 or 2 years after date, for the amount due its laborer, and that then, when such note is due, 90 days shall be allowed thereafter in which to file a memorandum claiming a lien for said amount; but it means that such a claim for a lien shall be made within 90 days from the time the labor was performed,—from the day the laborer was entitled to demand his wages. The legislature, for reasons plainly evident, has wisely limited the time within which such liens can be perfected, and has required that the record shall show that the party claiming has asserted them within 90 days from the time that his demand was due. The appellant is unable, from the record, to do this, and it must suffer the consequences. The statute extended to it certain privileges, and granted to it a security that many others were not permitted to enjoy; and certainly the appellant will not be allowed to accept the favor that was offered, and then to refuse to respect the terms accompanying it. A party desiring to comply with the requirements of the sections of the Virginia Code that we have been considering can easily do it, as the information called for is peculiarly within the knowledge of him who is seeking thereby to create a lien on the property of another; and, if he fails to do so, it is likely for the reason that the full statement of the facts would injure his claim, or because of either ignorance or inadvertence, neither of which will be received as an excuse, especially in cases where the rights of others are affected. The suggestion that the record, as it was made in the clerk's office, was sufficient to put any one who examined it on his guard, and that it was such notice as would induce a prudent business man to make full inquiry, is, we think, without force. No one is required to go outside of the clerk's office for the information he is told by the law he can find therein, nor expected to control his conduct by the conflicting statements made by the parties to the record; the one asserting, and the other denying, as their respective interests may suggest. The only question in such cases is, has the party claiming the lien observed the commands of the law, and been obedient to its requirements?

The conclusion we have reached is in consonance with the reasoning as found in the opinions of a number of the courts of the country, to which, without quoting the language of the judges, we here refer: *Boston v. Railroad Co.*, 76 Va. 182; *Shackleford v. Beck*, 80 Va. 573; *Mayes v. Ruffners*, 8 W. Va. 384; *Phillips v. Roberts*, 26 W. Va. 783; *Davis v. Livingston*, 29 Cal. 283; *Hooper v. Flood*, 54 Cal. 218; *Noll v. Swineford*, 6 Pa. St. 187; *Witman v. Walker*, 9 Watts & S. 186; *Thomas v. Barber*, 10 Md. 380; *Delaware Railroad Const. Co. v. Davenport & St. P. Ry. Co.*, 46 Iowa, 406; *Valentine v. Rawson*, 57 Iowa, 179, 10 N. W. 338; *Lyon v. Railroad Co.*, 127 Mass. 101; *Mulloy v. Lawrence*, 31 Mo. 583; *Cook v. Vreeland*, 21 Ill. 430; *Vane v. Newcombe*, 132 U. S. 220, 10 Sup. Ct. 60; *Van*

Stone v. Manufacturing Co., 142 U. S. 128, 12 Sup. Ct. 181. See, also, Phil. Mech. Liens, 576.

Holding, as we do, that the appellant did not acquire liens on the property mentioned in the bill by filing the memorandums referred to in the office of the clerk of the county court of Bedford county, it is consequently unnecessary for us to consider other points relied upon by counsel, presented so forcibly at the bar of this court, and passed upon by the court below. The decree appealed from will be affirmed.

BRAWLEY, District Judge. I am of opinion that the memorandum put upon record in this case was a sufficient compliance with the statutory requirements, and therefore dissent.

UNION CASUALTY & SURETY CO. v. SCHWERIN.

(Circuit Court of Appeals, Fourth Circuit. May 14, 1897.)

No. 216.

1. PRACTICE—MOTION FOR NONSUIT—ABANDONMENT.

When a defendant, after the denial of his motion for a nonsuit, proceeds to examine witnesses and make his case upon the merits, he thereby abandons the motion for a nonsuit, and cannot assign the denial thereof as error.

2. REVIEW ON ERROR—ASSIGNMENTS—EVIDENCE.

An assignment of error relating to the refusal of the trial court to give instructions to the jury cannot be considered when the evidence showing the relevancy of the propositions of law involved is neither quoted in full nor its substance referred to in the assignment of error.

In Error to the Circuit Court of the United States for the District of South Carolina.

T. Moultrie Mordecai, for plaintiff in error.

Marion Moise, for defendant in error.

Before GOFF, Circuit Judge, and HUGHES and BRAWLEY, District Judges.

GOFF, Circuit Judge. The plaintiff below, Cecile F. Schwerin, instituted her suit in the court of common pleas for the county of Sumter, in the state of South Carolina, against the defendant below, the Union Casualty & Surety Company of St. Louis, claiming the sum of \$3,000 as due her on a policy of insurance issued by said defendant on the life of one Herman Schwerin, dated April 24, 1895. The plaintiff was the beneficial owner and holder of said policy, and it was alleged in the complaint that the assured died on the 19th day of December, 1895, in said county of Sumter, during the time that the policy was in force. The case was duly removed to the circuit court of the United States for the district of South Carolina, where it was tried before a jury on the 17th day of December, 1896, when a verdict was returned for the plaintiff, on which a judgment was entered against the defendant for the sum of \$3,124.83 and the costs. The writ of error we are now considering was then sued out. During the

trial the counsel for the defendant, at the conclusion of the plaintiff's testimony, moved for a nonsuit, which was refused by the court. This refusal of the court to direct a nonsuit is assigned as error. Other assignments of error relate to the action of the court in refusing to admit certain evidence offered by, and in declining to give certain instructions requested by, the defendant below.

After the court overruled the motion for a nonsuit, the defendant proceeded to examine a number of witnesses, introduced other testimony, and presented various propositions of law which it asked the court to make part of the charge to the jury. This was an abandonment of the motion for a nonsuit, and the action of the court below thereon is not now reviewable here. A defendant has the right to rely upon his motion for a nonsuit, and to have his writ of error if it be refused, but he has no right to insist upon his exception, founded on said motion, after he has offered testimony and made his case upon the merits, for the court and jury then have the right to consider the whole case as it has been made by the testimony. The defendant, having thus abandoned the nonsuit, may move to have the case taken from the jury upon the conclusion of the entire evidence. *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493; *Insurance Co. v. Cran- dal*, 120 U. S. 527, 7 Sup. Ct. 685; *Railroad Co. v. Mares*, 123 U. S. 710, 8 Sup. Ct. 321; *Insurance Co. v. Smith*, 124 U. S. 405, 8 Sup. Ct. 534; *Railroad Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591; *Runkle v. Burnham*, 153 U. S. 216, 14 Sup. Ct. 837.

The assignment of error relating to the refusal of the court to permit the introduction of certain testimony is without merit. The court properly declined to admit evidence hearsay and secondary in character, and we refer to it only for the purpose of expressing our disapproval of exceptions evidently untenable and clearly frivolous.

We are unable to consider the points suggested by counsel for the plaintiff in error concerning the refusal of the court below to give the instructions asked for by the defendant, for the reason that the evidence, if any there was, showing the relevancy of the propositions of law propounded thereby, is neither quoted in full nor its substance referred to in the assignments of error. It therefore follows that we must presume there was no such evidence, in which event the court properly declined to give the instructions asked for. *Improvement Co. v. Frari*, 8 U. S. App. 444, 7 C. C. A. 149, and 58 Fed. 171; *Newman v. Iron Co.* (decided during the present term of this court) 42 U. S. App. —, 80 Fed. 228.

The judgment of the court below is affirmed.

SHAW ELECTRIC CRANE CO. v. SHRIVER.

(Circuit Court, S. D. New York. April 15, 1897.)

1. COSTS—CERTIFICATION OF DOCUMENTS.

A party cannot tax as costs the fees for certifying documents for use in evidence, which, in the absence of stipulation, would require certification, but have not in fact been certified.

2. SAME—ALLOWANCE AND DISALLOWANCE.

Where a nontaxable charge for certifying and a taxable charge for printing have been combined in a bill of costs, and the amount of the latter can be separated from the former, it should be allowed, though the former is disallowed.

Francis Forbes, for complainant.

John R. Bennett, for defendant.

LACOMBE, Circuit Judge. I do not see any authority for taxing this sum of \$500, which is practically charged as "constructive" fees. The order of this court restoring the cause to the calendar contained the proviso that complainant (who had made the motion) should file a stipulation that the "evidence taken in" the New Jersey case "be used in this case with the same force and effect," etc., "as though originally taken herein." A stipulation to this effect, including, also, testimony "to be taken" in the New Jersey suit, was forthwith filed by complainant. Thereupon the defendant had the choice either to take the evidence de novo, or to use the evidence taken in New Jersey. Of course, the order and stipulation authorizing the use of this testimony taken in another case presupposed that proper assurance of its authenticity would be made. If defendant decided to use it, the only proper shape in which it could have been offered to this court was under the certification of the clerk of the court in which it was filed, unless some further stipulation should dispense with this requirement. Had defendant obtained this certification, he could, of course, tax the disbursements necessary to obtain it, but he surely cannot charge anything for certification fees which he has not paid. Probably there was a further stipulation entered into by the parties (although the papers do not clearly show one) to the effect that an uncertified copy of the New Jersey evidence might be put in with the same effect as if it were certified, but, in the absence of any stipulation as to allowance of whatever sum defendant chose to pay for the uncertified copy, I cannot see how the court can include such sum in the bill of costs. The rules of this court, however, require that records for final hearings shall be printed. Defendant has paid out money in part to put the New Jersey evidence into print, which he was bound to do, and from which obligation no stipulation of his adversary could relieve him. The disbursements necessary to print this evidence should be allowed. Defendant ought not to lose them because he has paid both for copy and for printing in a lump sum. The proper amount is readily ascertainable, since the number of pages is known, and the price per page for such work is shown by the charge for printing so much of the record as was made up in this court.

HAYES et al. v. CITY OF NASHVILLE.

(Circuit Court of Appeals, Sixth Circuit. May 10, 1897.)

No. 464.

1. CONTRACTS—RESCISSION—ABANDONMENT.

Besides technical rescission of a contract, releasing each party from every obligation under it, as if it had never been made, there is a mode of abandoning a contract, as a live and enforceable obligation, which still entitles the party declaring its abandonment to look to the contract to determine the compensation he may be entitled to under its terms for the breach which gave him the right of abandonment; and courts, in construing the language used by laymen in such cases, will consider, not only the language of the party, but all the circumstances, including the effect of a complete rescission, and the probability or improbability of the party's intending such a result.

2. SALES—DEFAULT IN PAYMENTS—RIGHT TO RESELL.

When the title passes to something which is sold, one of the remedies of the vendor for a failure by the vendee to make payments in accordance with the contract at the time fixed for the deliveries and payments is, after notice, to resell the subject-matter of the sale, and to hold the defaulting vendee for the difference between the proceeds of the sale and the contract price.

Error to the Circuit Court of the United States for the Middle District of Tennessee.

The action below was by W. J. Hayes & Sons, a firm of brokers of Cleveland, Ohio, to recover from the corporation, the mayor and city council of the city of Nashville, Tenn., \$3,750, a part of the sum deposited under a contract made between the parties for the sale and purchase of \$400,000 of negotiable bonds. The defendants filed a plea averring they were entitled to retain the amount sued for because of damages in that sum sustained by them through the failure of the plaintiffs to take the bonds as agreed. The contract was as follows:

Agreement, made this 13th day of April, 1893, by and between the mayor and city council of Nashville, a corporation organized under the laws of the state of Tennessee, hereinafter to be known as the city of Nashville, and W. J. Hayes & Sons, of the city of Cleveland, in the state of Ohio, witnesseth: Whereas, the said city of Nashville did on the 11th day of April, 1893, offer to sell to the said W. J. Hayes & Sons the \$400,000 of city of Nashville 4½ per cent. trunk-sewer bonds, issued under the act of the general assembly of the state of Tennessee, approved February 2, 1892, and an ordinance of said city passed in pursuance thereof on the 13th day of March, 1893, at the par value of said bonds, less 2 per cent. thereof, to be allowed and paid by said city of Nashville to said W. J. Hayes & Sons as commission; and whereas, said W. J. Hayes & Sons did on the 11th day of April, 1893, accept said offer, and agree thereto: Now, therefore, the said city of Nashville does hereby agree to and does sell to the said W. J. Hayes & Sons the said four hundred thousand dollars of trunk-sewer bonds for the sum of four hundred thousand dollars, less the 2 per cent. commission aforesaid to be paid and allowed said W. J. Hayes & Sons by said city. Said bonds are to be dated April 1, 1893, of denomination of \$1,000, with semiannual interest coupons attached, interest at the rate of 4½ per cent. per annum, payable semiannually at the Chemical National Bank of New York City, or at the office of city treasurer, Nashville, Tennessee, at the option of the holders of the same. Said bonds are to mature in thirty years from the date thereof, with principal payable at the office of the treasurer of the said city of Nashville, Tenn. Said bonds are to be numbered from 1 to 400, inclusive, and are to be legally issued, and the said city of Nashville shall

furnish the said W. J. Hayes & Sons a transcript of said proceedings relating to said issue, showing the legality thereof. The said bonds are to be delivered to the said W. J. Hayes & Sons at the Chemical National Bank of New York City as follows, at expense of city: \$75,000 on or before the 1st day of May, 1893, \$75,000 in thirty days thereafter, and \$50,000 every thirty days thereafter, successively, until the entire issue is taken up. In consideration whereof, the said W. J. Hayes & Sons hereby agree to purchase, to take up and pay for said bonds when delivered, not only the par value thereof, less the two per cent. commission aforesaid, but in addition thereto all interest which shall have accrued on the par value of each installment of said bonds; interest to be calculated from April 1, 1893, up to date of such installments, as above provided; provided, however, that the said W. J. Hayes & Sons shall have the option of taking up and paying for the entire issue at any time after legality of bonds is established. If the said W. J. Hayes & Sons fail to take and pay for any installment of bonds as above provided when delivered, then, at the option of the said city of Nashville, this contract may be declared null and void in all its provisions. As an evidence of good faith upon the part of the said W. J. Hayes & Sons, and as a guaranty upon their part that they will faithfully carry out the provisions of their contract, they have delivered to the recorder of the city of Nashville a draft for the sum of five thousand dollars, receipt of which draft is hereby acknowledged by the said city of Nashville. A pro rata of said deposit, with 6 per cent. interest thereon, will be refunded to the said W. J. Hayes & Sons as each installment of bonds is taken up and paid for. The conditions of this contract are subject to the opinion of Judge John F. Dillon, of New York, as to the legality of bonds; the legal services for same to be paid by W. J. Hayes & Sons. In witness whereof, the mayor and city council of Nashville has caused this agreement to be signed by the finance committee of the city council, by the mayor of said city, and by the recorder, and has caused its official seal to be affixed thereto; and the said W. J. Hayes & Sons have caused the same to be signed by T. W. Heatley, their duly-authorized agent.

[Signed]

[Seal.]

Geo. B. Guild, Mayor.
A. S. Williams,
J. B. Murray,
G. P. Lipscomb,
Finance Committee.
James T. Bell, Recorder.

W. J. Hayes & Sons, per Thos. W. Heatley.

The bonds were declared to be legal by Judge Dillon of New York, in accordance with the contract, and the city issued them. It delivered \$100,000 of them to the plaintiffs, and received payment thereon; and, in accordance with the contract, it delivered up to the plaintiffs \$1,250 of the \$5,000 guaranty deposit. Though requested frequently by the city to take and pay for the remaining \$300,000 of the bonds the plaintiffs failed to do so. There was a good deal of correspondence between the parties, and the city authorities made a number of efforts to secure the completion of the contract by the plaintiffs. Finally a meeting of council was called for the purpose of considering the situation, the minutes of which were as follows:

Minutes of the Meeting of the City Council of Nashville of February 10, 1894:

Minutes.

City Hall, Nashville, Feb. 10, 1894.

The Hon. the city council met this evening at 4 o'clock in extra session, pursuant to a call from his honor the mayor. Present—Messrs. Barthell, Dalton, Goodloe, Goodman, Harwell, Moore, Murray (P. A.), Murrey (J. B.), Stewart, Sykes, Williams, and Prest. Higginbotham. The message of his honor the mayor, convening the council, was as follows:

"Gentlemen of the Council: You are called to meet in extra session this evening at 4 o'clock to consider the matter of declaring forfeited the trunk-sewer

bonds contracted for by W. J. Hayes & Sons, Cleveland, Ohio, and to take such steps as the emergency of the case may demand, and the interest of the city requires.

"Feb'y. 10th, 1894.

"Respectfully,

Geo. B. Guild, Mayor."

Which message was received and filed.

Mr. Sykes offered the following:

"Be it resolved by the mayor and city council of Nashville that whereas, the mayor, recorder, and finance committee, the commissioners appointed by ordinance approved March 13, 1893, to negotiate and sell the trunk-sewer bonds, have this day sent the following communication to the city council, to wit:

"To the Mayor and City Council: We herewith submit the resolutions of the commissioners appointed to negotiate the trunk-sewer bonds, which resolution was passed at a recent meeting held January 23, 1894, and is as follows: "Whereas, W. J. Hayes & Sons, of the city of Cleveland, Ohio, have failed to comply with the provisions of their contract made with the city of Nashville April 13, 1893, with reference to the sale of the trunk-sewer bonds (that is to say, said W. J. Hayes & Sons having failed to take the installments of said bonds at dates provided for under the terms of said contract); and whereas, by the terms of the said contract the said city of Nashville has authority, at its option, to declare said contract null and void upon failure of the said W. J. Hayes & Sons to comply therewith: Therefore be it resolved by the commissioners appointed by ordinance approved March 13, 1893, namely, the mayor, recorder, and the finance committee, that said contract is hereby declared null and void and of no further effect. Be it further resolved that said commissioners report their action to the city council for ratification and approval."

"[Signed]

Geo. B. Guild, Mayor.

"James T. Bell, Recorder.

"Chas. Sykes.

"A. S. Williams.

"M. J. Dalton.

"W. H. Higginbotham.

"Frank Goodman."

"Therefore be it resolved by the mayor and city council of Nashville that said action of the commissioners be ratified and approved. Be it further resolved that said contract be declared null and void, in accordance with the suggestions and recommendations of said commissioners. Be it further resolved that W. J. Hayes & Sons be notified of the action of the mayor and city council with reference to the said contract, and that they be further notified that the mayor and city council of Nashville, in accordance with the provisions of said contract, claim the guaranty deposited by them (the said W. J. Hayes & Sons) for the faithful performance thereof, not yet refunded to them, amounting to the sum of \$3,750.00. Be it further resolved that the treasurer and comptroller be directed to draw from the Fourth National Bank the said sum of \$3,750.00, and deposit the same with the legal depositories of the city, the First National Bank."

Which resolutions were on motion adopted, and then council adjourned.

[Signed]

W. H. Higginbotham, Prest.

Notice of these resolutions was conveyed to the plaintiffs in the following letters:

Letter of Recorder James T. Bell, of February 12, 1894:

Office of City Recorder.

Jas. T. Bell, Recorder and Judge of City Court.

Nashville, Tenn., February 12, 1894.

W. J. Hayes & Sons—Dear Sirs: I am directed to inclose a copy of resolutions adopted by the Hon. city council of Nashville February 10, 1894. I regret that things have assumed the shape as indicated. But Nashville has suffered considerably for your failure to comply with the terms of your contract, and

to-day is suffering for want of funds to carry on the work for which the bonds were issued.

Respectfully, yours,

James T. Bell, Recorder.

To which W. J. Hayes & Sons made the following reply:

February 14, 1894.

Hon. James T. Bell, Recorder, Nashville, Tenn.—Dear Judge: We have yours of the 12th inst., inclosing action of the council in accordance with a report signed by you and the other commissioners. We know none of your people intend to take any advantage of us, and we can assure you we have been acting under a great many disadvantages. We telegraphed you as per inclosed copy, saying we could take up \$50,000 in New York. When you come to know the difficulties which have arisen on this issue, you will not blame us.

Yours, truly,

W. J. Hayes & Sons.

Dict. by H. E. H.

The city then made efforts to sell the remaining bonds, and secured a purchaser in New York. The council (on February 15, 1894) then passed the following resolution:

Resolution.

City Hall, Nashville, February 15, 1894.

The Hon. city council met this morning at 11 o'clock, in extra session, pursuant to a call from his honor, the mayor. Present: Messrs. Barthell, Crutcher, Dalton, Goodloe, Goodman, Harwell, Hitchcock, Moore, Murrey (J. B.), McConnell, Sharenberger, Stewart, Sykes, Warren, Williams, and Prest. Higginbotham. The following message, convening the council, was transmitted from his honor the mayor, to wit:

"Nashville, Tenn., February 15, 1894.

"Gentlemen of the City Council: You are called to meet in extra session at 11 o'clock this a. m., to consider the proposition in regard to sale of the sewer bonds.

Geo. B. Guild, Mayor."

Which message was received and filed.

Mr. Sykes offered the following: "Be it resolved by the mayor and city council of Nashville that the trunk-sewer bonds commission be authorized and empowered to sell the \$300,000 trunk-sewer bonds at par and accrued interest to March 1, 1894, and to allow 2 per cent. commission on the par value of the bonds, and the \$3,750 forfeited by W. J. Hayes & Sons, of Cleveland, Ohio. The bonds, if sold, are to be paid for as follows: \$100,000 on March 1, 1894, \$100,000 not later than April 1, 1894, and the remaining \$100,000 not later than May 1, 1894." After being generally discussed by the members present, the resolution was adopted without dissent, and the council then adjourned.

W. H. Higginbotham, Prest.

These terms were accepted by the purchaser, Quintard, and the bonds were sold. It was in evidence that the method taken by the city to sell the bonds was according to the usual course of business in the disposition of such securities.

Parts of the court's charge to the jury to which the plaintiffs excepted were as follows:

"Now, then, looking to the provisions of this contract, viz. that the indemnity fund was deposited as an evidence of good faith, and as a guaranty of good faith, on the part of Hayes & Sons, that they would faithfully carry out the contract, if, in view of that, and in view of their failure to carry it out, it resulted, on conditions presently to be named, that the city was compelled to resell the bonds at a loss equivalent to the three thousand seven hundred and fifty dollars, or if, after the city had used due care and diligence to effect a sale, which I shall presently instruct you about, was unable to do so, and was compelled to sell the bonds in order to realize money which it expected under the contract, and had a right to expect, it would, in such a case as that, have a right to retain out of the indemnity fund enough to make itself whole

as it would have been if the plaintiffs had faithfully carried out their contract, to secure which this indemnity deposit was made; and that is a question you must determine.

"The question, then, would turn upon the city's dealing with these bonds after the contract was declared forfeited, and after it undertook to handle them, and after it became the owner of them. So that if, upon the proof, you believe that Hayes & Sons defaulted (to which there seems to be no controversy), and the city declared the contract forfeited (about which there seems to be no controversy), and the city then, for the purpose of realizing immediate proceeds upon the bonds, undertook to sell them, and did sell them, your next inquiry will be as to whether or not the city's conduct in the sale of them was lawful and just towards the plaintiffs, and if it acted properly, and was damaged by reason of having to resell them, to the extent of this three thousand seven hundred and fifty dollars, and taking the bonds back under a forfeiture, it became the duty of the city, in the reselling of these bonds, to exercise good faith and to exercise reasonable diligence in the reselling of these bonds for the best price they could obtain upon the market. That would have reference to the usual method or methods of selling securities at places where it was reasonable to expect there would be a demand for such securities. The city was not required to adopt any particular mode, but the mode they adopted must have been adopted in good faith, and must have been reasonable under the circumstances; and, to determine whether it was reasonable or not, you must look at the method pursued by the city in such cases, and the methods that are ordinarily pursued in handling securities of that kind; and whether it exercised good faith, through its officers, and used reasonable care and diligence to obtain the best price possible, is for the jury to decide upon the evidence before you."

W. G. Hutcheson, for plaintiffs in error.

John B. Keeble, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts as above). Though other questions are raised by the assignment of errors, we shall discuss only the two which were presented and argued to the court.

It was first contended on behalf of the plaintiffs in error that the city could not claim damages for breach of the contract, by way of set-off, because its action in annulling the contract was a complete rescission of it, releasing each party from every obligation under it, as if there never had been a contract made. It is well settled that a technical rescission of the contract has the legal effect of entitling each of the parties to be restored to the condition in which he was before the contract was made, so far as that is possible, and that no rights accrue to either by force of the terms of the contract. But, besides technical rescission, there is a mode of abandoning a contract as a live and enforceable obligation, which still entitles the party declaring its abandonment to look to the contract to determine the compensation he may be entitled to under its terms for the breach which gave him the right of abandonment. In *Mining Co. v. Humble*, 153 U. S. 540, 551, 14 Sup. Ct. 876, 879, defendant excepted to the following instruction of the trial court:

"If the jury find from the evidence that the plaintiffs were in good faith endeavoring to carry out and perform said contract according to its terms, and the defendant wantonly or carelessly and negligently interfered with and hindered and prevented the plaintiffs in such performance, to such an extent as to render the performance of it difficult, and greatly decrease the profits

which the plaintiffs would otherwise have made; then and in such case such interference was unauthorized and illegal, and would have justified the plaintiffs in abandoning the contract, and would have entitled them to recover such damages as they actually suffered by being hindered and prevented from performing such contract."

In sustaining the correctness of the charge the supreme court, speaking by Mr. Justice Brewer, said:

"It is insisted, and authorities are cited in support thereof, that a party cannot rescind a contract, and at the same time recover damages for his nonperformance. But no such proposition as that is contained in that instruction. It only lays down the rule—and it lays that down correctly—which obtains when there is a breach of a contract. Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken, and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about. Generally speaking, it is true that when a contract is not performed the party who is guilty of the first breach is the one upon whom rests all the liability for the nonperformance. A party who engages to do work has a right to proceed free from any let or hindrance of the other party; and if such other party interferes,—hinders and prevents the doing of the work,—to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop, and sue for the damages which it has sustained by reason of the nonperformance which the other has caused."

It very frequently happens that laymen do not distinguish between these two ways of ending a contract, and, therefore, that words are used by a party which, literally and strictly construed, would effect a complete rescission and destruction of the contract, when the party's real intention is only to declare his release from further obligation to comply with the terms of the contract by the default of the other party, and his intention to hold the other for damages. In such cases, courts consider, not only the language of the party, but all the circumstances, including the effect of a complete rescission upon the rights of the parties, and the probability or improbability that the complaining party intended such a result, in reaching a conclusion as to the proper construction of the language used. In this case the original contract provided for an "annulment" of the contract. If we can satisfy ourselves as to the meaning of the contract in this regard, it will throw a useful light on the meaning to be given to the subsequent action of the city authorities. The clause of the contract referred to is as follows:

"If the said W. J. Hayes & Sons fail to take and pay for any installments of bonds as above provided when delivered, then, at the option of the city of Nashville, this contract may be declared null and void in all provisions. As an evidence of good faith on the part of the said W. J. Hayes & Sons, and as a guaranty upon their part that they will faithfully carry out the provisions of this contract, they have delivered to the recorder of the said city of Nashville a draft for the sum of five thousand dollars, a receipt of which draft is hereby acknowledged by the said city of Nashville. A pro rata of said deposit, with 6 per cent. interest thereon, will be refunded to the said W. J. Hayes & Sons as each installment of bonds is taken up and paid for."

We cannot suppose that the city, in making this contract, intended to reserve to itself only the right completely to destroy the contract,

and thus to obligate itself to give up to the defaulting party the indemnity it had been careful to secure against loss; and yet such must be the construction of the contract, if the annulment provided therein means a complete rescission. The obvious intent of the parties was that upon default the city might free itself from any obligation thereafter to deliver the subsequent installments of bonds to W. J. Hayes & Sons, and that the fund deposited should be an indemnity against any loss the city might suffer by reason of the default. And it was in accordance with such an intent that the city declared its annulment of the contract, for it appropriated to itself the \$3,750 which still remained on deposit as indemnity for the performance of the contract. The declared intention of the city to retain its deposit can only be reconciled and made consistent with its declaration of annulment by construing the latter to be merely an abandonment of the contract, and not a complete rescission. This case presents many points in common with that of *Cherry Valley Iron Works v. Florence Iron River Co.*, decided by this court, and reported in 22 U. S. App. 655, 12 C. C. A. 306, and 64 Fed. 569. That was a suit for damages for the breach of a contract to purchase 10,000 tons of ore. The contract provided for the payment of the price in installments according to periodical deliveries of the ore, and contained this stipulation:

"And, in case said party of the second part fails to make any or either of the above-named payments for the period of ten days after the same becomes due, said Florence Iron River Company shall have the right to cancel this contract for all ore not delivered at the time such default is made."

The purchaser had failed to make the payments according to the contract, and correspondence ensued, in which the seller threatened that, unless payment was made, the undelivered ore would be sold for account of plaintiff, and the difference between the selling price and the unpaid purchase price would be charged to the plaintiff. Finally the sellers notified the buyers, in a letter in which they quoted in full the clause permitting cancellation of the contract for all ore undelivered, that they canceled the contract in accordance with that clause. It was vigorously contended on behalf of the purchaser that the cancellation was necessarily a complete rescission, and that it released both parties from the obligation of the contract, and that no damages could be recovered for failure to receive and pay for the undelivered ore. This court did not yield to the contention, but held that, upon the exercise of the right of cancellation provided by the contract after a failure to make the agreed payment, the further performance of the contract was abandoned and the aggrieved party had the right to pursue its remedy for the damages sustained by it in consequence of the breach of the contract which was the cause of its abandonment. The court, in reaching this conclusion, was fortified by the case of *Lumber Co. v. Bates*, 31 Mich. 158, 163, in which one party, by a declaration of rescission based on a default of the other party, was held not to intend a rescission in law, but a mere abandonment, because in the same letter was the declaration that the writer intended to look to the defaulting party for damages sustained by its failure to perform the contract. In the case of *Railroad Co.*

v. Howard, 13 How. 307, the contract between the railroad company and the building contractor contained the following clause:

"Provided, however, that in case the party of the second part shall at any time be of opinion that this contract is not duly complied with by the said party of the first part, or that it is not in due progress of execution, or that the said party of the first part is irregular or negligent, then and in such case he shall be authorized to declare this contract forfeited, and thereupon the same shall become null, and the party of the first part shall have no appeal from the opinion and decision aforesaid, and he hereby releases all right to except to or question the same, in any place, under any circumstances whatever; but the party of the first part shall still remain liable to the party of the second part for the damages occasioned by the said noncompliance, irregularity, or negligence."

The railroad company availed itself of this provision, and notified the contractor, after he had done part of the work, that in its opinion the contract had not been duly complied with by him, and, therefore, that the contract be, "and the same is hereby, declared to be forfeited." At the time of the forfeiture, money was due under the contract to the contractor, and he brought suit for the same. It was contended on behalf of the company that by its action in accordance with the contract, annulling the same, all rights acquired under the contract had been destroyed. The court below had given the following instruction:

"But this annulling did not deprive him [i. e. the contractor] of any rights vested in him at that time, or make the covenant void ab initio, so as to deprive him of a remedy upon it for any money then due him for his work, or any damages he had then already sustained."

Error was assigned to this charge on the ground stated above. In affirming the correctness of the charge, Mr. Justice Curtis spoke as follows:

"The law leans strongly against forfeiture, and it is incumbent on the party who seeks to enforce one to show plainly his right to it. The language used in this contract is susceptible of two meanings: One is the literal meaning, for which the plaintiff in error contends,—that the declaration of the company annulled the contract, destroying all rights which had become vested under it, so that if there was one of the monthly payments in arrear and justly due from the company to the contractor, and as to which the company was in default, yet it could not be recovered, because every obligation arising out of the contract was at an end. Another interpretation is that the contract, so far as it remained executory on the part of the contractor, and all obligations of the company dependent on the future execution by him of any part of the contract, might be annulled. We cannot hesitate to fix on the latter as the true interpretation. In the first place, the intent to have the obligation of the contractor, to respond for damages, continue, is clear. In the next place, though the contractor expressly releases all right to except to the forfeiture, he does not release any right already vested under the contract, by reason of its part performance, and 'expressio unius exclusio alterius.' And, finally, it is highly improbable that the parties could have intended to put it in the power of the company to exempt itself from paying money, honestly earned and justly due, by its own act declaring a forfeiture. The counsel for the plaintiff in error seemed to feel the pressure of this difficulty, and not to be willing to maintain that vested rights were absolutely destroyed by the act of the company; and he suggested that, though the covenant was destroyed, assumpsit might lie upon an implied promise. But if the intention of the parties was to put an end to all obligations on the part of the company arising from the covenant, there would remain nothing from which a promise could be implied; and, if this was not their intention, then we come back to the very interpretation

against which he contended, for, if the obligation arising from the covenant remains, the covenant is not destroyed. We hold the instruction of the court on this point to have been correct."

In the case of *Mayor, etc., of City of New York v. New York Refrigerating Construction Co.*, 146 N. Y. 210, 40 N. E. 771, the city made a contract with a refrigerating company to introduce a refrigerating apparatus into one of the markets of the city. The contract provided that, in case of the default of the company after certain proceedings, the city comptroller might notify the company to discontinue its system. After the contract had been partially performed, the comptroller did notify the company that the contract was canceled and annulled. By reason of the prior occupancy of the market houses by the company under the terms of the contract, certain rent was due from the company to the city. The company claimed that the cancellation destroyed any cause of action arising under the contract and that the rent could not, therefore, be recovered. It was held that the cancellation was not a rescission, in a strict, technical sense, which destroyed all right of action, but was simply a termination of the contract, leaving undetermined all existing liabilities. It was said that this result might be implied from all the surrounding circumstances, and grew out of the obvious meaning of the parties when the contract was executed, and that the position assumed by the appellants was "technical, forced, and unnatural." The court said:

"We have been referred to numerous authorities laying down the general doctrine that, where a contract is rescinded while in the course of performance, no claim in respect of performance, or of what has been paid or received thereon, may thereafter be made. This general rule is subject, however, to the qualifications that any claim founded on the contract must be referred to the agreement of rescission, to ascertain whether it has been expressly or impliedly reserved. See *McCreery v. Day*, 119 N. Y. 5, 23 N. E. 198. In the case cited, Judge Andrews says that the liability 'depends on the intention to be deduced from the agreement of annulment, construed in the light of attending circumstances.'"

In *Hinsdale v. White*, 6 Hill, 507, a landlord terminated the tenancy of a tenant under a section of the statute which provided for the issuing of a warrant at the instance of a landlord by the magistrate for the removal of the tenant, with declaration that "the contract or agreement for the use of the premises, if any such exist, and the relation of landlord and tenant between the parties, shall be deemed to be canceled and annulled." It was contended that the effect of this annulment and cancellation was a complete rescission of the contract of tenancy, and prevented the landlord from recovering any rent due him for occupancy by the tenant prior to the issuing of the warrant. The court refused to give the statute and removal of the tenant such effect; holding that the annulment operated only from the time the warrant issued, leaving the contract in full effect previous to that time. The court said:

"The words of the statute admit of either construction, inasmuch as they do not expressly fix the time; and, in determining which should prevail, it is our duty to regard consequences. To say that the contract shall be considered as void and inoperative from the beginning, would not only cut off the remedy afforded by its terms for rent which may have accrued at any time past, but

would even enable a tenant to recover back all he had paid. A consequence so unjust we cannot allow without words expressly declaring it."

This view was approved by the court of errors in *McKeon v. Whitney*, 3 Denio, 452, 453.

The foregoing cases seem to justify the interpretation we have put upon the act of the city in declaring the contract of sale with the plaintiff at an end. The charge of the court below with reference to the action of the city of Nashville in annulling this contract was therefore correct.

The second and only remaining question for our consideration is the question of damages. In the case of *Cherry Valley Iron Works v. Florence Iron River Co.*, 22 U. S. App. 655, 12 C. C. A. 306, and 64 Fed. 569, the question was of the proper measure of damages for the breach of the contract to take iron ore. The ore contracted to be sold in that case had not yet been taken from the mass. The subject of the bargain was not identified at the time when it was made, nor had it afterwards been identified before the breach. In considering the rule of damages, Judge Severens, in delivering the opinion of this court, said:

"If the subject-matter is identified when the contract is made, the title passes to the vendee, in the absence of controlling stipulations. When the subject-matter is subsequently identified by its appropriation to the contract, the title passes at the time of such appropriation; but, when there has at no time been any identification of the subject, the title remains in the vendor. In those cases where the title has passed before the contract is broken, and the rights of the parties have been converted into claims for damages arising from the breach, the nature and kind of remedies to which the vendor may resort are the subject of much controversy in the opinions of the courts. There is high authority for the proposition that the vendor in such a case may, among other remedies, by virtue of a species of lien for the purchase price, sell the goods as those of the vendee, and hold the latter for the difference between the price obtained and the contract price. This was the remedy resorted to here. It is not necessary for us to decide whether the vendor has this remedy in the class of cases just mentioned."

The learned judge then proceeded to show that the case he was dealing with did not belong to that class, that the title never passed, and that the goods to be sold at all times remained the property of the vendor, and, therefore, that the measure of damages was not to be reached by the remedy resorted to, of a resale, but that the vendor must recover the difference between the contract price and the market price at the time fixed for the delivery. In the case at bar, the subject-matter of the contract was bonds which were issued and appropriated to the contract within a very short time after it was made. The language of the contract is that of present sale. The title, therefore, did pass; and we have presented to us the question stated by Judge Severens in the passage just referred to, but which the court in that case did not find it necessary to decide, to wit, whether, when the title passes to something which is sold, one of the remedies of the vendor for a failure by the vendee to make payments in accordance with the contract at the times fixed for the deliveries and payments is, after notice, to resell the subject-matter of the sale, and to hold the defaulting vendee for the difference between the proceeds of the resale and the contract price. We think that the

vendor has such a remedy. The leading American authority is *Sands v. Taylor*, 5 Johns. 395. In that case the suit was for failure to receive part of a cargo of grain by a contracting purchaser. Chief Justice Kent stated the rule as follows:

"Nor was the subsequent act of the plaintiffs, in selling the wheat not delivered, a waiver of their claim for damages for nonperformance of the contract. The usage in such cases is to sell the article, after due notice to the other party to take it, and that in default of doing it the article will be sold. The usage is convenient and reasonable, and for the best interest of both parties."

In *McClure v. Williams*, 5 Sneed, 718, Judge McKinney, speaking for the supreme court of Tennessee, said:

"If goods have been bargained and sold by a valid contract, so that the right of property has thereby passed to the purchaser, the failure of the latter to receive and pay for the goods at the time and in the manner agreed upon will not have the effect of rescinding the contract, and revesting the right of property in the vendor, so as to entitle him to resell the goods, without something more on his part. In such case the seller has an election to proceed either, in an action for goods bargained and sold, to recover the price stipulated to be paid, or he may give the purchaser notice of his intention to resell the goods within a reasonable time from the service of such notice; and if, after notice, the purchaser will not take the goods or pay the price, the seller is not bound to keep them, to his own injury, but may resell them, and the purchaser will be held to have assented, and to have given the seller an implied authority to resell, and he will be responsible for the reasonable loss, if any, as also for the expenses of the resale,—that is, the difference between the price obtained on such resale and that originally agreed to be paid by the purchaser."

See, also, *Hughes' Case*, 4 Ct. Cl. 64.

Mr. Benjamin, in his work on *Sales* (section 788), after having stated the English law, says that:

"In the United States the law is somewhat different; and in *Dustan v. McAndrew*, 44 N. Y. 72, it was stated as follows: 'The vendor of personal property, in a suit against the vendee for not taking and paying for the property, has the choice, ordinarily, for one of three remedies: First, he may store or retain the property for the vendee, and sue him for the entire price; second, he may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price of resale; or, third, he may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price.'"

See, also, the American cases cited by the American editors on page 775 of Bennett's Edition of Benjamin on *Sales* (1892).

In *Sedg. Meas. Dam.* § 750, the learned author says, referring to cases where the title to the subject-matter of the sale has passed:

"It seems to be well settled in such cases that the vendor can resell them, if he see fit, and charge the vendee with the difference between the contract price and that realized at the sale. Though perhaps more prudent, it is not necessary that the sale should be at auction. It is only requisite to show that the property was sold for a fair price."

See, also, *Suth. Dam.* § 647, and cases cited.

In the case at bar the correspondence between the parties, and the action of the city council, communicated to Hayes & Sons, leave no doubt that due notice of the intention of council to resell the bonds was conveyed to Hayes & Sons, though this was not expressly stated in the contract of annulment. The situation of the city was

such, as explained in previous letters by its recorder to Hayes & Sons, that Hayes & Sons could have been left in no doubt as to the intention of the city to resell. Indeed, the letters of Hayes & Sons show that they supposed that the city was looking for a purchaser even before the formal action was taken by the city council, and approved its action in so doing. It was proved in the case that the city took the usual mode of disposing of such bonds, in its resale of them to Quintard; and the court left it to the jury to say whether the city had used due diligence, and had pursued the usual methods in disposing of such property, charging them that, if it had done so, then the difference between the price at which the bonds sold and the contract price was the proper measure of damages, and that it might be set off against plaintiffs' claim to recover the indemnity deposit from the city. This was correct. On the whole case, we find no error in the charge of the court below, and the judgment is affirmed.

JOHN HANCOCK MUT. LIFE INS. CO. v. CITY OF HURON.

(Circuit Court, D. South Dakota. May 8, 1897.)

1. NEGOTIABLE BONDS—BONA FIDE HOLDERS—PRESUMPTIONS.

In an action upon negotiable bonds, when evidence has been given to show that they are illegal, the plaintiff cannot rely on the presumption arising from title and possession thereof, but must prove that he gave value therefor in the usual course of business, in order to constitute himself a bona fide holder.

2. MUNICIPAL BONDS—VALIDITY—EXCESSIVE INDEBTEDNESS.

Municipal bonds issued at a time when the debt of the municipality exceeds 5 per cent. of its assessed valuation, and without any provision for a sinking fund, are illegal, under article 13, §§ 4, 5, of the constitution of South Dakota.

Jones & Culver, for plaintiff.

A. W. Wilmarth, for defendant.

CARLAND, District Judge. This action was commenced by the plaintiff, a Massachusetts corporation, against the defendant, a municipal corporation of this state, to recover from the defendant the amount of money claimed to be due to plaintiff on 240 coupons, of \$15 each, detached from 20 bonds, of \$500 each, issued by defendant on the 26th day of September, 1890. The bonds issued were all of the following form:

"The United States of America, State of South Dakota.

"\$500.00.

"Bond of the City of Huron, Beadle County, State of South Dakota.

"The city of Huron, twenty years after date, for value received, will pay to bearer the sum of five hundred dollars at the banking house of Kountze Bros., New York City, with interest thereon at the rate of six per cent. per annum, payable semiannually, according to the terms of the annexed coupons.

"Issued pursuant to an election held September 25th, 1890, by authority granted by article 32 of section 7 of the charter of the city of Huron; said charter approved by the legislative assembly of the territory of Dakota March 8th, 1883. Issued for the purpose of funding the floating indebtedness of the city of Huron.

"In testimony whereof the city of Huron, Beadle county, South Dakota, has caused this bond to be signed by the mayor thereof, and countersigned by the city clerk of said city, and the seal of said city is affixed, this 26th day of September, A. D. 1890.

H. J. Rice, Mayor of the City of Huron.

"B. M. Rowley, City Clerk of the City of Huron."

A jury having been waived in writing, this action was on the 27th day of April, 1897, tried to the court.

The defendant seeks to defeat a recovery by the plaintiff in this action upon certain grounds, which may be specified as follows: First, that at the time the bonds were issued the defendant had no power to fund its floating indebtedness; second, that at the time the bonds were issued the defendant had exceeded the amount of indebtedness which it lawfully could contract under the limitation contained in the constitution of this state; third, at or before the time said bonds were issued the defendant made no provision for the collection of an annual tax sufficient to pay the interest and principal of said bonds when due; fourth, that the proceeds of said bonds were used by the officers and agents of defendant for the purpose of paying the expenses incurred in carrying on a campaign to secure the location of the state capital at Huron, S. D., and that said proceeds never were paid into the treasury of defendant. The undisputed testimony shows that the bonds were issued for the purpose of raising money to carry on a capital campaign, and that the proceeds arising from the sale thereof were so used; that the equalized assessed value of the property subject to taxation in the city of Huron for the year 1890 was \$3,014,764; that neither before or at the time of the issue of said bonds was there any provision made by defendant for the collection of an annual tax sufficient to pay the interest and principal of said bonds when due; that the indebtedness of the defendant, exclusive of the money in its treasury, at the times these bonds were issued, was \$197,949.79. The plaintiff alleges in its complaint that it is the holder in good faith for value, before maturity, of the bonds and coupons involved in this action. This allegation is denied by the defendant in its answer. The plaintiff, in making out its prima facie case, relied upon the presumption that the holder of negotiable paper payable to bearer, subsequent to its date, holds it clothed with the presumption that it was negotiated to him at the time of its execution in the usual course of business, and for value, and without notice of any equities between the prior parties to the instrument. *Goodman v. Harvey*, 4 Adol. & El. 870; *Goodman v. Simonds*, 20 How. 365; *Noxon v. De Wolf*, 10 Gray, 346; *Ranger v. Cary*, 1 Metc. (Mass.) 373. Title and possession are one and inseparable to clothe the instrument with the prima facie presumption that it was indorsed or delivered at the date of its execution, and that the holder paid value for it, and received it in good faith in the usual course of business, without notice of any prior equities. It was not necessary for the plaintiff to show that it paid value for the coupons or bonds, in making out its prima facie case upon which it rested; but the defendant, in support of the denial in the answer, after the plaintiff had rested, had the undoubted right to show that the consideration of the bonds and coupons was illegal; that the instruments sued on were fraudulent in their inception, or that they had been lost or

stolen before they were negotiated to the plaintiff. And, if the defendant has proved any of these defenses, then it must prevail, unless the plaintiff again takes up the burden of proof which has been shifted back upon it, and proves that it gave value for the instrument in the usual course of business, in which event, as a general rule, it would still be entitled to recover. *Fitch v. Jones*, 5 El. & Bl. 238; *Smith v. Braine*, 16 Q. B. 244; *Hall v. Featherstone*, 3 Hurl. & N. 287; 2 Pars. Bills & N. 438. In *Commissioners of Marion Co. v. Clark*, 94 U. S. 285, Justice Clifford, in delivering the opinion of the court, said:

"Where the theory that the plaintiff paid value for the instrument depends solely upon the prima facie presumption arising from the possession of the instrument, the defendant may, if the pleadings admit of such a defense, prove that the instrument originated in illegality and fraud; and the rule is, if he establish such a defense, that a presumption arises that the subsequent holder gave no value for it. And it is also true that such a presumption will support a plea that the holder is a holder without consideration, unless the presumption is rebutted by proof that the plaintiff paid value for the instrument, in which event the plaintiff is still entitled to recover."

In the case of *Stewart v. Lansing*, 104 U. S. 505, it was distinctly held that in an action on coupons detached from certain bonds issued by the town of Lansing to aid a certain railroad, which bonds had been declared illegal by the courts, the holder of the coupons could not rely upon the presumption arising from the possession thereof, but, after the bonds were shown to be illegal, it was necessary for the holder to show that he paid value for the same; and, on failing to do so, a verdict was directed for the town. As the plaintiff introduced no testimony to show that it paid value for the coupons, it is necessary to inquire as to whether the testimony introduced by the defendant proved that the bonds in question originated in illegality or fraud. Section 4, art. 13, Const. S. D., provides:

"The debt of any county, city, town, school-district, or other sub-divisions, shall never exceed five per centum upon the assessed value of the taxable property therein."

Section 5, art. 13, provides:

"Any city, county, town, school-district, or any other sub-division, incurring indebtedness, shall at or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof, when due."

The only provision contained in the charter of the defendant under which it is claimed these funding bonds were issued is found in the enumeration of the powers of the city council of defendant, and is worded as follows:

"To borrow money and for that purpose to issue the bonds of the city in such denominations for such length of time, not to exceed twenty years, and bearing such rate of interest, not to exceed 7% per annum, as the city council may deem best."

In the view I take of this case, I do not find it necessary to decide whether the provision quoted from the charter of defendant empowers the defendant to issue bonds to fund its floating indebtedness. I am of the opinion, however, that the language quoted from the constitution of this state, when applied to the facts stated herein,

rendered the bonds, and necessarily the coupons involved in this action, illegal in their inception, and that the acts of the agents and officers of the defendant in issuing these bonds under false pretenses, and converting the proceeds thereof to the use of influencing the people of the state to vote for the defendant as the proper site for the location of the state capital, was not only illegal, but actually fraudulent. It follows that the bonds and coupons involved in this action are shown by the evidence to have originated in illegality and fraud, and, there being no evidence that the plaintiff is a bona fide holder for value of the same, it can take nothing by this action. Judgment should be entered for the defendant.

PORTER et al. v. PRICE et al.

(Circuit Court of Appeals, Eighth Circuit. April 12, 1897.)

No. 819.

1. ACCOUNT STATED—ACQUIESCENCE IN ACCOUNTS RENDERED.

When an itemized account showing a balance is duly rendered, the party receiving it is bound, within a reasonable time, to examine it, and object if he disputes its correctness. If he makes no objection in a reasonable time, he will be deemed to have acquiesced, and, in the absence of fraud or mistake, will be bound by the account as an account stated.

2. CONFLICT OF LAWS.

A contract intended to be performed, and actually performed, partly in one state and partly in another, may be treated by the parties as a contract of either state, and interest will then be due at the rate prevailing in that state.

3. ACCOUNT STATED—OPENING OF ACCOUNT—RATE OF INTEREST.

Where the rate of interest charged in an account stated is readily ascertainable by calculation, the account cannot be opened on the ground that the rate was not stated, or that the party receiving the account did not know what rate was charged, or that the rate was greater than could have been recovered by suit in the absence of a written agreement, such rate being lawful if agreed on in writing.

4. SAME—COMPOUND INTEREST.

A compounding of interest on the face of an account stated is no ground for opening the account, since an agreement to pay interest on an amount of interest already due is valid.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

In the year 1880 the defendant N. B. Price, a farmer and merchant residing and doing business at Mt. Adams, in the state of Arkansas, began doing business with the firm of Porter, Taylor & Co., cotton brokers, commission merchants, and grocers, at Memphis, in the state of Tennessee, which firm consisted of the plaintiffs and one Taylor, who withdrew from the business the next year, and thereafter the plaintiffs alone, under the firm name of Porter & Macrae, continued the same business, and the dealing with said N. B. Price, until some time in the spring of 1894. During all that time the said N. B. Price obtained from plaintiffs continual advances of money, merchandise, and supplies, and shipped to them cotton, to be sold by them at Memphis, upon commission, and the proceeds credited to him on account of such advances. The plaintiffs, in the course of such business, obtained insurance for the benefit of said N. B. Price upon all cotton so shipped to them against the perils of transportation, and also against loss by fire, and charged said Price with the cost of such in-

insurance, and with commissions for selling the cotton, and credited him with the proceeds of such sales. The plaintiffs at short intervals during all that time sent to said N. B. Price statements of the accounts between the parties, charging said N. B. Price with all advances of moneys, merchandise, and supplies, and cost of insurance and other disbursements, and with commissions on sales of cotton, and interest at the rate of 8 per cent. per annum on all such advances, and crediting him with the proceeds of such sales and interest thereon at the same rate. Each new statement commenced with the balance shown by the last previous statement, and the amounts charged for insurance and for interest in each instance appeared on such statements, which were carefully itemized; but the rate of interest was not stated on the face of the statements. Each of such statements was duly received and examined by said N. B. Price, or by the defendant Byron Price, his clerk and bookkeeper; and none of such statements were ever objected to. On August 4, 1894, the plaintiffs and said N. B. Price made a final settlement of their accounts, agreeing upon the balance as shown by the last of said statements as correct, and thereupon, at Mt. Adams aforesaid, where such settlement was made, the defendants executed and delivered to the plaintiffs the three promissory notes in suit in satisfaction of the balance of said accounts. After the maturity of all of said notes, the same being unpaid, and protested for nonpayment, this action was begun, and thereupon the defendants, in their answer, questioned the correctness of said accounts, alleging that excessive or usurious interest had been charged and compounded by the plaintiffs in said accounts; that the same contained also excessive charges for insurance, and that in many cases the plaintiffs had failed to credit therein sales of cotton as soon as they should have been credited, and that defendants had no knowledge of any of these matters when they settled said accounts and made said notes; that by reason of said facts said accounts were incorrect to the extent that nothing was really owing to the plaintiffs when said notes were given; that the notes were without consideration; and that plaintiffs had been overpaid a large sum, which was sought to be recovered as a counterclaim.

Upon the trial, the court, against the objections and exceptions of plaintiffs, allowed each of the defendants to testify that he never had examined nor computed the interest charged by plaintiffs, and appearing on said statements of accounts so furnished from time to time by plaintiffs, and did not know nor understand at or prior to the giving of said notes that such interest was charged at a higher rate than 6 per cent., and also that they did not, prior to the giving of said notes, know that said plaintiffs had charged for such insurance higher rates than had been paid by the plaintiffs therefor, or had failed to credit on such accounts the proceeds of sales of cotton as soon as such proceeds had been received by plaintiffs. Also, under like objections and exceptions, the court allowed the defendants to introduce evidence in respect to the current rates of river and fire insurance at Memphis, during the times of said transactions, and also some evidence as to sales by plaintiffs of such cotton at dates prior to the dates when the proceeds of such sales were credited.

After the evidence was closed, the plaintiffs' counsel requested the court to charge the jury as follows: "No. 6. Under the course of dealing between the plaintiffs and the defendant N. B. Price they could agree upon the highest rate of interest allowed by the state of Arkansas or Tennessee. If there was no express agreement as to the rate of interest, but the plaintiffs in fact charged the defendant interest at the rate of eight per cent. per annum, and rendered thereon accounts showing the amount of interest charged, from which they could have ascertained the rate by a computation; and if the settlement was made between the parties on the basis of eight per cent. interest on the account, and the notes sued on were executed for the balance so found to be due the plaintiffs,—the defendants cannot defend on the ground that there was no agreement in writing as to the rate of interest." The court refused so to charge, and to such refusal the plaintiffs excepted. The court did, in effect, charge the jury that the highest rate of interest the plaintiffs could charge in said accounts was 6 per cent., and that, if the testimony and circumstances showed that at the time of the execution of the notes the defendants did not know that the rate of interest charged in the account current was 8 per cent., the jury should deduct the overcharge from the amounts for which the notes were given; to which exception

was taken, and all the matters excepted to as above stated are assigned as errors.

William M. Randolph (George Randolph and Edward Randolph with him on the brief), for plaintiffs in error.

W. E. Hemingway (U. M. Rose, George B. Rose, M. A. Austin, S. M. Taylor, and Manning & Lea with him on the brief), for defendants in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

Where an itemized account showing a balance is duly rendered, the party receiving it is bound within a reasonable time to examine the same, or procure some one to examine it, and object if he disputes its correctness. If he omit to do so, he will be deemed, from his silence, to have acquiesced, and will be bound by it as an account stated in the absence of fraud or mistake. *Lockwood v. Thorne*, 11 N. Y. 170; *Davenport v. Wheeler*, 7 Cow. 231; *Wiggins v. Burkham*, 10 Wall. 129; *Philips v. Belden*, 2 Edw. Ch. 1; *Langdon v. Roane*, 6 Ala. 518; *Oil Co. v. Van Etten*, 107 U. S. 325, 1 Sup. Ct. 178; *Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657. This is especially true in respect to accounts rendered between merchants, and between merchants and their factors. *Manufacturing Co. v. Starks*, 4 Mason, 297, Fed. Cas. No. 11,802; 1 Am. & Eng. Enc. Law, 121. The contract shown by the course of dealing in this case was intended to be performed, and was performed, partly in the state of Tennessee and partly in the state of Arkansas. It might, therefore, be treated by the parties as an Arkansas contract, and as subject to such rates of interest as were allowed by the statutes of that state. *Cockle v. Flack*, 93 U. S. 344, 347; *Cromwell v. Sac Co.*, 96 U. S. 51, 62. The Arkansas statutes allowed interest at 6 per cent., and by agreement in writing at any rate not exceeding 10 per cent. The rate of 8 per cent. therefore was not usurious or illegal. That rate could not be enforced by suit upon verbal contracts, but, if paid voluntarily, could not be collected back, and, if allowed on settlement, and included in a note, the note would be a written promise to pay it.

The accounts rendered in this case, never objected to, became accounts stated; not subject to be opened except for fraud or mistake. There was no fraud as to the items of interest charged, as they were plainly set out in each account. The duty was cast on N. B. Price of examining these items of interest in each instance, or of having some competent person examine them, and of notifying the plaintiffs of his objection to them, if he did not assent to them. He cannot allege any mistake that any court can admit, as a simple arithmetical calculation of the stated items would disclose the rate. Such an excuse, if valid, would always excuse a man from looking at any account rendered. But a man cannot be allowed to lay a rendered account aside, and afterwards, merely upon saying that he did so trusting to the honesty and accuracy of the other party, be allowed to attack it in respect to matters apparent upon a reasonable examination of

the items as stated on the face of the account. Had objection been made at the beginning, or at a later time, to the interest charged, the plaintiffs might have declined further business. In the absence of objection they had the right to assume that the rate was assented to. It is incredible that a business man should receive such accounts for 14 years, and never know the rate of interest invariably charged in each account, and believe all the time that the interest was at another specific rate, never charged in any of the accounts, and never mentioned between the parties; and that he should at the end of the business, by reason of implicit confidence in the honesty and integrity of the other parties, settle the accounts without scrutiny, giving promissory notes for the footed balance, and yet, when these notes become due and unpaid, for the first time bethink himself to look over the accounts, finding readily therein the rate of interest charged. The inference is obvious. The rate of interest charged—8 per cent.—was legal under the Arkansas statutes. While its collection could not be enforced by suit in the absence of a written agreement to pay that rate, the party charged could pay or settle it at that rate. The promise implied upon a stated account is a promise to pay the stated balance, in the absence of fraud or mistake, and not a promise to pay any of the specific items. *Marye v. Strouse*, 5 Fed. 483, 496. In the course of the business all these items of interest were actually paid by Price by the application of credits to such payment, with his consent. Without specific directions from him the plaintiffs could apply the credits, or the law would apply them, to the older items of debit. But each account rendered showed the application of the credits by the plaintiffs to the entire previous account, including the interest items, and by not objecting Price consented to such application. Price must be held to have been cognizant of such application of payments, as well as of the rate of interest charged, and of everything else which a reasonable examination of the accounts as rendered would have shown. To hold differently would overthrow the wholesome rules of law in respect to accounts stated, and offer advantages to the dishonest and careless for throwing aside accounts rendered without examining them.

The case may be different in respect to the charges for insurance, contained in these accounts. A factor or commission merchant ordinarily would have no right to charge his principal any sum for insurance, or like disbursements, in excess of the amount actually paid. In view of the confidential relation, which, in respect to disbursements, is that of principal and agent, the law will not permit any overcharge. No custom allowing such overcharge can be sustained unless known and assented to by the principal. *Marye v. Strouse*, *supra*. The accounts rendered by plaintiffs afforded Price no means of ascertaining whether the amounts therein charged for insurance were the amounts actually so paid by the plaintiffs therefor. These items constituted representations by plaintiffs that they had paid the sums charged for such insurance. Price was obliged to rely and act on these representations, and, if deceived, he would not be estopped by the stated accounts, nor by having given the notes, from showing such deceit, and the actual facts relative to the amounts

paid for such insurance. The case of *Marye v. Strouse*, 5 Fed. 483, 494, determines all the points in the present case. The action was to recover a balance upon a mining-stock account between the plaintiff's assignors, who were stockbrokers, and the defendant, for whom they had acted in stock dealings. Accounts had been rendered, and, being retained without objection, had become, and were by the court considered, accounts stated. The defendant was permitted to falsify them in respect to overcharges for telegrams charged in accordance with a custom established by mining stockbrokers, but which the court refused to sustain, and also in respect to a charge for stock owned by one of the brokers, with which they filled an order of defendant for the purchase of stock, without disclosing that it was the broker's own stock which they represented they had bought for defendant. Another portion of the account objected to was various charges for interest at the rate of 2 per cent. per month, which the defendant claimed was illegal, because no agreement in writing had ever been made by him to pay that rate. The statute of Nevada allowed parties to agree in writing for the payment of any rate of interest, and, in the absence of written agreement, fixed the rate of interest at 10 per cent. per annum. The court held that the effect of the law was to prevent the recovery by suit of more than 10 per cent. where there was no agreement in writing; that the rate of 2 per cent. per month was not illegal, nor opposed to good morals, nor to the policy of the state; that such rate of interest might be included in the balance agreed upon in stating an account, which alters the nature of the debt, and amounts to a new promise to pay the agreed balance stated. The opinion of the court proceeds as follows (page 489):

"Under the circumstances of this case it appears to me that the balances struck in the 'broker's pass book' must be regarded, upon settled principles of law, as accounts stated. The book is kept for the express purpose of showing the customer how his account stands. It has on the debit side charges against Strouse for stocks bought, commissions, telegrams, assessments, and interest. On the credit side appear the proceeds of stock sold, money paid in on account, and dividends collected. The course of business in the brokers' office was to balance all stock accounts at the end of each month. The balance was carried forward as the first item of the next month's account. Interest on all advances during the month, as well as on the balance brought forward from the preceding month, was charged at the rate of two per cent. per month at the expiration of each month, and went into the balance struck. The pass book is a copy of the broker's ledger. Whenever it was brought in by the defendant it was written up by copying into it the entries from the ledger, and then returned to him, he having at all other times possession of the book. The first balance was struck August 31, 1874, and the last July 31, 1875. Every account and every balance made contains a charge for interest at the rate of two per cent. per month. In charging the item for interest it is not stated to be at the rate of two per cent., but the amount shows that to have been the rate. No objection was ever made by the defendant to this or any other portion of this account until the bringing of this suit in November, 1877. It thus appears that he retained the last account more than a year without objection. This warrants fully the presumption that he acquiesced in the accounts, and it is unnecessary that he should have given an express assent. *Wiggins v. Burkham*, 10 Wall, 129. The defendant, however, says that acquiescence ought not to be presumed, because he did not, in fact, know what rate of interest was charged to him in his accounts. It is perhaps a sufficient answer to this to say that, having been in the receipt of these monthly accounts for a year, if he did not know he

should have known that he was bound to examine them enough to discover what a very slight examination would have disclosed, upon the principle that a party is chargeable with knowledge when the means of knowledge are within his reach. *Ogden v. Astor*, 4 Sandf. 332. It would, indeed, be wrong to permit the defendant to lie by without objection while his broker advanced large sums for him upon the understanding that the rate of interest was to be as charged. But there can be no reasonable doubt that Strouse did know and assent to the rate of interest as charged. * * * It is impossible to believe that any business man could receive so simple an account, and not know the rate of interest he was charged. * * * Under such circumstances the authorities are clear that an account stated cannot be opened because an item of interest which went into it could not have been recovered by suit, provided such item is not illegal. *Backus v. Minor*, 3 Cal. 231; *Young v. Hill*, 6 Hun, 613; *Bainbridge v. Wilcocks*, *Baldw.* 536, *Fed. Cas.* No. 755; *Freeland v. Heron*, 7 Cranch, 147."

The circuit court therefore erred in overruling the objections of plaintiffs to the testimony of each of the defendants that he had not examined the interest charged in plaintiffs' accounts, and did not know nor understand that such interest was charged at a higher rate than 6 per cent. It also erred in refusing to charge the plaintiffs' sixth request, above quoted, and in its charge to the jury to the effect that the highest rate of interest which plaintiffs could charge in said accounts was 6 per cent.; and that, if the testimony and circumstances showed that at the time of the execution of the notes the defendants did not know that the rate of interest charged in the accounts current was 8 per cent., the jury should deduct the overcharge from the amounts for which the notes were given.

The circuit court correctly instructed the jury that there was nothing in the case to sustain any claim for deduction because of compound interest. Whatever of compound interest was charged was plain and obvious on the face of the accounts, and was assented to by lack of any objection. An agreement to pay interest upon an amount of interest already due and unpaid is valid. *Guernsey v. Rexford*, 63 N. Y. 631; *Stewart v. Petree*, 55 N. Y. 621. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

SECOND WARD SAV. BANK OF MILWAUKEE v. CITY OF HURON

(Circuit Court, D. South Dakota. May 8, 1897.)

1. MUNICIPAL CORPORATIONS—BONA FIDE PURCHASERS.

In the absence of evidence to the contrary, a stipulation that a party "purchased" certain negotiable bonds is sufficient to show that he is a bona fide holder of them for value.

2. SAME—ESTOPPEL BY RECITALS.

As against a bona fide holder of its bonds, a municipal corporation is estopped, by recitals in such bonds of the purpose of their issue and that all the provisions of the act authorizing their issue were complied with, from asserting that they were not issued for such purpose or that the provisions of the act were not complied with.

3. SAME—REFUNDING BONDS.

It is no defense to an action on municipal bonds, issued to fund floating indebtedness, that the proceeds were used to take up warrants issued for illegal purposes.

4. SAME.

A municipal corporation empowered by its charter to borrow money by issuing bonds, for any legitimate municipal purpose, is thereby authorized to issue bonds to fund its floating indebtedness.

5. SAME—EXCESSIVE INDEBTEDNESS—ESTOPPEL.

A municipal corporation, for the purpose of selling its bonds, furnished to an intending purchaser a certificate, purporting to show the assessed valuation of its property and the amount of its indebtedness, being less than the legal limit. The bonds were taken and paid for, and the municipality paid several coupons. Held that, as against a bona fide purchaser, it was estopped to set up that, at the time of the issue of the bonds, it was indebted to an amount exceeding the legal limit.

Howard & Mallory, for plaintiff.

A. W. Wilmarth, for defendant.

CARLAND, District Judge. The plaintiff brings this action to recover of the defendant the sum of \$2,400, claimed to be due upon certain coupons, which are attached to certain bonds issued by the defendant on August 15, 1889. The bonds were 16 in number, for \$500 each, and were in the following form:

"The United States of America, Territory of Dakota.

"\$500.00.

"Bond of the City of Huron, Beadle County, Dakota Territory.

"The city of Huron, ten years after date, for value received, will pay to bearer the sum of five hundred dollars, at the American Exchange National Bank, New York, with interest thereon at the rate of six per cent. per annum, payable semiannually, according to the terms of the annexed coupons.

"Issued pursuant to an election held April 2, 1889, by authority granted by article 32 of section 7 of the charter of the city of Huron. Said charter approved by the legislative assembly of the territory of Dakota, March 8, 1883. Issued for the purpose of funding the floating indebtedness of the city of Huron.

"In testimony whereof the city of Huron, Beadle county, Dakota, has caused this bond to be signed by the mayor thereof, and countersigned by the city clerk of said city, and the seal of said city affixed this 15th day of August, 1889.

H. J. Rice, Mayor of the City of Huron.

"B. M. Rowley, City Clerk."

By stipulation in writing a jury was waived, and the action was tried to the court on April 27, 1897. The plaintiff at the trial relied upon the presumption that the holder of negotiable paper is presumed to have received the paper for value, in due course of business, without notice of any defects therein, and also upon the following stipulation filed in the case:

"It is stipulated hereby that the firm of Farson, Leach & Co., of Chicago, Illinois, purchased the bonds described in the complaint herein outright from the defendant, and that the plaintiff purchased said bonds outright from the said firm, and that said firm in no manner whatever acted as agents for said plaintiff in said matter.

Howard & Mallory, Plaintiff's Attorneys.
A. W. Wilmarth, Defendant's Attorney."

"Dated April 27th, 1897.

I quote this stipulation for the reason that it is the only evidence in the case that the plaintiff is a bona fide holder for value of the bonds and coupons involved in this action, providing the defendant has proved that the bonds originated in illegality or fraud, and thus has overcome the presumption arising from the possession of the bonds and coupons. The word "purchased," in the connection in

which it is used in the stipulation, imports that the plaintiff paid value for the bonds, and therefore, for the purposes of this case, the plaintiff will be held to be a bona fide holder for value, in due course of business, without notice of any defect in the bonds.

It now remains to be considered whether there are any defects in these bonds, shown by the evidence, which would defeat recovery, on the coupons attached thereto, by an innocent holder. The bonds contain this recital:

"Issued pursuant to an election held April 2, 1889, by authority granted by article 32 of section 7 of the charter of the city of Huron. Said charter approved by the legislative assembly of the territory of Dakota, March 8, 1883. Issued for the purpose of funding the floating indebtedness of the city of Huron."

Article 32 of section 7 of the charter referred to is in the following words:

"Powers of City Council.

"To borrow money, and for that purpose to issue the bonds of the city in such denominations for such length of time, not to exceed twenty years, and bearing such rate of interest, not to exceed 7% per annum, as the city council may deem best. Said bonds to express upon their face under what authority and for what purpose they are issued, and may have interest coupons attached: provided that no bonds shall be issued by the city council unless at an election after twenty days' notice in a newspaper published in the city, stating the purpose for which said bonds are to be issued, and the amount thereof, the legal voters of said city, by a majority, shall determine in favor of issuing said bonds: provided, further, that no bonds issued by the city council, under this act, shall be sold for less than par value."

As against this plaintiff, the defendant is estopped by the recital in the bond from denying that all the provisions of said article 32 were complied with. *Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613; *Town of Coloma v. Eaves*, 92 U. S. 484; *Commissioners v. Bolles*, 94 U. S. 104; *Mercer Co. v. Hackett*, 1 Wall. 83; *Commissioners v. Beal*, 113 U. S. 227, 238, 239, 5 Sup. Ct. 433; *Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. 803; *National Life Ins. Co. v. Board of Ed.*, 10 C. C. A. 637, 62 Fed. 783. It is also estopped, as against this plaintiff, from denying that the bonds were in fact issued for the purpose stated on their face. *National Life Ins. Co. v. Board of Ed.*, 10 C. C. A. 637, 62 Fed. 783, and cases cited on page 645, 10 C. C. A., and page 785, 62 Fed.; *Simonton, Mun. Bonds*, p. 167. And it is no defense to these bonds, as against the plaintiff, that the proceeds thereof were used to take up and pay warrants issued for an illegal purpose. In *National Life Ins. Co. v. Board of Ed.*, supra, it was said:

"That a municipal corporation has given away or squandered the proceeds of negotiable securities which it placed upon the market cannot affect the rights of bona fide purchasers who had no knowledge of or part in the gift or waste."

These propositions of law dispose of several of the matters urged against the validity of these bonds. It is further contended that the defendant had no power to fund its floating indebtedness, and that, the bonds having recited on their face that they were issued for such a purpose, the coupons are invalid in the hands of the plaintiff. The power to fund the floating indebtedness of the plaintiff, by issuing negotiable security, must be found, if at all, in the provision quoted herein from defendant's charter. Does the power to

borrow money, and issue negotiable securities for that purpose, give to the defendant the power to issue bonds to fund a floating debt? In *Portland Sav. Bank v. City of Evansville*, 25 Fed. 389, the court held that the words, "to borrow money for the use of the city," conferred the power to issue renewal bonds. The provision quoted from defendant's charter confers the power to borrow money by issuing bonds for any legitimate municipal purpose. Is not the borrowing of money to fund an existing indebtedness a legitimate municipal purpose? There seems to be but one answer to the question, and that is, that the general power to borrow money by issuing negotiable security necessarily carries with it the power to issue bonds to fund a floating debt. *Simonton, Mun. Bonds*, § 126. Sections 1149, 1150, *Comp. Laws S. D.*, do not limit or restrict the power of the defendant conferred by its charter, as section 1150 states "that this act shall not be construed to limit or restrict the powers already conferred by any special charter upon the council of any city or municipal corporation." At the time these bonds were issued the defendant was a municipal corporation of the territory of Dakota, and as such was subject to section 4 of an act of congress approved July 30, 1886, which is in the following language:

"No political or municipal corporation, county or other subdivision, in any of the territories of the United States, shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within such corporation, county, or subdivision, to be ascertained by the last assessment for territorial and county taxes, previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount, given by such corporation, shall be void."

The plaintiff, as a part of its case, introduced into evidence a certificate made by the clerk of defendant under its corporate seal, addressed to Farson, Leach & Co., and dated August 14, 1889, wherein the bonds involved in this action are offered for sale, and wherein it is stated to be true that the assessed valuation of the property in the city of Huron for the year 1889, liable to taxation, was \$1,573,001, and that the total debt of defendant was: Water, \$4,000; funding, \$14,500. This certificate is addressed to the same firm which it is conceded purchased these bonds outright from the city of Huron, and from whom, it is conceded, the plaintiff purchased the same bonds outright. It was made for the purpose of selling these bonds. The evidence shows that the defendant received in cash, which went into its treasury and was used to pay off outstanding warrants, \$8,140; that defendant has paid the first four coupons on each of these bonds; that at an election duly held, as recited in the bond, the constituent members of the defendant corporation decided to issue these bonds. Can the defendant now set up the fact that at the time the warrants were issued, which the proceeds of these bonds paid off, the defendant was indebted in an amount exceeding the limitation imposed by the law of congress? Has not the defendant, by its conduct and representations, estopped itself from now showing that the warrants which the proceeds of these bonds paid off were issued in excess of the statutory limit? Every

principle of right and justice would seem to require an answer in the affirmative.

The bonds in this case contain the recital that they were issued for the purpose of funding the floating indebtedness of the city of Huron. The bonds do not specify any particular floating indebtedness, and an innocent holder for value of these bonds would have no right to presume that the proceeds of the bonds were to be used in paying off illegal warrants, nor is it possible that the law is that the holders of these bonds were bound to know that the proceeds of the bonds were to be used in paying illegal warrants. The city council had the right to determine what indebtedness should be funded, and if, after getting the money arising from the sale of these bonds, it saw fit to apply it to the payment of warrants which were illegal, the plaintiff, as an innocent holder of these bonds, cannot have its rights depend merely upon the decision of the city council as to what debt it should pay off with the proceeds of the same. If this limitation contained in the act of congress shall be considered a constitutional limitation, still the courts hold that, even in that event, municipal corporations may be estopped by recitals. *Chaffee Co. v. Potter*, 142 U. S. 355, 12 Sup. Ct. 216; *National Life Ins. Co. v. Board of Ed.*, *supra*.

The principle of law heretofore stated, to the effect that innocent holders of negotiable securities are in no wise responsible for the wise and economical use by the corporation of the fund it borrows, is also applicable, so long as there was nothing recited in the bonds showing the particular portion of the defendant's floating debt which was to be funded with the proceeds of plaintiff's bonds. In *City of Cadillac v. Woonsocket Inst. for Savings*, 7 C. C. A. 578, 58 Fed. 939, the circuit court of appeals for the Sixth circuit said:

"It seems to us that the representations made on the face of the bonds estops the city, as against a bona fide holder, from disputing the fact that these bonds were issued to take up old bonds falling due. Power was conferred by the act upon the common council to issue new bonds to take up bonds falling due. The question as to whether there are any such bonds is referred to the council. The old bonds, on the facts found by the circuit court, were at least 'colorable obligations.' The council determined to issue new bonds to take them up. It seems to us that, upon these circumstances, it did not devolve upon the purchaser of the new bond to look into the validity of the funded old bonds. * * * The defense it might have made against the old bonds it elected not to make. It should not now be permitted to make the same as against an innocent holder of the new bonds."

LEAHY v. LOBDELL, FARWELL & CO.

(Circuit Court of Appeals, Sixth Circuit. May 17, 1897.)

No. 305.

1. BANKERS AND BROKERS—PLEDGE.

When securities have been purchased from one who deals in them sometimes as owner, and sometimes as broker for others, though a credit is given for a greater part of the price, and the securities remain in the vendor's hands subject to a lien for the balance, the mere fact that the vendor has, in other transactions, acted as the vendee's broker in dealing in securities with others, does not convert the securities purchased into the subject of a pledge for the payment of balances due from the vendee on the general account for brokerage transactions.

2. RESCISSION OF SALES—PART PAYMENT—ENFORCEMENT OF LIEN.

When a vendor gives credit for a part of the price of the articles sold, and retains them subject to a lien for the remainder of the price, if he either sells such articles before the expiration of a fixed term of credit, or, when there is no fixed term of credit, if he sells them without giving the vendee due notice, with an opportunity to pay the price, the vendee may treat the sale as rescinded, and recover back what he has paid, with interest.

3. PLEDGE—COLORABLE SALE BY PLEDGEE.

A sale by a pledgee of the article held in pledge, which is merely colorable, and which is subsequently rescinded by the pledgee, who takes back such article into his possession, is wholly inoperative to divest the pledgor's title; and by reporting such a pretended sale to the pledgor, thereby leading him to believe that his rights in the pledge are gone, the pledgee disentitles himself to make a subsequent sale of the pledge without giving the pledgor notice of the facts and of his intention to make such sale.

In Error to the Circuit Court of the United States for the Western District of Michigan.

Lobdell, Farwell & Co., of Chicago, who were plaintiffs in the court below, brought this suit against the defendant, Leahy, a resident of Muskegon, Mich., for the purpose of recovering a balance alleged to be due them on account of certain dealings in stocks and bonds. In 1893, and for several years previous thereto, Lobdell, Farwell & Co. were engaged in the business of buying and selling stocks and bonds as brokers for other parties, and also in buying and selling stocks and bonds on their own account. Among others who had bought and sold stocks and bonds through them as brokers was the defendant, Leahy, who is plaintiff in error here. This dealing was for the purposes of speculation on the part of Leahy. On the 26th day of January of the year above mentioned, after some preliminary conversation between the parties in reference to a sale by Lobdell, Farwell & Co. to Leahy of a certain amount of bonds of the Metropolitan West Side Elevated Railroad Company of Chicago, and some stock of that company, the right to which passed to the holder of the bonds, and certain stock of the West Side Construction Company, also of Chicago,—being a corporation organized for the purpose of building the road of the Metropolitan West Side Elevated Railroad Company,—Leahy signed and delivered to Lobdell, Farwell & Co. a certain instrument in writing of that date, addressed to them, of which the following is a copy:

"As per my talk with you this morning, please reserve for me \$25,000 (par value) of the bonds of the Metropolitan West Side Elevated Railroad Company, at par, and charge my account. With these bonds you are to allow as a bonus 25 per cent. of my subscription, or 62½ shares of the stock of the Metropolitan West Side Elevated Railroad Company. Also, as talked this morning, you are to allow me to have 25 shares of the stock of the West Side Construction Company, on which 40 per cent. has been paid, the cost of which (\$1,000) you will also charge to my account, with interest. The stock of the Metropolitan West Side Elevated Railroad Company, I understand, is not yet issued, and

when it is issued it will be issued to a trust company in New York, whose receipts will be issued therefor. This will be perfectly satisfactory to me, as stated."

This proposition was accepted, and Leahy paid down, as part of the purchase price, or as a margin to carry the stocks and bonds,—it is uncertain which,—the sum of \$2,500.

From the bill of exceptions it appears that evidence was given by Leahy upon the trial in the court below tending to show that, at the time of his purchase of the stocks and bonds mentioned in the instrument above set forth, Lobdell, Farwell & Co. agreed to carry those stocks and bonds for him for a year at least, and, if his necessities required it, for another year longer, upon the terms of his paying to them interest at the current business rate. The plaintiff below denied the making of this agreement. The bonds and stocks thus purchased by Leahy belonged to Lobdell, Farwell & Co., and were not bought by them as brokers. In July following Lobdell, Farwell & Co. wrote Leahy that, on account of the high rates of interest prevailing, they would have to charge a commission of $\frac{1}{2}$ per cent. per month on all open accounts in addition to regular charges for interest, and on the 26th of July Leahy replied as follows:

"When I purchased the bonds, you stated that you would carry them a year or two, if necessary, at the regular interest rates, which were six per cent. at that time, and, when you advanced to seven per cent. I supposed you were paying more, but when you come to double it, I must say it is too high. You certainly made a good profit on the bonds when you sold them, and I do not believe you should charge a commission at this time when so many are losing money, myself among the number."

At the date of this purchase, other accounts between the parties, growing out of the purchase and carrying of stocks and bonds for Leahy by Lobdell, Farwell & Co., were still open. This transaction of purchase and sale of the bonds and stock of the Metropolitan West Side Elevated Railroad Company, and of the shares of stock of the construction company, was entered upon their books by Lobdell, Farwell & Co. in their general brokerage account with Leahy, and subsequently they rendered successive statements of account, in which these bonds and stocks were intermingled and treated as being subject to the same conditions as other purchases of bonds and stock which they had made for Leahy; and evidence was given upon the trial from which the jury might have found that the defendant, Leahy, assented to this mode of treating the bonds and stock in controversy, and that the parties, subsequently to the contract of sale, had an understanding and an agreement that these bonds and stock should stand in the same situation, and subject to be treated in like manner, with bonds and stock which Lobdell, Farwell & Co. had, as brokers, bought and were carrying for Leahy.

In the early summer of 1893 the financial troubles of that year began, and the stocks and bonds of all kinds which Leahy then had in the hands of Lobdell, Farwell & Co., among them those purchased of them as above stated, quite rapidly depreciated. That depreciation went on to such an extent that, in the latter part of July, Lobdell, Farwell & Co. wrote to the plaintiff in error, calling his attention to the financial situation, and stating, in substance, that they desired additional margin on his account, and on the 2d day of August they addressed to him the following letter:

"We wrote you some days ago, asking for additional margin on your account, and telling you the condition of the market. The borrowing power of all stocks and bonds has declined very seriously, even while actual quotations have, perhaps, not changed a great deal. Alley stock has been offered here quietly at 65, with no public bids. Probably the stock would be sold around 60, if forced, although we do not know of any such bid at the moment. In figuring your securities at the close of the month, we have figured Alley stock at 60, Metropolitan 5's at 70, and Construction Company at 75, although these prices are nominal. Figuring them at these prices would leave a deficiency on your account of about \$3,000. As a matter of fact, we are unable to borrow more than 40 on Alley stock, 50 on Metropolitan 5's, and 60 on Construction stock. As things are now, it looks as though we would be obliged to sell out all securities which we hold that are not properly margined, and write you this

letter to tell you the condition, and ask you, if you are not able to give us cash, to give us mortgages, or good notes, or some other securities, which will be enough to be good security for at least \$5,000. We trust you will respond to this at once, and let us know what we shall do. If you are unable to give us this security, it looks now as though we will be obliged to sell the securities for what they will bring, although we should dislike to do so very much, if it can be avoided. When the market turns up again, we will probably be able to return you whatever security you may give us. Do not fail to reply to this at once upon receipt."

Other correspondence ensued immediately thereafter, and on August 14th Lobdell, Farwell & Co. sent the following letter to Leahy:

"Please wire us upon receipt of this letter, in case you are not able to make the raise talked of in former letter, and we will sell the securities which we are now carrying for your account. We have an opportunity to sell Metropolitan bonds at 65 with the stock, and the 25 Construction stock at 60. Alley 'L' sold to-day at 55, and we may be able to work this off at the same price, although it is not certain. If this deal is to go, we will have to make it at once. You will please wire us to-morrow, authorizing us to make the sale, in case you cannot put up the other security."

And again, on the 17th, the following:

"We have been unable to find a buyer for your Alley stock since the receipt of your telegram. We have to-day, however, a probable buyer for 100 shares at 50. We have, also, an opportunity to sell the \$25,000 Metropolitan bonds with the stock bonus at 65, and the 25 Construction stock at 60. Please wire us as early as possible to-morrow if we shall make this sale, or whether you have succeeded in making your arrangements for additional collateral."

To this last letter Leahy, on the 18th of August, made the following reply:

"Your letter received, and would say in reply that I do not wish to sell Metropolitan bonds and stocks that go with them at present. I wired you a few days since to sell Alley 'L' stock at best price."

On the same day Lobdell, Farwell & Co. addressed to him the following letter:

"We have to-day closed out your account at the following prices, and inclose herein memorandum showing the balance due us. We closed out 100 shares of Alley 'L' stock at 50, 25,000 Metropolitan bonds with their stock rights at 65, and 25 Construction Company at 60. In making a lump sale of these securities, at this price, you have obtained more than they could be peddled out for. We trust you will be able to secure us the balance due us."

Leahy replied to this on the 19th of August, as follows:

"Yours of 18th inst., stating that you had closed out one hundred shares of Alley 'L' stock at 50, and twenty-five thousand Metropolitan bonds with their stock rights at 65, and twenty-five shares Construction Company stock at 60, and inclosing memorandum, received. I authorized you to sell the Alley 'L' stock, but you had no authority from me to sell the bonds with their stock rights and the Construction Company stock. In view of the arrangements you made with me at the time of selling me those bonds with their stock rights and the Construction Company's stock, and by which I was induced to buy them, I do not recognize on your part any right to sell, nor do I assent to your reported action in making sale of those bonds, the stock rights, and Construction stock, or any part of them, without authority from me. I therefore expect and demand that you forthwith place me in the same position I occupied with respect to the Metropolitan bonds, with their stock rights, and the Construction Company's stock, immediately before you reported sale thereof. I certainly cannot and do not admit the memorandum inclosed in your letter to be correct."

Not long after this, upon the closing out of their business with Leahy, they sent him a statement of account, showing the balance due upon all of their transactions to be \$5,361.17, and upon Leahy's refusal to pay the balance thus claimed they brought this suit.

Upon the trial it was disclosed that the sale made by Lobdell, Farwell & Co. of Leahy's stocks and bonds, mentioned in their letter of the 18th of Au-

gust, was not a bona fide sale, but was a merely nominal one to Charles H. Deere, who at that time was a director of the Lobdell, Farwell & Co. corporation. Deere never paid anything for the property, and a few days afterwards the sale to Deere was canceled; Lobdell, Farwell & Co. agreeing to stand in Deere's place in regard to the property. The stocks and bonds in question were held by them until October 31, 1893, when a part of them were sold; the other part being held until December 30th of the same year, when they also were sold. The amount realized on these sales was \$2,400 more than the amount reported by Lobdell, Farwell & Co. as having been realized on the sale made to Deere on the 18th of August. The rescission of the sale to Deere, and the resale of the same bonds and stocks by Lobdell, Farwell & Co. later on in the year, was never reported by them to Leahy, nor was he made aware of those facts until they were proven upon the trial. The declaration was on the common counts in assumpsit, to which the defendant pleaded the general issue and gave notice of set-off thereunder, which mode of pleading is allowed by the law and rules of practice in the courts of the state of Michigan. The questions raised at the trial related solely to the circumstances involved in the transaction of the sale and purchase of the Metropolitan Elevated Railroad bonds and stock and the Construction Company stock, and the subsequent dealings with and disposition of that stock by the plaintiff in the suit; there being no controversy with regard to other matters of account between the parties. Proof was given upon the trial of the transactions above detailed, and upon the view that, under the circumstances attending the purchase by the defendant of Lobdell, Farwell & Co. of the bonds and stocks above mentioned, and the subsequent conduct of the parties in reference to them, the bonds and stocks were held by them as pledgees for security, in common with other stocks and bonds held by them, for the payment of the balance of the purchase price of all bonds and stocks which Lobdell, Farwell & Co. were carrying for Leahy, the court held that Lobdell, Farwell & Co. were entitled, as such pledgees, to sell the bonds and stock in question upon Leahy's refusal to keep his account good. The court further held that the sale to Deere and the cancellation of that sale did not affect the rights of the parties or their relation to the bonds, and that the plaintiff in suit was chargeable for the amount finally realized for the bonds and stocks in October and December, as above stated. A direction was given to the jury to render a verdict, in accordance with these views of the court, for the sum of \$3,179.78, that being the amount agreed upon between the parties upon the assumption that the ruling of the court was correct. The defendant, Leahy, excepted to this ruling, and contended that the only relation between Lobdell, Farwell & Co. and himself arising from the sale was that of vendor and purchaser, and that the proofs justified him in claiming that the plaintiff had agreed to carry the stocks and bonds for one or two years on his paying interest at the current rate, and that the resale by the vendor was in violation of his rights as a purchaser, authorizing a rescission of the sale by him, and a recovery of the amount of the \$2,500 which he had paid, with the interest thereon, and insisted that he was entitled upon that state of facts to a verdict for the sum of \$3,807.96; and it was agreed between the parties that, if the defendant's contention was well founded, the verdict ought to be for that sum, and the court, while directing a verdict for the plaintiff for the sum previously mentioned, \$3,179.78, further asked the jury to find what amount would be due from the plaintiff to the defendant, if the plaintiff were not entitled to charge up anything, either principal or interest, on account of the Metropolitan bond transaction, and the defendant were entitled to a credit of \$2,500 for the money paid by the defendant on the transaction, with interest to date. The sum due from the plaintiff on this contingency was agreed by the parties to be the sum of \$3,807.96. The defendant excepted to the ruling and direction of the court to the jury, and also presented requests to charge the jury in accordance with his claim in reference to the nature of the transaction and the relation of the parties, as above stated, and asked, if that was not allowed, to have the questions of fact involved in their contention submitted to the jury. These requests were denied by the court, and the defendant excepted. The jury rendered a general verdict for the plaintiff for the sum of \$3,179.78, as directed by the court, and further found, in response to the request for a special finding, that upon the facts stated in that request the

defendant would be entitled to a verdict against the plaintiff for the sum of \$3,807.96. Judgment having been entered in accordance with the general verdict, the defendant brings the case here on writ of error, and sufficiently assigns the errors complained of to bring up the questions of law raised upon the trial.

Smith, Nims, Hoyt & Erwin and James E. Monroe, for plaintiff in error.

Smiley, Smith & Stevens and Thomas C. Clark, for defendant in error.

Before LURTON, Circuit Judge, HAMMOND, J., and SEVERENS, District Judge.

SEVERENS, District Judge, having made the foregoing statement of the facts, delivered the opinion of the court.

It seems clear that the result of the purchase of the Metropolitan Company bonds and stock and the Construction Company stock by Leahy on January 26, 1893, of Lobdell, Farwell & Co., though accompanied by a credit for a part of the price, with an agreement to carry the bonds and stock during the time for which such credit was given, was to pass the title to the bonds and stock to the purchaser, subject, however, to a lien of the vendor for the unpaid purchase price. This lien, however, would be suspended during the time for which the credit was given, and would not attach if the vendor should not still be in possession at the expiration of that time. This lien does not depend upon any express stipulation of the parties that it shall exist, but is implied by law upon principles of natural justice. *McElwee v. Lumber Co.*, 37 U. S. App. 266, 16 C. C. A. 232, and 69 Fed. 302; *Hodgson v. Loy*, 7 Term R. 440; *Bloxam v. Sanders*, 4 Barn. & C. 948; *McEwan v. Smith*, 2 H. L. Cas. 328; *Arnold v. Delano*, 4 Cush. 39; *Railroad Co. v. Vibbard*, 114 Mass. 447-458; *Welsh v. Bell*, 32 Pa. St. 12; *Owens v. Weedman*, 82 Ill. 409; 1 Jones, Liens (2d Ed.) § 800; 2 Schouler, Pers. Prop. (2d Ed.) § 553; 2 Benj. Sales (Bennett's 6th Am. Ed.) p. 804. It appears to have been a fact undisputed at the trial that a credit was given on this purchase, though the terms and conditions of the credit were a subject upon which the parties differed.

The mere fact that Lobdell, Farwell & Co. had, in other transactions, acted as Leahy's brokers in purchasing bonds and stocks from others, did not convert the bonds and stocks of this purchase from Lobdell, Farwell & Co. into the subject of a pledge for the payment of balances due from Leahy on the general account for brokerage transactions; and, in the absence of some agreement between the parties, the relation of the parties with reference to bonds and stocks purchased on this occasion would be that of vendor and vendee, with the incidental rights growing out of that relation in a case where credit is given for the purchase money. If the agreement in respect to the giving of credit was for a period reaching beyond the time when Lobdell, Farwell & Co. finally disposed of the bonds and stocks in question, and Leahy kept up the interest as required by the agreement, and there was no further agreement changing the relations of the parties, it is manifest that Lobdell, Farwell & Co. had no right

to sell the bonds and stocks as they did; and such unauthorized sale would entitle Leahy to treat the sale to him as rescinded, and to recover back what he had paid on the purchase, with interest from the date of payment. *Holland v. Rea*, 48 Mich. 222-224, 12 N. W. 167; *Pollen v. Le Roy*, 30 N. Y. 549-557; *Fancher v. Goodman*, 29 Barb. 317; *Rosenbaums v. Weeden*, 18 Grat. 793; *McClure v. Williams*, 5 Sneed, 718; *Redmond v. Smock*, 28 Ind. 365; *Benj. Sales* (6th Am. Ed.) §§ 782-795.

But we see no reason to doubt that it was competent for the parties, by further agreement, to impress upon the bonds and stocks in question the character of a pledge, giving to Lobdell, Farwell & Co. a lien for the payment of any balance due them on their general account with Leahy. There is some evidence in the record tending to show that such an understanding was had between the parties. It was affirmed by the plaintiff and denied by the defendant. The determination of the fact is followed by important consequences. If no such an agreement was had, Leahy, as already stated, was in position to treat his contract of purchase as at an end, and to recover back the \$2,500 which he had paid, with interest; and, if the facts were as just stated, the result would have been the same if no credit for a definite time had been given, but the price was subject to call, for the subsequent sale finally made by Lobdell, Farwell & Co. was not justified by any proper proceedings taken by them to that end. In such case they were bound to call for payment of the purchase price, and in case of his default notify the purchaser of their intention to sell the property for their indemnity. *Benj. Sales*, § 794, and pages 775 and 776, *Bennett's note*, where the American cases are numerously collected. This they did not do. They called on Leahy to furnish margins on general account, and notified him that if he did not comply they would sell the property upon the footing of a pledge for the whole balance due them. This was a demand and notice wholly unwarranted by such conditions, and furnished no basis whatever for the subsequent sale.

On the other hand, if the parties agreed that Lobdell, Farwell & Co. should hold the bonds and stocks as security for the balance of account upon their dealings with Leahy, as they held those which they had bought as brokers for him, this would constitute a pledge. If they should exercise the rights of a pledgee, they would necessarily waive any lien which might have inured to them as vendors in the sale to Leahy, which would be inconsistent with the pledge, and depend upon the latter's personal responsibility. But in such case there would be no rescission of the sale, and Lobdell, Farwell & Co. would hold the bonds and stocks as the property of Leahy, subject to the terms and conditions of the pledge. In that state of things, if they disposed of the property in an unauthorized way, they would be liable to the pledgor for its value in an action of trover, or the pledgor might waive the tort and recover the price for which the property was sold. The measure of damages would not be the contract price on the sale to Leahy, which would have become an indifferent matter in respect to such subsequent dealings.

Pursuing the subject further upon this latter alternative, there

can be no doubt that the court below correctly held that the sale to Deere on the 18th of August and the subsequent rescission of it were wholly inoperative to divest Leahy's title. And we are also of opinion that Lobdell, Farwell & Co., by reporting the pretended sale to Leahy, and thereby leading him to suppose that they had made an actual sale of his bonds and stocks, disentitled themselves to make the sales of them which they made in October and December following, without giving him notice of the facts, and of their intention to make those sales. He might then have been in condition, and preferred to redeem the pledge. By their conduct they had led him to suppose that his property was gone, and therefore that he had no occasion for concern about its further disposition. They had apparently exhausted the right to sell founded upon the notice they had given him. Upon any view of the case which can be taken, there can be no question that the sales by Lobdell, Farwell & Co. of Leahy's bonds and stocks in October and December were without right, and amounted to a conversion. The question is reduced to one of the measure of damages, and that depends upon the determination of the fact whether the parties supplemented the sale of the bonds and stocks of January 26, 1893, by the further agreement that they should stand pledged for the general balance of account, or whether the contract of sale remained unaffected by any such supplementary agreement. In the former case, this being an action of assumpsit upon a claim of set-off, the measure of damages would be the sum finally realized by Lobdell, Farwell & Co. upon the sales of the bonds and stocks in October and December, 1893, with interest. In the latter case, the vendor might treat the contract as rescinded, and the measure of damages would be the amount he had paid upon it, with interest. We think the rulings of the court below upon the law of the case were right, and that the results reached by the jury correctly represented the sums for which judgment upon the alternatives of the decisive question of fact should be rendered. But the difficulty is that the court did not submit to the jury the determination of the fact as requested, but assumed that the parties had agreed that the bonds and stocks should be regarded as pledged for the security of the balance of their general account. Upon the evidence, while that conclusion might be justified, there was room for a different conclusion. It was for the jury to determine the question. We think the court erred in not submitting the case to the jury upon this point, and for that reason the judgment must be reversed, and the case remanded, with directions to award a new trial.

DUDLEY v. BOARD OF COM'RS OF LAKE COUNTY, COLO.¹

(Circuit Court of Appeals, Eighth Circuit. April 12, 1897.)

No. 821.

1. COUNTY BONDS—COUPONS—RIGHTS OF HOLDERS.

Where bona fide holders for value of county bonds transfer the coupons attached thereto by delivery and written assignment, the transferees are entitled to maintain action on the coupons, whether they have given any consideration for them or not.

2. SAME—ILLEGAL INCREASE OF INDEBTEDNESS—NOTICE TO PURCHASER.

Under the constitution and statutes of Colorado limiting the indebtedness which a county may incur by loan, where there is a neglect by county commissioners to make the prescribed semiannual statements of the financial condition of the county, and by the clerk of the board to keep a record thereof (Act March 24, 1877), the county will be estopped, as against a bona fide holder, by recitals in bonds declaring that the legal limit of indebtedness has not been exceeded.

3. SAME—CONST. COLO. ART. 11, § 6.

The restriction imposed by article 11, § 6, of the constitution of Colorado on the power of a county to incur indebtedness in any one year, by loan, in the absence of a vote by the qualified electors, does not apply where authority has been given by such a vote to incur a greater indebtedness. In that case the only limitation imposed is that the aggregate debt shall not be made to exceed twice the amount previously prescribed. *Lake Co. v. Rollins*, 9 Sup. Ct. 651, 130 U. S. 662, distinguished. Thayer, Circuit Judge, dissenting.

4. SAME—ESTOPPEL TO SET UP IRREGULARITY BY PAYMENT OF INTEREST.

When a county has paid interest on bonds for several years, it is estopped to set up a mere irregularity in their issue, as against bona fide holders for value, or their transferees.

In Error to the Circuit Court of the United States for the District of Colorado.

This action was brought to recover the amount of a large number of coupons, aggregating \$26,500, exclusive of interest, which had formed part of and been attached to bonds of said county of Lake, in the state of Colorado, which had been issued to the amount of \$50,000 on or after September 6, 1880, but bearing date July 31, 1880, for the purpose of erecting necessary public buildings for said county. Said bonds bore interest at the rate of 10 per cent. per annum, payable annually on the 1st day of April of each year at the office of the county treasurer of said county, upon delivery of the attached interest coupons. The bonds were redeemable at the pleasure of the county after 10 years, and were due and payable at the office of the county treasurer 20 years from the date thereof. The coupons maturing upon these bonds before April 1, 1884, were all paid, as they matured, at the office of said county treasurer; but no coupons maturing at or after that date have been paid, the coupons sued on being among those unpaid. The answer of the defendant denied knowledge, or information sufficient to form a belief, as to whether plaintiff was the owner and holder of any of the coupons, or had become the purchaser of them for a valuable consideration, without notice of any claim affecting their validity. But the principal defense, variously stated in the answer, was, in substance, that under the constitution and laws of the state of Colorado the board of county commissioners of said county of Lake had not, when they issued said bonds, any power or lawful authority to issue the same, for the alleged reason that by the issue of such bonds a debt of said county was contracted, or the prior debt of said county increased, to an amount prohibited by the constitution of said state, and that, from the existing facts and circumstances shown by the records of said county, all purchasers of said bonds were bound to take notice of their invalidity. Section 6 of article 11 of the constitution of Colorado, as it stood prior to the year 1888, was as follows: "No county shall

¹ Rehearing denied June 7, 1897.

contract any debt by loan in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges, and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to wit: Counties in which the assessed valuation of taxable property shall exceed five millions of dollars, \$1.50 on each thousand thereof; counties in which such valuation shall be less than five millions of dollars, \$3.00 on each thousand dollars thereof. And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not exceed twice the rate upon the valuation last herein mentioned: provided, that this section shall not apply to counties having a valuation of less than one million of dollars." The said bonds contained a recital upon the face of each bond, as follows: "This bond is one of a series of fifty thousand dollars, which the board of county commissioners of said county have issued for the purpose of erecting necessary public buildings, by virtue of and in compliance with a vote of a majority of the qualified voters of said county at an election duly held on the 7th day of October, A. D. 1879, and under and by virtue of and in compliance with an act of the general assembly of the state of Colorado entitled 'An act concerning counties, county officers and county governments, and repealing laws on those subjects,' approved March 24th, A. D. 1877; and it is hereby certified that all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond." Sections 20-25, inclusive, of said act, were also printed upon said bonds, and contained all the provisions of said act relative to the action of the board of county commissioners in determining upon the necessity of creating an indebtedness for the purpose of erecting necessary public buildings, making or repairing roads and bridges, and by order specifying the amount required, and submitting the question of incurring the debt to a vote of the qualified electors at a general election, by posting of notices; also, prescribing the form of ballots and manner of voting and canvassing the vote, and the authority of the county commissioners in case the vote should be carried to contract the indebtedness, and the limitations upon such authority, and the form and purport of the bonds to be issued, and provision to be made for the payment of the interest and principal of the bonds, and a provision that they should not be sold at a discount of more than 15 per cent. of their par value. Section 21 of said act contained a provision, as follows: "Provided, that the aggregate amount of indebtedness of any county exclusive of debts contracted prior to July first, 1876, in which the assessed valuation of property shall exceed one million of dollars, for all purposes, shall not be in excess of the following ratio, to wit: Counties in which the assessed valuation of property shall exceed five million of dollars, \$6.00 on each thousand dollars thereof; counties in which the assessed valuation of property shall be less than five millions, and exceed one million of dollars, \$12.00 on each thousand dollars thereof."

The action of the board of county commissioners preliminary to and in submitting to vote of the qualified electors of said county at the general election held October 7, 1879, the question of creating an indebtedness of \$50,000, for the purpose of erecting necessary public buildings, and \$5,000 for the building and construction of public roads and bridges, was strictly in conformity with said act. The election was duly held, and the vote on that question duly had and canvassed, and found and declared to be carried. And all the acts and doings were properly recorded, and the bonds prepared, executed, and issued in strict accordance with the provisions of said act. And the bonds were sold for 95 cents on the dollar of their par value, and have, since within one year of their issue, been held and owned by purchasers for full value, without actual notice of any illegality or infirmity in said bonds. The plaintiff is the holder of the coupons sued upon, by delivery of the same with properly executed

written assignments thereof to him, by the former owners of such coupons, but without payment by him of any money therefor. The assessed valuation of taxable property in said county of Lake for the year 1879 was \$3,485,628, and for the year 1880 was \$11,124,489, and such assessment was completed on the 1st day of September in each of said years, by the action of the board of equalization. Section 30 of the act above referred to made it the duty of the board of county commissioners of each county to make out semiannual statements at the regular sessions in January and July, and publish them in some weekly newspaper published in the county, or, if no such newspaper be so published, to cause such statements to be posted in three conspicuous places in the county, one being the courthouse door, showing the amount of debt owing by the county, in what it consists, what payments have been made thereon, the rate of interest, and a detailed account of receipts and expenditures for the preceding months, and striking a balance showing the deficit or the balance in the treasury. "And the statement thus made, in addition to being published as before specified, shall also be entered of record by the clerk of the board of county commissioners, in a book to be kept by him for that purpose only, which book shall be kept open to the inspection of the public at all times." There was no evidence in the case that any such semiannual statement made by the board of county commissioners for said county of Lake at the January or July sessions of said board in the year 1880 had ever been entered of record in any book kept for that purpose only, as required by said act. The fair inference from the testimony is that no such record was ever made. Upon the trial the defendant, to prove its allegation that on July 31, 1880, the date of said bonds, and also at the time they were issued, the aggregate outstanding indebtedness of said county of Lake was largely in excess of the amount of the extreme limitation fixed by the constitution of said state and the act aforesaid, offered in evidence a book kept in the years 1880 and 1881 by the county clerk of said Lake county, called the "County Clerk's Account Book," and purporting to contain, among other things, detailed statements of the financial condition of said county on January 1, 1880, July 1, 1880, and January 1, 1881; and the same was admitted in evidence by the court, over the objection and exception of plaintiff that it was not the record provided for by said act, nor the semiannual statement of the board required by said act. Much other evidence tending to show the existence of outstanding warrants and indebtedness of said county at the time of issuing said bonds to an amount largely in excess of the aggregate amount of indebtedness which the county could, under said constitutional limitations, lawfully incur, was offered by defendant, and admitted by the court, over the objections of the plaintiff that the same was incompetent and immaterial. At the conclusion of the evidence the court refused all of the plaintiff's requests for instructions to the jury, and instructed the jury to return a verdict for the defendant; to which refusal and instruction exceptions were duly taken by the plaintiff. The jury accordingly found for the defendant, and judgment for the defendant was entered upon the verdict.

H. B. Johnson, Daniel E. Parks, and E. F. Richardson, for plaintiff in error.

George R. Elder, C. S. Thomas, W. H. Bryant, and H. H. Lee, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

1. The plaintiff, by the delivery to him of the coupons and written assignments thereof, became the legal owner of such coupons, and entitled to maintain an action upon them, whether he had actually paid the former owners any consideration for them or not. Holding them by valid written transfers from former bona fide holders for value, he succeeded to all rights of such former holders. No

defense is pleaded which makes it material whether the plaintiff, under such circumstances, did or did not pay value for the coupons. *Sheridan v. Mayor*, 68 N. Y. 30; *Commissioners v. Bolles*, 94 U. S. 104, 109. The instruction to the jury asked for in plaintiff's second request was correct, and the refusal of the court to give such instruction was error.

2. A county is an organized political subdivision of the state. It has such power, and such only, to contract loans and incur other forms of indebtedness as is expressly or by fair implication granted to it by the legislature of the state, which has plenary authority over that subject, as it has over all ordinary subjects of legislation, except in so far as its authority is taken away, curtailed, or restricted by the controlling force and effect of the provisions of the state constitution. Section 6 of article 11 of the constitution of Colorado is wholly restrictive in its effect and operation, and does not by its terms authorize any county to incur any form of indebtedness for any purpose. It forbids the contracting of a debt of a specified kind, except for specified purposes, and within specified limits, and forbids the contracting of indebtedness, of any and all kinds beyond specified limits, and then prescribes an enlarged limit as to indebtedness, after a county shall have been authorized by vote of the qualified electors, in the manner indicated, with a provision in respect to bonds, if any be issued. But it does not by its own terms grant to any county the power to incur indebtedness, even within the specified restrictions. The authority to grant such power, within such restrictions, therefore, necessarily remains in the legislature, which might, in its discretion, prescribe further limitations and restrictions, and provide in detail in respect to the manner in which the power should be executed, and in respect to what acts should be done, and what record made in the execution of such power, and as to the effect of such acts and records. The bonds in question in this case were issued under the provisions of the act of March 24, 1877, which is expressly referred to in the recital in the bonds, and six sections of which were printed upon the bonds. This act, by its terms, commits to the board of county commissioners the power to determine the necessity of creating an indebtedness for the erection of public buildings, and of submitting the question to a vote of the qualified electors at a general election, and of issuing the bonds, if the vote is favorable, keeping within the limitation contained in section 21 in respect to the aggregate indebtedness of the county at the time of issuing the bonds. The granting of these powers necessarily intrusts to the board of county commissioners the power and duty of determining whether the proposition to create the indebtedness was carried at the election, and the ascertainment of the fact that the aggregate amount of all forms of the county indebtedness was within such amount that it would not, by the issue of the bonds, be made to overpass the prescribed limitation. Hence, except for the provision contained in section 30 of the same act, requiring the board to make and publish the semiannual statements of the indebtedness and financial condition of the county, and requiring the clerk of the board to record such statements in a book to be kept for that

purpose only, and to be open to public inspection, the recitals in the bonds above quoted would be conclusive, and would estop the county in a suit by a bona fide holder of the bonds or coupons. *Commissioners v. Aspinwall*, 21 How. 539; *Coloma v. Eaves*, 92 U. S. 484; *County of Clay v. Society for Savings*, 104 U. S. 579; *Commissioners v. Bolles*, 94 U. S. 104; *Evansville v. Dennett*, 161 U. S. 434, 446, 16 Sup. Ct. 613; *Wesson v. Saline Co.*, 20 C. C. A. 227, 73 Fed. 917; *Chaffee Co. v. Potter*, 142 U. S. 355, 12 Sup. Ct. 216. In *Chaffee Co. v. Potter*, last cited, where the recital in the bonds contained a certificate that the total amount of the issue did not exceed the limit prescribed by the constitution of Colorado, and had been duly authorized by a vote of the qualified electors of the county of Chaffee at the general election named, it was held that the county was estopped to dispute these recitals in an action upon coupons by an innocent holder for value. The case of *Sutliff v. Commissioners*, 147 U. S. 230, 13 Sup. Ct. 318, deserves special attention, as the bridge bonds, coupons from which were sued upon in that case, were issued under the same act, and upon the authority of the same vote of the qualified electors, as were the public building bonds which are under consideration in this case. In the *Sutliff Case* it was held that as section 30 of the same act, under which the bonds were issued, made it the duty of the board of county commissioners to make out and publish semiannual statements showing the indebtedness, if any, of the county, and that such statements should be entered of record by the clerk of the board in a book to be by him kept for that purpose only, and to be open to the inspection of the public, a person about to purchase such bonds was charged with the duty of examining this public record provided for by the very act under which the bonds were issued, and from that inform himself whether the amount of the issue stated in the bonds increased the aggregate indebtedness of the county beyond the constitutional limit, which was there held to be identical with the like limitation contained in the act, namely, \$6 on the \$1,000 of the assessed valuation,—the total assessed valuation of the taxable property in that county being more than \$5,000,000,—and that because of such public record of such semiannual statements the county was not estopped to prove that before such bonds were issued the indebtedness of the county had passed the constitutional and statutory limit. The theory of that case is that a purchaser of bonds issued under that act would have constructive notice of what the record of the semiannual statement provided for by the act, and which it was his duty to examine, would have shown, had he in fact examined such record. The fact that such record actually existed was assumed and not questioned in the *Sutliff Case*. But in this case it is clearly shown that there never were any such semiannual statements, or record thereof, covering any of the time which could affect the legality of these bonds. As there was no such record in existence as the act required and contemplated, there was no record which a purchaser of these bonds was bound to examine, or which would be constructive notice to him of the aggregate indebtedness of the county when the bonds were issued. Such purchaser was therefore entitled to rely on the recitals in the bonds. And as

one of these recitals was a certificate that all the provisions of the act had been fully complied with by the proper officers in the issuing of the bonds, and as a provision of that act limiting the issue of the bonds by the aggregate of all the indebtedness of the county was, in effect, identical with the constitutional provision on the same subject, the recital was equivalent to a certificate that this provision of the constitution had been complied with, and brings the case within the decision in *Chaffee Co. v. Potter*, *supra*. It has often been held that, in the absence of any statutory public record, a county or municipality may be estopped by similar recitals in bonds from showing that when the bonds were issued there was an aggregate outstanding indebtedness rendering the issue of bonds illegal. *Marcy v. Oswego*, 92 U. S. 637; *Humboldt v. Long*, *Id.* 642, 645; *Buchanan v. Litchfield*, 102 U. S. 278, 292; *Sherman Co. v. Simons*, 109 U. S. 735, 3 Sup. Ct. 502; *Dalles Co. v. McKenzie*, 110 U. S. 686, 4 Sup. Ct. 184; *Wilson v. Salamanca*, 99 U. S. 499. The debt created by the bonds in this case was incurred, not at the time the board of commissioners determined that it was necessary, nor when the qualified voters of the county gave authority to incur it, nor at the date of the bonds (they having been antedated), but at the date, later than September 6, 1880, when the bonds were in fact issued and sold. The bonds recite that the whole issue is \$50,000, and this recital was notice to purchasers of the bonds of the creation of an indebtedness of the county to that amount. The assessed valuation of the taxable property of the county of Lake, according to the assessment which was completed by equalization on September 1, 1880, was \$11,124,489. This assessed valuation, in view of the vote authorizing the creation of the indebtedness, would admit of a lawful aggregate of indebtedness of that county to the extent of upward of \$66,000. So that the recited amount of that issue of bonds was not of itself notice to a purchaser that the lawful aggregate limit of indebtedness had been passed, even if such purchaser was bound to take notice of the assessed valuation of the taxable property of the county, as was held in *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. 315. As said by the court in *Chaffee Co. v. Potter*, 142 U. S. 355, 363, 12 Sup. Ct. 216, 219:

"The purchaser might even know—indeed, it may be admitted that he would be required to know—the assessed valuation of the taxable property of the county; and yet he could not ascertain, by reference to one of the bonds and the assessment roll, whether the county had exceeded its power, under the constitution, in the premises."

The court therefore erred in overruling the plaintiff's objections to the county clerk's account book, the warrant register, and the proof of publication of financial statements. None of this evidence was material, as none of it constituted constructive notice to a bona fide purchaser of the bonds.

3. A question not suggested by the answer in the case remains to be considered. The first part of section 6 of article 11 of the constitution of Colorado, above quoted, as applicable to the class of counties having an assessed valuation of taxable property exceeding \$5,000,000, in the absence of any vote of the qualified electors, restricts the amount of debt by loan which the county can be allowed

to contract in any one year to \$1.50 on each \$1,000 of such assessed valuation. It is questioned whether this limitation upon the amount of debt by loan which the county may be allowed to contract in any one year does not continue, even after authority has been given by vote of the qualified electors, to create an aggregate indebtedness to the extent, it may be, of \$6 on each \$1,000 of such assessed valuation. The contention that the restriction referred to, respecting the amount of debt by loan which a county may be allowed to contract in any one year without such vote, continues after the changed condition effected by such vote, appears to rest upon what seems to us to be a misconception of a sentence in the opinion in *Lake Co. v. Rollins*, 130 U. S. 662, 669, 9 Sup. Ct. 651. Under the stipulation in that case (page 664, 130 U. S., and page 651, 9 Sup. Ct.), the only question in the case was whether the limitations contained in section 6 of article 11 aforesaid were restrictive only of the power of counties to create debts by loan, or restricted further the power to create and incur all forms of indebtedness; it being admitted by the stipulation that if the general limitations expressed in that section covered all forms of indebtedness, and were not confined to debts by loan exclusively, the defendant in that action was entitled to judgment. Mr. Justice Lamar pointed out that the first clause of the section, down to where the subject of aggregate indebtedness is considered, speaks only of debts by loan. He then added, "Here the matter of indebtedness by loan is completed, and the section passes to a broader subject." In view of the exact question then under consideration, this language means that at the point of the section indicated the matter of debt by loan exclusively is completed, and that thenceforward the section passes to a broader subject, embracing all other forms of indebtedness as well as debt by loan. It is obvious that every sentence of the entire section may enlarge, limit, or in some way qualify the power to contract debts by loan. The provision in respect to submitting the question of incurring indebtedness to the qualified electors contemplates the submitting of specific propositions, and, if the vote is in favor of incurring the debt, the provision that, if bonds are issued, they shall run not less than 10 years, necessarily provides that such debt, when so authorized, may be created by loan. The case of *People v. May*, 9 Colo. 80, 10 Pac. 641, does not touch the question of how much indebtedness by loan may be contracted by a county in any one year, after authority has been given by a majority vote of the qualified electors to contract the indebtedness. In that case, as in the *Rollins Case*, the sole question considered arose upon the contention that the constitutional restriction contained in said section 6 as to the aggregate amount of county indebtedness should be regarded only as a limitation of county indebtedness by loan. The court held, as in the *Rollins Case*, that the general limitations as to aggregate indebtedness embraced all forms of county indebtedness. The provisions of section 6 aforesaid divide themselves into two general clauses, distinct from each other, and each applicable to a condition differing from that to which the other is applicable. The first clause, extending down to the preposition "unless," prescribes the restrictions and limitations in respect to the

power of contracting indebtedness by counties where there has been no vote of the qualified electors authorizing the creation of specific indebtedness, and not only limits the aggregate amount of indebtedness that can be incurred for all purposes and in all forms, but also limits the amount of indebtedness by loan that can be created in any one year. The second clause, following the preposition "unless," provides for a changed and different condition, in which a county, by vote of a majority of its qualified electors, upon a proposition submitted to them at a general election, has been authorized to create a specific indebtedness. In that case a single and different limitation is prescribed, namely, that the aggregate debt of the county shall not be made to exceed twice the amount limited in the other case, and a provision (contemplating debt by loan) that the bonds, if any be issued therefor, shall not run less than 10 years. But there is no limitation in such case as to the amount of the indebtedness so authorized which can be created in any one year. It would be singular, indeed, if, after authorizing a county, upon vote of its qualified electors, to create a specific indebtedness for the erection of necessary public buildings, the same provision should cripple the power to erect such buildings by requiring that the long-time bonds authorized should only issue and be sold in small annual installments; making the county wait, perhaps, a series of years before getting enough money to warrant it in beginning the erection of the necessary public buildings, and be paying in the meantime interest on the earlier bonds, the proceeds of which would be lying idle, awaiting the accumulation of enough to begin with. Neither the grammatical construction of the section nor any sound reason justifies the importation into the last clause of the section of the restriction in the first clause as to the amount of debt by loan which can be created in any one year. It may be added that the legislative construction of this section of the constitution, as shown by section 21 of the act of March 24, 1877, under which these bonds were issued, conforms to the views here expressed, and that the supreme court, in *Sutliff v. Commissioners*, 147 U. S. 230, 234, 13 Sup. Ct. 318, refers to this statute as being, in respect to limitations, in conformity with the constitution.

4. The county of Lake received full consideration for these bonds. Most of them were taken directly by the contractor who erected the public buildings for which they were issued. They passed immediately to bona fide holders for full value. The county acknowledged and ratified them by paying the interest upon them, as it matured, for several years. If it were conceded that after the board of county commissioners of Lake county had been, by vote of the qualified electors, empowered to create a debt of \$50,000 to erect necessary public buildings, they were required to execute that power by issuing not more than \$16,500 of the \$50,000 in any one year, and they issued the whole \$50,000 at once, instead of issuing the same in yearly installments, the case would not be one of lack of power to issue all the bonds, but a case where the power existed, but was irregularly exercised. In such case the payment of interest on the bonds for several years estops the county from asserting such irregu-

larity as a defense. *Supervisors v. Schenck*, 5 Wall. 772; *County of Clay v. Society for Savings*, 104 U. S. 579; *Commissioners v. Beal*, 113 U. S. 227, 5 Sup. Ct. 433; *Moulton v. Evansville*, 25 Fed. 382; *McKee v. Vernon Co.*, 3 Dill. 210, Fed. Cas. No. 8,851; *Bank v. Springfield*, 4 Fed. 276. The circuit court erred in directing the jury to return a verdict for the defendant. The judgment of the circuit court is accordingly reversed, and the case is remanded for a new trial.

THAYER, Circuit Judge (dissenting). I am unable to concur in the views expressed by my associates in the foregoing opinion. My disagreement with them arises out of the fact that I am not able to read section 6, art. 11, of the constitution of Colorado, quoted in the statement, as they have seen fit to construe it. Without going into the subject at length, it will suffice to say that in my judgment the first paragraph of section 6, art. 11, of the constitution of Colorado, fixes an absolute limit to the amount of indebtedness created by loan which a county may contract in any one year, either with or without the sanction of a popular vote; such limit being \$1.50 per \$1,000 of the assessed valuation of taxable property in counties where such valuation exceeds \$5,000,000. This was the construction of the constitutional provision in question which seems to have been adopted in *Lake Co. v. Rollins*, 130 U. S. 662, 669, 9 Sup. Ct. 651, and in *People v. May*, 9 Colo. 80, 86, 87, 10 Pac. 641; but in the absence of these adjudications I should entertain the same view, founded upon the language of the statute and the probable motive of the lawmaker. The framers of the Colorado constitution intended, as I think, to impose such restrictions upon counties as would compel them to act prudently, no matter what might be the will of the people, and such restrictions as would prevent them, as far as possible, from exhausting their power to contract debts by overborrowing in a single year. To this end they prohibited counties absolutely from borrowing money, except for one purpose, and limited the amount that might be borrowed even for that purpose during a single year. Such being my interpretation of the constitutional provision in question, it follows therefrom that the trial court acted properly in directing a verdict for the defendant, because each bond showed on its face that the aggregate debt thereby created in a single year was \$50,000, and because the purchasers of the bonds were bound to take notice of the amount of the assessed valuation, which valuation did not authorize the creation of a debt by loan in a single year to an amount exceeding \$16,500. *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. 315; *Hedges v. Dixon Co.*, 150 U. S. 182, 14 Sup. Ct. 71; *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. 654. The plaintiff below was not an innocent purchaser of the bonds in suit, but was affected with knowledge of a want of power in the county to issue the bonds, which rendered the same void. My associates apparently agree with me that the debt evidenced by the bonds in suit was a debt contracted by loan, so that nothing need be said on that point. The judgment being, in my opinion, for the right party, on uncontradicted facts disclosed by the record, I think it should be affirmed.

HUBBARD v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court, D. Rhode Island. May 10, 1897.)

1. LIFE INSURANCE—FALSE REPRESENTATIONS—WAIVER BY COMPANY.

A notification by the insurer to the beneficiary that payment of the policy will be made in full is not a waiver of a defense founded upon alleged false statements in the application, where, at the time, the insurer had no reason to suspect that such statements were false.

2. SAME—ESTOPPEL BY DELAY.

An insurance company which, several months after receiving proofs of loss, notifies the beneficiary that the claim has been approved, and will be paid, is not precluded by the delay from thereafter setting up the falsity of representations made in the application, where nothing had come to its knowledge putting it upon inquiry as to the truth of the representations. This is especially true where the beneficiary has taken no action in reliance upon the notice of approval, and has been in no way prejudiced thereby.

3. SAME—COMPROMISE.

A notice by a life insurance company to the beneficiary that the policy will be paid in full is not an adjustment of liability, or a compromise, which will preclude it from setting up false representations in the application.

4. SAME—PROMISE WITHOUT CONSIDERATION.

A notice by a life insurance company to the beneficiary that the policy will be paid in full is not a binding promise, which will preclude it from subsequently setting up false representations, which render the policy void ab initio; for in such case the promise would be without consideration.

5. PLEADING—SPECIAL TRAVERSE.

The inducement of a special traverse should be an indirect denial, and, if it consists of a direct denial, the special traverse is improper.

6. LIFE INSURANCE—APPLICATION—AGREEMENT AS TO AGENCY.

An agreement contained in the application that the person taking the application, and also the medical examiner, are the agents of the applicant, and not of the insurance company, is binding on the insured; and he cannot, by parol evidence, show the fact to be otherwise.

7. SAME—WAIVER OF DEFENSES—REASONS FOR REFUSAL TO PAY.

The company is not restricted in its defense to the reasons set forth in its notice to the beneficiary of its refusal to pay, when it does not appear that the beneficiary has been misled or influenced by the omission to set forth other reasons.

Bassett & Mitchell, for plaintiff.

Edwards & Angell, for defendant.

BROWN, District Judge. This is an action on a policy of insurance issued by the defendant corporation upon the life of George W. Hubbard. The policy was issued upon a written application made by the insured. The insured agreed, in the application, that the answers and statements therein contained, whether written by him or not, were warranted to be full, complete, and true, and that this agreement and the constitution and by-laws of the defendant association, together with the application, were thereby made a part of any certificate or policy that might be issued thereon; that, if any of such answers and statements were not full, complete, and true, then the certificate or policy issued thereon should be null and void; and that the person taking said application, and also the medical examiner, should be and were the agents of the applicant, and not the

agents of said association, as to all statements and answers in the application; and that no statements or answers made or received by any person or to the association should be binding on the association unless reduced to writing, and contained in the application. The insured, in said application, further warranted that the answers as written to the questions put in the medical examiner's report forming part 2 of the application were his answers, and were full, complete, correct, and true, and that the same should be made part of the contract of his certificate of membership or policy of insurance. In and by the certificate of membership or policy of insurance, and in and by the constitution or by-laws of the defendant corporation, the answers and statements contained in the application were made part of said certificate or policy. The defendant pleads that certain answers and statements made by the insured in the application were untrue; that a false statement was made by the insured to the medical examiners; that satisfactory proofs of death have not been presented to or accepted by the defendant, as required by the policy as a condition precedent to recovery; that the policy was never delivered to the insured while in good health, as required by the policy; that the policy was issued subject to the provisions of the constitution or by-laws of the defendant association; and that the insured never became a member of the association in accordance with these provisions. To these defenses the plaintiff replies in the second replication that the defendant association received the proofs of loss December 31, 1893, and thereafter approved the claim founded thereon, and of this action gave notice to the plaintiff April 5, 1894, and May 2, 1894, also notified her again of the approval of the claim, and that she might expect payment within a few days of June 1, 1894; that during all this time the defendant had ample opportunity to determine the truth or falsity of said representations and statements, as it ought to have done if it relied upon the same; and that said acts and failure to act, on the part of the association, constitute a waiver of the defenses set forth in the pleas, and estop the defendant from pleading the same in bar.

The first question for consideration is raised by the demurrer to the second replication, and is whether the facts therein set forth constitute a waiver of the defenses set forth in the pleas. There is no averment that, at the time of approval of the claim and of the notification of the company to the plaintiff that she might expect payment, the company had knowledge that there was a forfeiture of the policy on account of the alleged false statements contained in the application. Since waiver is the intentional relinquishment of rights, knowledge of the existence of the rights is a necessary element, and should be averred.

In *Bennecke v. Insurance Co.*, 105 U. S. 355, the rule of law is thus stated by Mr. Justice Woods:

"A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally, but with knowledge of the circumstances. This is the rule when there is a direct and precise agreement to waive the stipulation. A fortiori is this the rule when there is no agreement, either verbal or in writing, to waive the stipulation, but when it is sought to deduce a waiver from the conduct of the party."

Further, as said by Mr. Justice Field in *Insurance Co. v. Wolff*, 95 U. S. 326:

"The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct, and enforce the conditions. To a just application of this doctrine, it is essential that the company sought to be estopped from denying the waiver claimed should be apprised of all the facts."

The replication avers merely that from December 31, 1893, to the date of the notification that payment might be expected, May 2, 1894, "there was ample opportunity to investigate and determine the truth or falsity of all said representations and statements in said various pleas represented to be untruthfully made by said Hubbard, as said defendant corporation ought to have done had it relied upon the same." To hold that such a duty existed would be tantamount to holding that in such cases a presumption of fraud exists, casting upon the company the duty of inquiry, whereas the true rule is that the company is entitled to rely upon the statement of the assured, and can rescind for fraud whenever it is brought to its knowledge. In the absence of an averment of actual knowledge or of facts sufficient to put the company upon inquiry, there was, so far as appears from the pleadings, no obligation upon the company to suspect the validity of the statements of the assured, or to instigate an inquiry from mere suspicion. Furthermore, as the doctrine of estoppel can only be invoked where the conduct of the company has been such as to induce action in reliance upon it, and as it does not appear that the plaintiff was in any way prejudiced by the approval and notice, the replication is also in this respect defective. The promise to pay, therefore, was a mere naked promise, without consideration, and without prejudice to the plaintiff. There was no adjustment of a disputed claim, and no mutual concession of rights as a consideration for the promise. The fact that the notice was of an intention to pay the full amount of the policy precludes the contention of the plaintiff that the promise amounts to an adjustment of liability, since the essential element of an adjustment—a dispute as to the fact of liability or as to the amount of liability—was lacking. The difference between this case and the case of an open policy of fire insurance, where the sum to be paid must be determined by the parties or proved by the assured, is obvious. It is also apparent by the pleas that the assured agreed in the application "that, if any of the answers or statements made are not full, complete, and true, * * * then the policy issued hereon shall be null and void." Assuming the truth of the facts stated in the pleas, then the policy was void ab initio, and the notice must be held the making of a new promise, for which the replication discloses no consideration. For the foregoing reasons, therefore, the demurrer to the second replication must be sustained.

The second inquiry arises upon demurrers to the sufficiency of the replications numbered 3 to 13, inclusive. Each of these replications is in form a special or *absque hoc* traverse, and contains a direct and unqualified denial of what is averred in the plea to be the true fact,

and the contrary of a certain answer or statement made by the assured, with a denial under the *absque hoc* that said answer and statement were made a warranty. For example, the second plea alleges that in and by the application it was inquired of the assured: "State fully your occupation, profession, or trade. State kind of business and duties." To which George W. Hubbard answered as follows: "Banker and broker." "Whereas the defendant avers that in truth and in fact the occupation, business, and trade of said George W. Hubbard was not, at the date of said application, that of a banker and broker," etc. The replication which is an example of the remaining replications covered by the demurrers is, as follows: "And the said plaintiff saith that for everything by the said defendant corporation secondly above pleaded *precludi non*, because she says that the occupation, profession, and trade of said Hubbard at said time was that of a banker and broker (without this said answers are by said certificate of membership or policy of insurance warranties on the part of said Hubbard), and of this the said plaintiff puts herself on the country." The replications (with one exception) do not deny the making of the statements, but substantially deny their falsity, and furthermore deny that the answers or statements were made warranties. As the inducement of a special traverse can properly be of no other nature than an indirect denial, and as in this case it consists of a direct denial, the special traverse must be held improper. Steph. Pl. p. 184.

The defendant contends that the denial under the *absque hoc* is insufficient in law. If so, then, although in such case the inducement may be traversed, the replication, without a proper denial under the *absque hoc*, is merely a common traverse in effect, and should be so pleaded. If, on the other hand, the denial under the *absque hoc* is sufficient in law, then the inducement can neither be traversed nor confessed and avoided. Steph. Pl. p. 188. There is, as defendant's counsel contend, a practical difficulty in attempting to rejoin to these replications. If defendant files a *similiter*, and the denial under the *absque hoc* is good in law, then the only issue is whether the answers were warranties. But there are also, upon the face of the pleadings, material and contradictory averments upon which, according to the rules of pleading, no issue can be reached. Although the pleadings show the substantial dispute to be whether the statements of the assured were true or false, the only issue reached is whether they were warranties; thus defeating the purpose averred by the plaintiff's counsel upon his brief, and manifest throughout the pleadings, as well as violating well-established principles of pleading. The facts of the plea constitute but one connected proposition or entire point, and, on examination of the whole record, the first fault is not with the defendant, but with the plaintiff.

The third inquiry is as to the validity of the agreement of the insured that the person soliciting or taking the application, and also the medical examiner, should be the agents of the applicant, and not of the company, and that no statements or answers should be binding on the company unless reduced to writing, and contained in the application. The counsel for the plaintiff says on the brief: "All of

these clauses attempt to make the insured say that the company's agents are his, and the second that nothing known by the company is known unless in writing. Both of these propositions are bold attempts on the part of the company to alter facts, and to make that which is not the fact for the purpose of this contract to be taken as reality." The plaintiff attempts by her replication to set up a contract different from the written contract, and thereby to avoid by parol evidence the effect of the written agreement. The case of *Insurance Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, has settled the law upon this question. Mr. Justice Field said that "it was his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty in all business transactions if a party making a written proposal for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it notwithstanding their falsity as to matters essential to its obligation and validity." "The present case," said the court, "is very different from *Insurance Co. v. Wilkinson*, 13 Wall. 222, and from *Insurance Co. v. Mahone*, 21 Wall. 152." "In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. * * * Here the power of the agent was limited, and notice of such limitation given, by being embodied in the application which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is therefore bound by its statements." See, also, the opinion of Mr. Justice Harlan in *Maier v. Association* (February 2, 1897) 24 C. C. A. 239, 78 Fed. 566.

The fourth inquiry is: Is the company restricted in its defense to the reasons assigned in its refusal to pay? This arises upon demurrer to the sixteenth replication, which, in reply to the defense contained in the fourteenth plea (that no satisfactory proofs of the death of George W. Hubbard, made out in accordance with the provisions of the policy, had ever been presented to or accepted by the defendant), avers that the defendant, "by vote of its executive, voted, for reasons in said vote stated, to revoke, cancel, and annul the approval of said claim of said plaintiff to the payment of said policy, and that thereafterwards, to wit, on January 9, 1894, transmitted to said plaintiff a certified copy of said vote; and said plaintiff avers that in and by said vote and said copy of the same, as so aforesaid transmitted to her, said defendant does not assign, as its reason for said refusal to pay said policy, any of the several matters in said fourteenth and subsequent pleas set up by said defendant in bar of said plaintiff's said suit, and said plaintiff avers that, by said acts of said defendant as herein set forth, said defendant has waived its right, if any it ever had, to set forth any of said several matters in said pleas contained in bar of said plaintiff's said action, and is thereby estopped to plead the same herein, and this she is ready to verify," etc. As was said by Mr. Justice Field in *Insurance Co. v. Wolff*, 95 U. S. 326, above quoted, the doctrine of waiver is only another name for estoppel, and can only be invoked where the conduct of the company has been such as to in-

duce action in reliance upon it. And as was said in *Ketchum v. Duncan*, 96 U. S. 659: "An estoppel in pais does not operate in favor of everybody. It operates only in favor of a person who has been misled to his injury, and he only can set it up." There is no averment that the action of the plaintiff was influenced by the omission to set forth the ground in the notice. The defendant's demurrers are sustained, and the plaintiff's demurrers overruled.

HOLT COUNTY et al. v. NATIONAL LIFE INS. CO. OF MONTPELIER, VT.

(Circuit Court of Appeals, Eighth Circuit. April 19, 1897.)

No. 867.

1. RES JUDICATA—MANDAMUS TO LEVY TAX.

A judgment against a school district, and the issuance of a mandamus requiring its officers to levy a tax to pay the same, is conclusive upon the question whether the levy ordered was in excess of the statutory power of the school district, and cannot be again raised or retried in a subsequent proceeding by either the school district, its officers, or any parties in privity with them.

2. SAME—ESTOPPEL AGAINST TAXPAYER.

County officers whose duty it is under the statutes of a state to levy and collect the taxes voted by a school district and certified by its officers, pursuant to a judgment of mandamus of a federal court, become the mere ministerial officers of that court to enforce its judgment, and they stand in privity with all the parties to the proceeding for the mandamus.

3. SAME—FEDERAL AND STATE COURTS—INJUNCTION.

An injunction issued by a state court at the instance of a taxpayer restraining the collection of a tax levied pursuant to a mandamus from a federal court is ineffectual, and is no excuse to the county officers for failing to collect the tax.

In Error to the Circuit Court of the United States for the District of Nebraska.

This writ of error was sued out by the county of Holt, in the state of Nebraska, and its county clerk, county treasurer, and board of supervisors, the plaintiffs in error, to reverse a judgment of mandamus against them, which directed them to collect and pay over a tax of 50 mills on the dollar which had been levied upon the property in school district No. 44 in that county, to pay a judgment in favor of the National Life Insurance Company of Montpelier, Vt., which had been rendered against that district. The case was tried by the court upon an agreed statement of facts, and the only question presented here is whether those facts warrant the judgment. The facts were these: On November 26, 1894, the National Life Insurance Company of Montpelier, Vt., recovered a judgment in the court below for \$5,023.88 against school district No. 44 in the county of Holt. In the case of the United States, on the relation of this insurance company, against school district No. 44, its director, moderator, and treasurer, the same court subsequently adjudged that the school district and its officers should make and report to the county clerk and board of supervisors of the county of Holt, annually, for five years, the amount of tax upon the property in that district necessary to be levied and collected to pay one-fifth of the amount due on this judgment, with interest and costs, and that, in case the necessary steps should not be taken to make such reports and to levy and collect such taxes until the entire judgment should be paid, a peremptory writ of mandamus should issue to compel the performance of these duties. On June 25, 1895, pursuant to this judgment, the following taxes were voted by this school district for the ensuing year, viz.: For teachers' fund,

15 mills on the dollar; for fuel, repairs, books, and supplies, 10 mills on the dollar; for judgments against the district, 50 mills on the dollar,—total, 75 mills on the dollar; and the school board of that district certified these taxes to the county clerk of Holt county, and he duly levied them upon the property in the district, placed them upon the tax list, and certified them to the county treasurer of the county for collection, pursuant to the command of the judgment and the provisions of the statutes of Nebraska. On February 7, 1896, the Fremont, Elkhorn & Missouri Valley Railroad Company, a corporation, and one of the taxpayers in school district No. 44, refused to pay the tax of 50 mills which had been levied on its property to pay the judgment, on the ground that that levy was illegal, and thereupon the board of supervisors of Holt county passed a resolution to the effect that the county treasurer of that county might fail to collect that tax, and that the county attorney of that county might enter into an amicable suit with the railroad company upon an agreed statement of facts, to determine the legality of the levy of this 50 mills, which had been made pursuant to the judgment of the federal court. On February 17, 1896, the railroad company brought a suit in one of the state courts in Nebraska against the plaintiffs in error in this suit, and prayed for an injunction forbidding them to collect this tax. The railroad company was careful not to disclose to that court in its complaint in that suit the controlling fact that this tax had been levied under the judgment of the circuit court of the United States, and the state court undoubtedly acted in ignorance of that fact. The plaintiffs in error demurred to this complaint, and an injunction was issued against them as prayed. On May 28, 1896, the United States, on the relation of the National Life Insurance Company of Montpelier, Vt., brought this action, and prayed that the county of Holt and its officers be commanded to collect and pay over the tax which had been levied to pay the judgment of the insurance company against the school district, and, after answer and trial, the prayer of the petitioner was granted.

William B. Sterling, B. T. White, and H. E. Murphy, for plaintiffs in error.

Lionel C. Burr and Charles L. Burr, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The only ground on which it is contended that the judgment below in this case was erroneous is that the tax of 50 mills on the dollar, which was levied on the property in school district No. 44, pursuant to the judgment of mandamus against that district, to raise money to pay a part of the money judgment against it, was in excess of the limitation prescribed by the statutes of Nebraska for the annual levy of taxes by that district, and was therefore illegal and void. The legislature of the state of Nebraska by "An act to provide for the payment of judgments recovered against municipal corporations," which took effect on February 18, 1867, provided:

"4112. That whenever any judgment shall be obtained in any court of competent jurisdiction in this territory for the payment of a sum of money against any county, township, school district, road district, town or city board of education, or against any municipal corporation, or when any such judgment has been recovered and now remains unpaid, it shall be the duty of the county commissioners, school district board of education, city council, or other corporate officers, as the case may require, to make provisions for the prompt payment of the same.

"4113. If the amount of revenue derived from taxes levied and collected for ordinary purposes shall be insufficient to meet and pay the current expenses for the year in which the levy is made, and also to pay the judgment remain-

ing unpaid, it shall be the duty of the proper officers of the corporation, against which any such judgments shall have been obtained and remaining unsatisfied, to at once proceed and levy and collect a sufficient amount of money to pay off and discharge such judgments.

"4114. The tax shall be levied upon all the taxable property in the district, county, township, town, or city, bound by the judgment, and shall be collected in the same manner and at the same time provided by law for the collection of other taxes.

"4115. The corporate officers whose duty it is to levy and collect taxes for the payment of the current expenses of any such corporation, against which a judgment may be so obtained, shall also be required to levy and collect the special tax herein provided for, for the payment of judgments.

"4116. If any such corporate authorities whose duty it is, under the provisions of this act, to so levy and collect the tax necessary to pay off any such judgment, shall fail, refuse or neglect to make provisions for the immediate payment of such judgments, after request made by the owner, or any person having an interest therein, such officers shall become personally liable to pay such judgments, and the party or parties [interested] may have an action against such defaulting officers to recover the money due on the judgment, or he or they having such interest may apply to the district court of the county in which the judgment is obtained, or to the judge thereof in vacation, for a writ of mandamus to compel the proper officers to proceed to collect the necessary amount of money to pay off such indebtedness, as provided in this act; and when a proper showing is made by the applicant for said writ, it shall be the duty of the court or judge, as the case may be, to grant and issue the writ to the delinquents, and the proceedings to be had in the premises shall conform to the rules and practice of said court, and the laws of this territory, in such cases made and provided."

Cobbey's Consol. St. Neb. 1891.

By "An act to establish a system of public instruction for the state of Nebraska," approved March 1, 1881, which took the place of similar acts passed or amended in 1867, 1869, 1871, 1873, and 1875, the same legislature enacted that:

"3542. The legal voters at any annual meeting shall determine by vote the number of mills on the dollar of the assessed valuation which shall be levied for all purposes—except for the payment of bonded indebtedness and purchase or lease of school house—which number shall not exceed twenty-five (25) mills in any year. The tax so voted shall be reported by the district board to the county clerk, and shall be levied by the county board, and collected as other taxes.

"3543. The legal voters may also, at such meeting, determine the number of mills, not exceeding ten mills on the dollar of assessed valuation, which shall be expended for the building, purchase or lease of school house in said district, when there are no bonds for such purpose, which amount shall be reported, levied and collected as in the preceding section; provided, that the aggregate number of mills voted shall not exceed twenty-five (25) mills."

Cobbey's Consol. St. Neb. 1891.

The claim of the plaintiffs in error is that sections 3542 and 3543, supra, limit the power of school districts to vote taxes to pay judgments under the special law of 1867 to 25 mills on the dollar, annually, for all purposes, and that, as in this case the district voted 25 mills for current expenses and 50 mills to pay the judgment, the levy of the 50 mills was in excess of the limitation, and void. If this contention could have been maintained under the law, it might have constituted a good defense for the school district in the original action for a mandamus against that corporation; but it is difficult to understand how, after that judgment was rendered, it could be any excuse for the failure of the county treasurer or any other county officer to

collect the tax which the district voted, certified, and caused to be levied in compliance with the judgment in that case. The circuit court necessarily heard and decided the very issue which the plaintiffs in error are seeking to retry here before it adjudged that the school district must certify and cause the 50 mills on the dollar to be levied on the property within its boundaries to pay the money judgment. That court could have directed no levy which the district and its officers had not the power to certify and cause to be made, and the extent of that power, under the statutes we have quoted, must have been the very first question that challenged its consideration, and demanded its judicial decision in that case. That its decision was adverse to the view urged upon us by the counsel for the plaintiffs in error is evident from the fact that it directed the school district to cause twice the total amount which they claim it could cause to be levied annually for all purposes to be levied annually for the sole purpose of paying this judgment. It is not material that the school district and its officers failed to interpose the defense now urged in that action. It is a universal rule that in an action between the same parties, or those in privity with them, upon the same claim or demand, a judgment upon the merits is conclusive, not only as to every matter offered, but as to every admissible matter which might have been offered to sustain or defeat the claim or demand. *Board of Com'rs v. Platt*, 79 Fed. 567; *Cromwell v. Sac Co.*, 94 U. S. 351, 352; *Dickson v. Wilkinson*, 3 How. 57, 61; *Dimock v. Copper Co.*, 117 U. S. 559, 565, 6 Sup. Ct. 855. The parties to the original action of mandamus were the defendant in error in this case on one side and school district No. 44 and its officers on the other; and as to them, and as to all parties in privity with them, the question which counsel seek to present in this case is *res adjudicata*. The judgment in that case conclusively estops them all from again presenting this defense, for that judgment has never been reversed, set aside, or modified, and this action is based upon the same claim as was that. How, then, can the plaintiffs in error be heard to retry this question? Their only connection with, or interest in it, or in any question involved in this case, arises by virtue of their privity with the parties to that proceeding. They have no pecuniary interest in any of these questions. They bear no relation to the subject-matter of the controversy, or to the questions involved in it, save that which is established by the law and the statutes of Nebraska, which impose upon them the duty of levying, collecting, and paying over the tax which the school district voted and certified, pursuant to the command of the judgment in that case. Their relation to that judgment of mandamus and to the parties to that action is the same that a sheriff holding an execution bears to the parties to the action in which it was rendered. The county treasurer of Holt county holds the tax list which contains this tax of 50 mills on the dollar upon the property in school district No. 44, and the warrant of the county clerk, and the direction of the statute, commanding him to collect it, and pay it over for the benefit of this insurance company, pursuant to the judgment under which it was levied. *Cobbey's Consol. St. Neb. 1891*, §§ 3981, 3982, 3986, 3988. The plain-

tiffs in that judgment ask him to proceed to collect the money, and pay it over for the benefit of the plaintiff in the money judgment, and the county treasurer and the other plaintiffs in error answer that they will not, because the original judgment of mandamus against the district was for the wrong party. Who made them an appellate tribunal to review the judgments of the courts? Who ever heard that a sheriff could lawfully excuse himself from collecting an execution against the defendant on the ground that the judgment of the court which issued it should have been against the plaintiff? The fact is that under the law and the statutes in Nebraska the plaintiffs in error are the mere hands of the court in this case, the mere ministerial officers upon whom the duty has been imposed of taking the amount owing under the original judgment of mandamus from the taxpayers in school district No. 44, and paying it over to the insurance company to whom it is due. They stand in privity with both the plaintiffs and defendants in the original judgment of mandamus, and their only connection with the subject-matter of that action, or with this case, arises from that privity alone. They are, accordingly, as effectually estopped from questioning the decision of the court in that case, and from retrying the question of the legality of the levy directed by that judgment, and the question of the power of the school district to vote and certify the tax ordered thereby, as is the district itself. Nor was the railroad company which applied for the injunction against the collection of this tax in any better plight. It was a taxpayer in school district No. 44, and, as long as the judgment of mandamus against that district stood unreversed, unmodified, and unimpeached for fraud or collusion, it conclusively estopped every citizen and every taxpayer in it from questioning or retrying the extent of the power of that district to vote and certify the tax ordered by the judgment, or any other question which involved the legality of that tax. In that litigation the school district was the representative of the railroad company and of every other taxpayer in it, and the decision and the judgment, in the absence of fraud or collusion, were as conclusive upon them as upon the corporate entity itself. *Freem. Judgm.* § 178; 2 *Black, Judgm.* § 584; *Clark v. Wolf*, 29 *Iowa*, 197; *Ashton v. City of Rochester* (N. Y. App.) 30 *N. E.* 965; *Railroad Co. v. Baker* (Wyo.) 45 *Pac.* 494, 501.

It is not claimed that the injunction issued by the state court is any defense to this action, and with good reason. The circuit court of the United States had jurisdiction of the parties against whom its judgments were rendered, and of the property which those judgments charged with liens years before the suit in the state court was commenced. When it was commenced, the federal court was proceeding by its judgment of mandamus to collect its judgment for money. The former was, in effect, the writ of execution to enforce satisfaction of the latter, and the plaintiffs in error were, as we have seen, the ministerial officers charged under the law and the statutes with the duty of executing this writ. The tax of 50 mills on the dollar to pay the judgment had been voted, certified, levied, and placed upon the tax list of the county, pursuant to the command of the judgment of mandamus in that court, and the county clerk had delivered to the

county treasurer the tax list and his warrant, commanding him to collect the taxes upon it, and the statutes of Nebraska made it his duty to do so. Then it was that the railroad company and the plaintiffs in error succeeded in obtaining an injunction against the latter, forbidding them to collect the tax levied to pay the judgment by presenting to the state court a complaint without an answer, which failed to disclose the judgment of mandamus, under which the tax had been levied. No such injunction would have been granted by that court if this controlling fact had been disclosed to it. Moreover, any injunction which it could grant would, upon well-settled principles, have been without effect to stay the proceedings under the judgments of the national court. A state court cannot, by injunction, prevent a circuit court of the United States from enforcing its judgment by a mandamus to compel the levy and collection of a tax to pay it. *Riggs v. Johnson Co.*, 6 Wall. 166; *Supervisors v. Durant*, 9 Wall. 415; *Hawley v. Fairbanks*, 108 U. S. 543, 2 Sup. Ct. 846. The injunction was, therefore, ineffectual. The railroad company was estopped from questioning the legality of the tax, and had no ground for instituting the suit in which the injunction was issued, and the plaintiffs in error had no excuse for failing to collect the tax, which had been levied in compliance with the judgment of mandamus against the school district. It was doubtless to prevent such causeless delays and evasions of duty as the record in this case discloses that the legislature of Nebraska provided, in terms, that any corporate officer whose duty it was to levy and collect the tax necessary to pay off such a judgment as that here in question should become personally liable to pay the judgment himself, if he neglected his duty (*Cobbeys's Consol. St. Neb.* 1891, § 4116), and it is by no means certain that one who conspires to prevent such officers from discharging this duty does not thereby incur the same liability.

It is not unworthy of notice in this connection that the question which the plaintiffs in error have vainly sought to raise in this action appears to have been settled against them on the merits by the highest judicial tribunal of the state of Nebraska, whose decision as to the extent of the powers of the municipal and quasi municipal corporations of that state, under its statutes, is controlling in the national courts. *Madden v. Lancaster Co.*, 27 U. S. App. 528, 12 C. C. A. 566, and 65 Fed. 188. In *Jackson v. Washington Co.*, 34 Neb. 680, 683, 686, 52 N. W. 169, 171, the contention was that the act to provide for the payment of judgments against municipal corporations, which took effect February 18, 1867, was repealed or modified by section 77 of the general revenue law of 1879, which prescribed and limited the amount of taxes that could be levied for county purposes. But the court held otherwise, and said:

"We will assume, as do counsel, that in 1879 the legislature passed a general law for the levy and collection of taxes without expressly repealing the act making provision for collecting revenue to satisfy judgments by means of a special levy. The rule is that repeals by implication are not favored, and, when acts upon the same subject can be harmonized by a fair and liberal construction, it will be done. *Sedg. Const.* 98; *Lawson v. Gibson*, 18 Neb. 137, 24 N. W. 447; *State v. Babcock*, 21 Neb. 599, 33 N. W. 247. And this rule has especial application to cases where the subsequent statute treats of a sub-

ject in general terms, but not expressly contradicting the more particular and positive provision with reference to the same subject in a prior act. *State v. Village of Perrysburg*, 14 Ohio St. 486; *Brown v. County Com'rs*, 21 Pa. St. 43. In *State v. Dwyer*, 42 N. J. Law, 327, the court says: 'Where a general law and a special statute come in conflict, the general law yields to the special, without regard to priority of date, and a special law will not be repealed by a general statute unless by express words or necessary implications.' * * * There being no necessary conflict between the statutes under consideration, it follows that the appellants did not exceed their authority in making the special levy for the purpose of satisfying the judgment against the county."

The judgment below must be affirmed, with costs, and it is so ordered.

E. H. ROLLINS & SONS v. BOARD OF COM'RS OF GUNNISON COUNTY

(Circuit Court of Appeals, Eighth Circuit. May 3, 1897.)

No. 856.

1. REVIEW ON ERROR—PEREMPTORY INSTRUCTIONS—BILL OF EXCEPTIONS.

When a peremptory instruction is given in favor of either party, the only question with respect to the charge which is open for consideration by an appellate tribunal, though the charge discusses the case at length, is whether the direction to find for one party or the other is right, when considered in the light of the pleadings and all the evidence; and, if the bill of exceptions fails to disclose that it contains all the evidence, that question cannot be noticed.

2. COUNTY BONDS—LIMIT OF INDEBTEDNESS—BONA FIDE PURCHASERS—COUNTY RECORDS.

The county of G. issued certain funding bonds, which bore upon their face recitals that they were issued to fund valid floating indebtedness, under a certain act of the legislature, in that behalf enacted, that all the requirements of law had been fully complied with in the issuing of the bonds, and that the total amount of the issue did not exceed the limit prescribed by the constitution. The statute under which the bonds were issued required the county commissioners to determine the amount of the county indebtedness at the time of the institution of proceedings for issuing the bonds, and to place a certificate thereof on record. Such certificate was duly recorded in this case, but it did not disclose that the constitutional limit of indebtedness had been passed, or that the bonds were invalid. Another law of the state required statements of the aggregate county indebtedness to be made and published every six months. *Held*, (1) that a purchaser of the bonds, in view of the recitals, was not bound to examine the semiannual statements; (2) that, if the statement of the county debt which was entered of record when the bonds were issued did not show that the bonds were invalid, a bona fide purchaser was entitled to assume that they were valid; (3) that bonds issued to fund "valid floating indebtedness" do not create a new debt, but simply change the form of an existing indebtedness; and (4) that said semiannual statements and evidence, showing the time when the floating debt was contracted, were inadmissible, as against such a purchaser, for the purpose of showing that the bonds did exceed the constitutional limit.

3. SAME.

A purchaser of negotiable securities from a bona fide holder thereof is entitled to all the rights of such holder, though himself having notice of defenses.

In Error to the Circuit Court of the United States for the District of Colorado.

This was a suit which was brought by E. H. Rollins & Sons, a corporation of New Hampshire, the plaintiff in error, against the board of county commissioners of the county of Gunnison, state of Colorado, the defendant in error. The action was founded on coupons attached to 10 county bonds, each of which was in the following form:

"No. ———. Series A. \$1,000.

"United States of America.

"County of Gunnison, State of Colorado.

"Funding Bond.

"The county of Gunnison, in the state of Colorado, acknowledges itself indebted and promises to pay to ——— or bearer one thousand dollars, lawful money of the United States, for value received, redeemable at the pleasure of said county after ten years, and absolutely due and payable twenty years from the date hereof at the office of the treasurer of said county in the city of Gunnison, with interest thereon at the rate of eight per cent. per annum, payable semiannually, on the first day of March and the first day of September in each year, at the office of the county treasurer aforesaid, or at the Chase National Bank in the city of New York, at the option of the holder, upon the presentation and surrender of the annexed coupons as they severally become due. This bond is issued by the board of county commissioners of said Gunnison county in exchange, at par, for valid floating indebtedness of the said county, outstanding prior to September 2, 1882, under and by virtue of, and in full conformity with the provisions of, an act of the general assembly of the state of Colorado entitled 'An act to enable the several counties of the state to fund their floating indebtedness,' approved February 21, 1881; and it is hereby certified that all the requirements of law have been fully complied with by the proper officers in the issuing of this bond. It is further certified that the total amount of this issue does not exceed the limit prescribed by the constitution of the state of Colorado, and that this issue of bonds has been authorized by a vote of the majority of the duly-qualified electors of the said county of Gunnison voting on the question at a general election duly held in said county on the 7th day of November, A. D. 1882. The bonds of this issue are comprised in three series, designated A, B, and C, respectively; the bonds of series A being for the sum of one thousand dollars each, those of series B for the sum of five hundred dollars each, and those of series C for the sum of one hundred dollars each. This bond is one of series A. The faith and credit of the county of Gunnison are hereby pledged for the punctual payment of the principal and interest of this bond.

"In testimony whereof, the board of county commissioners of said Gunnison county have caused this bond to be signed by their chairman, countersigned by the county treasurer, and attested by the county clerk, under the seal of the county, this first day of December, A. D. 1882."

The coupons attached to said bonds were in the following form:

"\$40.00. County of Gunnison. \$40.00.

"In the State of Colorado.

"Will pay the bearer forty dollars at the office of the county treasurer in the city of Gunnison, or at the Chase National Bank in the city of New York, on the first day of March, 188—, being six months' interest on funding bond.

"No. ———. Series A.

"County Treasurer."

The answer to the complaint, which was very lengthy, pleaded, in substance, that the bonds to which the coupons in suit were attached had been issued in an attempt to fund a pretended floating indebtedness of the county of Gunnison, which was evidenced by county warrants; that said floating indebtedness was contracted under, and subject to the provisions of, section 6, art. 11, of the constitution of Colorado (Laws Colo. 1877, p. 62); that when said indebtedness was contracted and said warrants were issued the county of Gunnison already had an outstanding indebtedness exceeding \$6 per \$1,000 of the assessed

valuation of the property in the county, exclusive of debts contracted before the adoption of the constitution, and exclusive of debts contracted for erecting public buildings and in making and repairing roads and bridges; that the indebtedness to fund which said bonds had been issued when such indebtedness was created, or pretended to be created, was in excess of the amount of lawful indebtedness which could be created by the county of Gunnison under the provisions of section 6, art. 11, of the constitution of the state; and that the bonds issued to fund warrants representing such illegal indebtedness were themselves wholly illegal and void.

The act of February 21, 1881, referred to in the foregoing bond, contained, among others, the following provision: "Section 1. It shall be the duty of the county commissioners of any county having a floating indebtedness exceeding ten thousand dollars, upon the petition of fifty of the electors of said counties [county] who shall have paid taxes upon property assessed to them in said county in the preceding year, to publish for the period of thirty days in a newspaper published within said county, a notice requesting the holders of the warrants of such county to submit in writing to the board of county commissioners, within thirty days from the date of the first publication of such notice, a statement of the amount of the warrants of such county which they will exchange at par, and accrued interest, for the bonds of such county, to be issued under the provisions of this act, taking such bonds at par. It shall be the duty of such board of county commissioners at the next general election occurring after the expiration of thirty days from the date of the first publication of the notice aforementioned upon the petition of fifty of the electors of such county who shall have paid taxes upon property assessed to them in said county in the preceding year, to submit to the vote of the qualified electors of such county who shall have paid taxes on property assessed to them in said county in the preceding year, the question whether the board of county commissioners shall issue bonds of such county under the provisions of this act, in exchange at par for the warrants of such county, issued prior to the date of the first publication of the aforesaid notice; or they may submit such question at a special election, which they are hereby empowered to call for that purpose at any time after the expiration of thirty days from the date of the first publication of the notice aforementioned, on the petition of fifty qualified electors as aforesaid; and they shall publish for the period of at least thirty days immediately preceding such general or special election, in some newspaper published within such county, a notice that such question will be submitted to the duly qualified electors as aforesaid, at such election. The county treasurer of such county shall make out and cause to be delivered to the judges of election in each election precinct in the county, prior to the said election, a certified list of the taxpayers in such county who shall have paid taxes upon property assessed to them in such county in the preceding year; and no person shall vote upon the question of the funding of the county indebtedness, unless his name shall appear upon such list, nor unless he shall have paid all county taxes assessed against him in such county in the preceding year. If a majority of the votes lawfully cast upon the question of such funding of the floating county indebtedness, shall be for the funding of such indebtedness, the board of county commissioners may issue to any person or corporation holding any county warrant or warrants issued prior to the date of the first publication of the aforementioned notice, coupon bonds of such county in exchange therefor at par. No bonds shall be issued of less denomination than one hundred dollars, and if issued for a greater amount, then for some multiple of that sum, and the rate of interest shall not exceed eight per cent. per annum. The interest to be paid semiannually at the office of the county treasurer, or in the city of New York, at the option of the holders thereof. Such bonds to be payable at the pleasure of the county after ten years from the date of their issuance, but absolutely due and payable twenty years after date of issue. The whole amount of bonds issued under this act shall not exceed the sum of the county indebtedness at the date of the first publication of the aforementioned notice, and the amount shall be determined by the county commissioners, and a certificate made of the same and made a part of the records of the county; and any bond issued in excess of said sum shall be null and void; and all bonds issued under the provisions of this act shall be registered in the office of the state auditor, to whom a fee of ten cents

shall be paid for recording each bond." Laws Colo. 1881, pp. 85-87. Section 6, art. 11, of the constitution of Colorado, referred to in the defendant's answer, is as follows: "No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges; and such indebtedness contracted in any one year shall not exceed the rates upon taxable property in such county, following to-wit: Counties in which the assessed valuation of taxable property shall exceed five millions of dollars, one dollar and fifty cents on each thousand dollars thereof. Counties in which such valuation shall be less than five millions of dollars, three dollars on each thousand dollars thereof. And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited, unless when in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county, as in the year last preceding such election, shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned; provided that this section shall not apply to counties having a valuation of less than one million of dollars." Laws Colo. 1877, p. 62.

The case was tried to a jury, and at the conclusion of the trial the court directed a verdict for the defendant. To reverse the judgment entered on such verdict, the plaintiff below sued out a writ of error.

H. B. Johnson and E. F. Richardson (Willard Teller was with them on the brief), for plaintiff in error.

C. S. Thomas and T. C. Brown (J. R. Hinkle, W. H. Bryant, and H. H. Lee were with them on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Inasmuch as the bill of exceptions fails to show that it contains all the evidence which was produced at the trial of the case, the point is well made, in behalf of the defendant, that the action of the lower court in directing a verdict for the defendant cannot be reviewed. Nor can any of the exceptions which were taken to the charge be reviewed, for, while the charge was somewhat lengthy, yet, as it concluded with a peremptory direction to the jury to return a verdict for the defendant, it must be treated by this court precisely as it would have been had the trial court, without any explanation of its views, simply directed a finding for the defendant. When a peremptory instruction is given, either in favor of the plaintiff or the defendant, the only question with respect to the charge which is open for consideration by an appellate tribunal is whether the direction to find for the one party or the other, when considered in the light of the pleadings and all the evidence, was right; and, if the bill of exceptions fails to disclose that it contains all the evidence, that question, for obvious reasons, cannot be noticed. *Taylor-Craig Corp. v. Hage*, 32 U. S. App. 548, 16 C. C. A. 339, and 69 Fed. 581; *Association v. Robinson*, 36 U. S. App. 690, 20 C. C. A. 262, and 74 Fed. 10.

It results from this view that the only question which can be considered on the present record is whether errors were committed in the

admission or exclusion of testimony. The first error of this sort which is assigned and argued consists in the action of the trial court in admitting in evidence the assessment lists of the county of Gunnison for the years 1880, 1881, and 1882, which were offered by the defendant. An examination of the record shows, however, that, while these assessment lists were objected to generally for immateriality when they were offered, yet no exception was saved when they were admitted. For this reason the objection to the assessment lists was waived, and cannot be noticed.

In addition to the assessment lists last mentioned, the defendant county also offered in evidence three statements purporting to be financial statements of Gunnison county, Colo., for the six months ending, respectively, on December 31, 1881, June 30, 1882, and December 30, 1882. To each of the aforesaid statements was appended a certificate of the board of county commissioners to the effect that it was a true, full, and correct statement of the financial condition of Gunnison county for the period which the statement purported to cover. Each statement, when offered in evidence, also bore a certificate, made by the county clerk of Gunnison county under his hand and seal, to the effect that the aforesaid statement was a full, true, and correct copy of the financial statement of Gunnison county for the period which it purported to cover, as the same appeared "in the records of Gunnison county, in Book of Statements," at certain designated pages. These statements showed the total indebtedness of Gunnison county, consisting of bonds and warrants, to have been as follows: On December 31, 1881, \$77,559.01; on June 30, 1882, \$118,691.49; and on December 30, 1882, \$284,763.05. They also showed on what account debts had been incurred by the county during the period covered thereby, and the names of many persons and firms in whose favor warrants had been drawn. The financial statements in question seem to have been prepared by the board of county commissioners for the purpose of complying with section 30 of an act passed by the legislature of the state of Colorado on March 24, 1877, entitled "An act concerning counties, county officers and county government, and repealing laws on these subjects." Laws Colo. 1877, pp. 218, 237. The thirtieth section of said act, in substance, required the various boards of county commissioners throughout the state to make semi-annual financial statements at their regular sessions in January and July of each year, showing, among other things, the total indebtedness of their respective counties at such periods, of what the indebtedness consisted, and the rate of interest paid thereon, which statements were required to be entered of record by the clerk of the county board in a book kept for that purpose, and to be published in some weekly paper, or to be posted in three conspicuous places in the county, if no newspaper was published therein. Another document which was offered in evidence by the defendant was a duly-certified copy of the record of proceedings of the board of county commissioners of Gunnison county, which had been taken under the act of February 21, 1881, quoted in the statement, by virtue of which proceedings certain floating indebtedness of the county had been funded, and the bonds in controversy had been issued. These proceedings contained, among other things,

a certificate made by the board of county commissioners showing that the floating indebtedness of the county of Gunnison was \$174,115.29 on August 21, 1882, when the first publication was made of the notice to warrant holders which was required to be given by the provisions of said act. The plaintiff objected to the admission of the financial statements and the record of the proceedings of the board, but they were admitted in evidence over such objection, and an exception was duly saved to their admission. This exception presents the question of chief importance which arises upon the record. We are constrained to hold that the financial statements to which reference has been made were not admissible in evidence against an innocent purchaser for value, before maturity, of funding bonds containing such recitals as those contained in the bonds in controversy. The funding act of February 21, 1881, made it the duty of the board of county commissioners to determine the amount of the county indebtedness, and make a certificate thereof, and spread the same upon the records of the county, as one of the initial steps towards an issuance of funding bonds. The record discloses that such a determination was made and duly entered of record before the bonds in controversy were issued; and, such determination having been made by the board of county commissioners in obedience to the mandate of the statute, it is certainly entitled to as much credit as the semiannual statements made by the same board in pursuance of the provisions of the act of March 24, 1877. Indeed, when it is borne in mind that the board was required to determine the true amount of the county debt, as of the date of the first publication of the notice to warrant holders, if the county proposed to issue funding bonds, and when it is also borne in mind that the indebtedness of the county was liable to great fluctuations between the dates of the several semiannual statements, it is fair to presume that the statement of the total county debt for which provision was made in the funding act was the only authentic statement of such indebtedness which the legislature intended should be consulted, either by warrant holders, or other persons who might be concerned in the issuance of funding bonds. In the case of *Sutliff v. Commissioners*, 147 U. S. 230, 13 Sup. Ct. 318, it was held that a purchaser of bonds issued by a county of Colorado under section 21 of the act of March 24, 1877, *supra*, was charged with the duty of examining statements of the financial condition of the county which had been made by the board of county commissioners pursuant to section 30 of the same act, notwithstanding a recital contained in the bonds "that all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond." But the two cases—the one at bar and that case—are not parallel, in this: that the bonds involved in the present suit were not issued under the act of March 24, 1877, but under an act which, in the very first section conferring the power to issue funding bonds, also made provision for a judicial determination of the amount of the county indebtedness, before such bonds were issued, and also required such determination to be made as of the date of the proposed issue. We do not understand the decision in the *Sutliff Case* to go to the extent of holding that a bond purchaser must, at his peril, examine every record of

county indebtedness which has been made by county officials, pursuant to the provisions of a statute, with a view of satisfying himself that the constitutional limit of indebtedness has not been exceeded. Even if such is the rule where, in cases like the Sutliff Case, the bonds do not contain an express recital that the issue does not exceed the constitutional limit, yet it ought not to be applied to a case like the one in hand, where the bonds do contain a certificate "that the total amount of this issue does not exceed the limit prescribed by the constitution of the state of Colorado." When, as in the present case, it appears that there are two acts, passed at different times, each making provision for an official statement of the county indebtedness to be made at different times, one of which statements is required to be made with express reference to an issue of bonds, and as one of the preliminary steps to that end, we think it is reasonable to conclude that a purchaser of the bonds is, at most, only charged with the duty of examining the latter statement. If a discrepancy exists between the two statements, it is clear, we think, that that statement should govern and control which was made with express reference to an issue of bonds, and presumably for the information of the bondholder, and that the bondholder should only be charged with the duty of examining the statement on which he has a right to rely.

It is contended on the part of the plaintiff that a purchaser of the funding bonds in controversy, in view of the recitals therein contained, was not even chargeable with notice of the certificate made by the board of county commissioners, showing the county indebtedness on August 21, 1882, to have been \$174,115.29; but we have not found it necessary to consider that proposition, and shall express no opinion thereon. It may be conceded, though not decided, that a purchaser of the bonds in question was affected with notice of all the facts disclosed by the record of the proceedings of the board which culminated in the issuance of the bonds; but, notwithstanding this concession, we are of opinion that the record made by the board of county commissioners disclosed no facts rendering the bonds void in the hands of an innocent purchaser for value. These bonds contained a recital, heretofore quoted, to the effect that the amount issued did not exceed the constitutional limit of indebtedness; and the certificate made by the board, showing the total county indebtedness, as of August 21, 1882, did not pretend to state when that indebtedness was created. Moreover, the bonds on their face purported to be funding bonds issued "for valid floating indebtedness," which would not create a new debt, assuming the warrants for which they were issued to have been valid, but would simply change the form of an existing indebtedness. In *re State Bonds (Me.)* 18 Atl. 291; *Powell v. City of Madison*, 107 Ind. 110, 8 N. E. 31; *City of Los Angeles v. Teed* (Cal.) 44 Pac. 580; *Commissioners of Marion County v. Commissioners of Harvey County*, 26 Kan. 181, 201; *Hotchkiss v. Marion*, 12 Mont. 218, 29 Pac. 821; *Miller v. School Dist. No. 3 (Wyo.)* 39 Pac. 879. A purchaser of the bonds, therefore, who examined one of them, or the whole issue, for that matter, in the light of the constitutional provision and the certificate made by the board, would have been unable to say that the aforesaid recital was false, and that the bonds were void, for

the reason that the entire debt certified to by the board might have been created before the assessed value of county property reached the \$1,000,000 mark, until which time there were no restrictions upon the power of the county to contract debts. If, upon any theory, the bonds might be valid notwithstanding the fact that the county debt was \$174,115.29 on August 21, 1882, a purchaser of the bonds was entitled to presume that such was the fact, that the recitals were true, and that the constitution had not been violated. *National Life Ins. Co. v. Board of Education*, 27 U. S. App. 244, 10 C. C. A. 637, and 62 Fed. 778, and cases there cited; *Chaffee Co. v. Potter*, 142 U. S. 355, 363, 364, 12 Sup. Ct. 216; *Evansville v. Dennett*, 161 U. S. 434, 443, 16 Sup. Ct. 613. It results from this view of the case that, as against a bona fide holder of the funding bonds in controversy, the certified copy of the proceedings of the board of county commissioners, which was admitted in evidence, was at least immaterial testimony.

Another item of proof which was admitted by the trial court over an objection duly made by the plaintiff consisted of three lists of county warrants which had been surrendered to the county by the owners and holders thereof when the ten funding bonds which are involved in the present suit were issued. With reference to these lists, it is sufficient to say that on three occasions a large number of warrants appear to have been surrendered to the county in exchange for funding bonds, and that the bonds in suit, being Nos. 9 to 13, both inclusive, 63 to 66, both inclusive, and No. 98, formed a part of the three issues of bonds which had thus been put in circulation. It did not appear, however, that any particular warrants had been exchanged for any particular bond, but that a large number of warrants—in one instance, warrants amounting to \$49,896—had been exchanged for an equivalent sum in bonds. This testimony appears to have been offered for the purpose of showing, by the production of the warrants and an examination of their dates, that the indebtedness represented by the funding bonds in suit had been created after the constitutional inhibition against contracting debts beyond a certain amount had become applicable to Gunnison county, by reason of its assessed valuation having reached an amount exceeding \$1,000,000. That limit appears to have been attained for the first time by the assessment made for the year 1881. It follows from the views which we have heretofore expressed that the lists of warrants in question were inadmissible, against a bona fide purchaser of bonds, to contradict and overcome the recitals which the bonds in controversy contain. A purchaser of such securities for value, in the open market, can neither be expected nor required to examine the warrants issued for the original indebtedness, with a view of ascertaining when the debt was contracted, especially when the bonds contain such explicit representations as the bonds in suit contain. No case, we believe, has ever imposed a burden of that kind upon the bondholder.

We have thus far considered the admissibility of the foregoing testimony from the standpoint occupied by an innocent purchaser of the bonds for value, and before maturity; but, as the question is raised whether the plaintiff corporation is armed with the rights of a bona fide holder as to any of the bonds in suit, it becomes necessary to

notice that contention. The testimony contained in the present record shows, we think, without contradiction, that the plaintiff was a bona fide holder, when the suit was brought, of at least five of the bonds which are involved in the present controversy, because it holds the title of Joseph Stanley, who was himself an innocent purchaser of said bonds, before maturity, for the price of 98 cents on the dollar. The rights which Stanley acquired by virtue of such purchase inure to the plaintiff, by virtue of its purchase of the bonds from Stanley in June, 1892, and this without reference to any knowledge which the plaintiff may have had at the latter date affecting the validity of the securities. A bona fide holder of commercial paper is entitled to transfer to a third party all the rights with which he is vested, and the title so acquired by his indorsee cannot be affected by proof that the indorsee was acquainted with the defenses existing against the paper. *Commissioners v. Clark*, 94 U. S. 278, 286; *Hill v. Scotland Co.*, 34 Fed. 208; *Daniel*, Neg. Inst. § 803, and cases there cited. The rights of the plaintiff with respect to the remaining five bonds, which it also purchased from Stanley, may be different, as Stanley appears to have received the remaining five bonds direct from the county of Gunnison, in exchange for warrants which he owned and held, instead of purchasing the bonds in the open market. Whether the plaintiff acquired the last-mentioned bonds under circumstances which constitute it a bona fide holder is a question which may require the consideration of a jury, and we shall not undertake to decide it on the facts preserved in the present record. The testimony above considered appears to have been admitted by the trial court on the assumption that it was competent, even as against a bona fide purchaser of funding bonds, for the purpose of impeaching the bonds; and, as we cannot concur in that view, the judgment of the circuit court must be reversed, and the cause remanded for a new trial. It is so ordered.

WEAVER v. NORWAY TACK CO.

(Circuit Court, E. D. Pennsylvania. September 15, 1896.)

1. IMPLIED CONTRACTS—PATENTS—PURCHASER FROM LICENSEE.

Where one purchases machines from a licensee of a patent and proceeds to use the same with knowledge of the facts and after notice from the owner of the patent that if he does so he will be held liable to make compensation for such use, an action may be brought by the owner of the patent upon an implied contract to recover such compensation.

2. FEDERAL COURTS—JURISDICTIONAL AMOUNT.

Where an action is brought upon a single agreement based upon the use of three distinct patents, it is unimportant for the purpose of giving jurisdiction of the suit that the sum claimed to be due on any one of the patents does not exceed \$2,000, provided that the total sum claimed upon all three patents does.

This was an action of assumpsit in which the plaintiff's statement of claim disclosed the following state of facts:

The plaintiff being the owner of three patent rights for improvements in the manufacture and bluing of tacks entered into an agreement with the Pennsylvania Tack Works, whereby he sold to that company the right to employ

the devices and processes specified in his patents in consideration of the payment to him of a certain yearly royalty for the use of each patent. This agreement was carried out until the dissolution of the Pennsylvania Tack Works in 1886. In 1891 the defendant company came into possession of the former plant of the Pennsylvania Tack Works, which at that time contained various devices, built in accordance with the specifications of the three patents belonging to the plaintiff. The plaintiff informed the defendant of his rights concerning the same and gave the defendant notice that if it employed these devices the plaintiff would consider that it accepted the same terms as those which had existed between him and the Pennsylvania Tack Works prior to its dissolution. The defendant continued to employ the devices and processes referred to, and the plaintiff brought suit to recover \$3,218.02, being a sum equal to the amount of the royalties which the plaintiff would have been entitled to receive for the use of the three patents under the agreement previously existing between him and the Pennsylvania Tack Works.

To this statement a demurrer was taken by the defendant on the ground that:

(1) The statement did not aver that there was any contract actually entered into between the parties nor any facts from which such a contract might be implied; (2) it did not disclose any facts tending to show any liability on the part of the defendant for the alleged contract or engagement of the Pennsylvania Tack Works; and (3) since it appeared from the statement that each of the three distinct causes of action involved an amount of less than \$2,000 in value this court had no jurisdiction of the subject-matter.

Ingham & Newitt, for plaintiff.

Hector T. Fenton, for defendant.

BUTLER, District Judge. As the court understands the plaintiff's statement the demurrer cannot be sustained. The suit is founded on an alleged implied contract for the use of several machines covered by distinct patents. The defendant was not a licensee; but having purchased the machines from one who was, he proceeded to use them with knowledge of the facts and after expressed notice, that if he did so he would be held liable to make compensation for such use. The reference in the statement to contracts with the former licensee and to the notice, is made by way of inducement, and to strengthen, the implication in favor of the contract sued upon. This latter contract is similar in all respects to such as arise where one uses a patented machine without authority and with knowledge of the facts. I do not think the statement is liable to any other construction than that just stated. That the plaintiff so understands it, is made plain by the following language taken from his brief:

"The contracts between the plaintiff and the Pennsylvania Tack Works are not the foundation of the claim against the defendant but are set up as inducement only."

In the defendant's brief it is said:

"If the defendant used the machine and if the patents are valid the plaintiff may have a right of action for the infringement in which the measure of damages would perhaps be the license price paid by the Pennsylvania Tack Works or other licensees if there are any, but it is obvious on reading the statement that no facts are alleged from which a contract can be implied."

We think the cause of action set out is substantially the one just described and that all facts necessary to justify an implication of a contract to pay for the use are sufficiently averred. The claim is not

upon several contracts but a single one based upon the circumstances attending the use of the several machines. Under the laws of this state, and the practice here, it would probably be unimportant if the suit embraced several of such contracts; and if in such case the sum claimed aggregated \$2,000 the defendant could not object to the jurisdiction selected.

LAUGHLIN v. ATLANTIC CITY R. CO. et al.

(Circuit Court, E. D. Pennsylvania. December 29, 1896.)

JOINDER OF ACTIONS—JOINT NEGLIGENCE—RAILROADS.

An action will lie against two railroad companies jointly for an injury to a passenger in a train of one of them when occasioned by a collision of that train with a train of the other.

T. J. Shoyer, for plaintiff.

David W. Sellers, for defendant West Jersey & S. R. Co.

Gavin W. Hart, for defendant Atlantic City R. Co.

DALLAS, Circuit Judge. The defendant the West Jersey & Seashore Railroad Company demurs to the plaintiff's statement of claim, and assigns for cause "that it does not appear therefrom that there was any joint duty of the defendants to the plaintiff." The statement of claim is as follows:

"The above-named plaintiff, Harry Laughlin, a citizen of the state of Pennsylvania, seeks to recover from the above-named defendants, the Atlantic City Railroad Company and the West Jersey & Seashore Railroad Company, the sum of \$25,000 upon the cause of action of which the following is a statement: The above-named defendant the Atlantic City Railroad Company is a corporation of the state of New Jersey, doing business by carrying passengers for hire in cars drawn by locomotives propelled by steam through the state of New Jersey. The West Jersey & Seashore Railroad Company is also a corporation of the state of New Jersey, engaged in the same business and conducted in the same manner, and in said state. That in carrying on their business as aforesaid both of the above-named defendant companies ran and operated trains of cars from Camden to Atlantic City, in the state of New Jersey. It was and became the duty of both of the said defendants, in the operation and conduct of their said trains aforesaid, through their agents and servants, that passengers in their respective trains should suffer no injury in the trains of said defendant companies. That, notwithstanding their duty in this behalf, on the 30th day of July, A. D. 1896, the said defendant companies, through their agents and servants, ran and conducted their trains in a negligent and careless manner, as follows, to wit: On the day and year aforesaid the above-named plaintiff, Harry Laughlin, was lawfully riding on the train operated and controlled by the defendant company the Atlantic City Railroad Company, and rode from Camden to Atlantic City, which was known as the '5:40 Express from Philadelphia.' That when said train arrived, a little before 7 o'clock, at the 'Meadows,' adjacent to Atlantic City, where the tracks of the West Jersey & Seashore Railroad Company intersect the tracks of the Atlantic City Railroad Company, the train of the said Atlantic City Railroad Company, through its agents and servants, to wit, the engineer, ran into, against, and upon a certain train operated by the West Jersey & Seashore Railroad Company, the other of said defendants. That on the day and year aforesaid, at the place aforesaid, the defendant company, the West Jersey & Seashore Railroad Company, through its agents and servants, ran into and against the train of the Atlantic City Railroad Company, in which this plaintiff was riding. That both of said trains were running at an unlawful rate of speed, and un-

lawfully attempted to cross the tracks of the other defendant company, at the intersection aforesaid, without giving to the other the proper notice and warning, which it was their respective duties to do. That by virtue of the terrific force and violence of said collision this plaintiff was thrown violently against the back of the seat of the car in which he was riding, whereby he suffered injury to his spine and other parts of his body, and has suffered great pain and agony; as a result therefrom has been unable to follow his usual occupation, and has been permanently disabled, and has suffered damages in the sum of \$25,000. Wherefore he brings this suit."

The demurrer cannot be sustained. "Where more than one person is concerned in the commission of a wrong, the person wronged has his remedy against all, or any one or more, of them, at his choice." See Webb, Pol. Torts, p. 230, and note, in which the American authorities are cited. The learned counsel of the demurrant has referred to three Pennsylvania cases, which might lend some support to his position, but for the fact that, in a more recent one, in which the material facts are quite analogous to those here presented, the supreme court of that state seems to have entertained no doubt that an action will lie against two companies jointly for injury to a passenger in a car of one of them, when occasioned by a collision of that car with a train of the other of them. *Downey v. Railroad*, 161 Pa. St. 588, 29 Atl. 126; *Colegrove v. Railroad Co.*, 20 N. Y. 492; *The Atlas*, 93 U. S. 302-315. The doctrine of *Thorogood v. Bryan*, 8 O. B. 115, as to the identification of the passenger with his carrier, was long since exploded in England, and has been repeatedly repudiated by our courts.

The demurrer is overruled, with leave to plead in eight days.

ST. ONGE v. WESTCHESTER FIRE INS. CO.

(Circuit Court, D. Rhode Island. May 5, 1897.)

1. FIRE INSURANCE—WAIVER OF FORFEITURE—ESTOPPEL.

A prior forfeiture of a fire insurance policy is not waived where an agent of the insurer, after a loss, indorses on the policy an agreement assuming liability for future losses, since such indorsement does not induce any action of the policy holder affecting his rights, and therefore cannot operate by way of estoppel.

2. PLEADING—ARGUMENTATIVE DENIAL.

An argumentative denial of the allegation of a rejoinder amounts to a simple traverse only, and must conclude as such.

Dexter B. Potter, for plaintiff.

Comstock & Gardner, for defendant.

BROWN, District Judge. This is an action on a fire insurance policy issued by the defendant to the plaintiff September 3, 1893, upon a stock of merchandise and fixtures in plaintiff's shop, partially destroyed by fire on June 5, 1894. A decision upon the demurrers now before the court requires the assumption of the following state of facts: Before the date of the loss, the plaintiff, to whom the policy was originally issued, with the consent of the company, assigned the policy to one Bouvier, together with the property covered thereby. Prior to the loss, Bouvier, without the knowl-

edge or assent of the defendant, reassigned the policy to the plaintiff, and reconveyed to him the insured property. The policy stipulated that, unless otherwise provided by agreement indorsed thereon or added thereto, it should be void if any change, other than by the death of the insured, took place in the interest, title, or possession of the insured property. Subsequently, on June 5, 1894, the loss occurred, and plaintiff gave to the company the notice required by the policy. The defendant refused or neglected to make payment to the plaintiff. On July 10, 1894, more than a month after the loss, and at least 10 days after the plaintiff had made proof of claim, one W. A. Lester, an agent of the defendant corporation, made the following indorsement upon the policy:

"Providence, R. I., July 10, 1894.

"It is understood and agreed that on and after date this policy will cover the within-described property while contained in first and second stories of within-described building. Attached to and forming a part of policy No. 5,822.

"Westchester Fire Insurance Co.,

"W. A. Lester, Agent."

By his fourth replication, the plaintiff, though confessing the unauthorized transfer to Bouvier, and the conditions of the policy making such transfer a forfeiture, claims that by the above indorsement the company acknowledged said policy to be in force between the company and himself. In other words, that the indorsement not only waived the forfeiture, but transferred the title from Bouvier to the plaintiff. Even were the indorsement a waiver of a prior forfeiture, the plaintiff, upon the state of facts set up in his replication, can have no cause of action, since he has averred the existence of a title in Bouvier; and the indorsement in no way refers or relates to a change of title. The waiver, if one were made, was merely a confirmation of Bouvier's title, and not a transfer of it. But upon examining the terms of the indorsement it is manifest that it does not relate to a change, past or future, in the interest, title, or possession of the insured property, and therefore that it is not such an agreement as by the terms of the policy is necessary to obviate a forfeiture. Neither can it be considered in the light of an independent agreement inconsistent with a denial of liability for a prior loss. By the transfer from Bouvier the liability of the company at once ceased, and did not exist at the date of loss. The company was under no liability whatever until July 10, 1894, when, by the indorsement, it assumed a liability by express language made entirely prospective. There is no inconsistency between a denial of the prior liability and this agreement to be liable in future. Neither from the terms nor from the substance of this agreement can an estoppel or waiver be inferred. The loss had already occurred, and the indorsement induced no action of the plaintiff at all affecting his prior rights, if any, to compensation for that loss. In *Insurance Co. v. Wolff*, 95 U. S. 326, Mr. Justice Field says:

"The doctrine of waiver, as asserted against insurance companies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon

it; and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow this conduct and enforce the conditions."

The decision that the indorsement effected no waiver or estoppel of course disposes of the subordinate question of the authority of Lester to make a waiver.

The fifth rejoinder alleges that Lester had no authority to make the indorsement. The surrejoinder avers that Lester was a general agent, and therefore had authority, and concludes with a verification. This is merely an argumentative denial of the allegation of the rejoinder, and, amounting merely to a simple traverse, should have concluded to the country.

The defendant's demurrers to the fourth replication and to the last surrejoinder must therefore be sustained.

CRANE ELEVATOR CO. v. CLARK.

(Circuit Court of Appeals, Seventh Circuit. May 22, 1897.)

No. 346.

1. CONTRACTS—PERFORMANCE TO SATISFACTION OF ARCHITECT.

When a contractor has undertaken to do certain work to the satisfaction of an architect, the determination of the architect so constituted an umpire is final and conclusive, and can be impeached only for fraud, collusion, or such gross mistake as implies bad faith; but the parties have a right to the independent and honest judgment of the umpire with respect to the matters submitted to him, and an arbitrary refusal to determine the fact, or to accept performance, where the work has been in good faith performed, constitutes a fraud in law, availing to dispense with the necessity for his judgment as a condition precedent to the right of recovery by the contractor for the work done.

2. SAME—EVIDENCE—QUESTION FOR JURY.

Plaintiff agreed with defendant to construct elevators in a building, payment thereof to be made when the plant should be in running order to the satisfaction of the architect. In an action to recover the price of the elevators, there was evidence tending to show that the architect had sent a representative to attend a test of the elevators, that they then worked properly, and the architect's representative expressed his entire satisfaction with them, but that the architect afterwards refused to give his approval, stating no reasons for so doing, and no specific objections to the elevators, but only transmitting to the plaintiff a letter from the owner of the building protesting against the acceptance of the elevators. *Held*, that the question whether the architect exercised an independent judgment as to the performance of the contract, or arbitrarily refused his approval, should have been submitted to the jury.

3. SAME—PLEADING AND PROOFS.

When a contractor sues in assumpsit to recover for work done under a contract requiring the approval of an umpire, his declaration containing a special count alleging performance, and also the common counts, evidence may be given under the latter of any facts dispensing with the necessity of the umpire's approval, and a recovery may be had thereon.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

This is an action of assumpsit brought by Crane Elevator Company, the plaintiff in error, to recover the unpaid balance of the contract price for the furnishing and construction in a 12-story and basement building in the city of Chicago of three high-pressure hydraulic passenger elevators. C. Everett

Clark, the defendant in error, was the contractor for the construction of the building for William D. Boyce, the owner. The declaration contained a special count setting forth the contract with the plaintiff in error, which contained the following provision: "One-half of the contract price shall be paid when the cylinders are in permanent position; the balance when the plant is running to the satisfaction of the architect, and has been accepted by him." The special count alleges performance of the contract, and that the "elevators, and each of them, were accepted by Henry Ives Cobb, the architect of said building, and the agent of said W. D. Boyce and of the defendant in that behalf." The declaration contained a special count upon an independent agreement for the use of certain steam-belt freight elevators, touching which there was no contest, and also contained the common counts. The plea was the general issue. At the trial the plaintiff gave evidence tending to prove: The performance by it of the work specified in the contract. That on the 24th day of October, 1893, the plant was tested to determine whether the contract had been performed with reference to speed and load. This test was prearranged, the defendant (by his agent) and the owner of the building being present. The architect was notified of the test to be made, and was requested to be present or be represented at such test, and promised to be represented, and was represented by his assistant, C. J. Clark, who, after the conclusion of the test, then and there expressed his satisfaction; stating that the test, as to capacity and the speed of the elevators, fulfilled every condition of the contract, and that he was perfectly satisfied with it. That, upon application to the architect for a certificate, he made no specific objection, but stated certain objections that had been urged by the owner of the building. The defendant gave evidence tending to prove that in certain respects the contract had not been performed. The architect testified that the elevators were not completed to his satisfaction, and had not been accepted by him; that he declined to give a certificate "until the work was completed according to contract"; that he thought he gave some reasons, "as I usually do," but could not recall the reasons, if any, that he gave. He did not, at the trial, give any particulars wherein the work was defective or incomplete. He stated that before the test he had observed that the elevators did not start and stop properly, and were too noisy; that he is not an expert with respect to elevators, and he does not state whether the failure to start and stop properly was owing to a defect in workmanship or in operation; that noise is incidental to the operation of all elevators; that on the 31st day of October, 1893, he received from the owner, Mr. Boyce, a letter which states that he is informed that Mr. Cobb contemplated acceptance of the elevator plant, and states certain objections, and, closing, "I do most positively protest against the acceptance of the elevators in my name or in my behalf, and forbid you to do so." A copy of this letter he sent upon the following day to the plaintiff in error without comment. The witness made this further statement: "I think it is well to explain my understanding of my position relative to this contract. I look upon myself as an arbiter between the two,—the owner and the contractor. If the owner, Mr. Boyce, had agreed to accept these elevators in spite of the report of my inspector being that they were not satisfactory, he has a right to do it, and, as they both agree that they shall be accepted, I have to accept them, because the two parties agree." There was no evidence given of any report made by Mr. Clark to the architect, nor was the former called as a witness. There was also evidence tending to prove that after the test the owner, Mr. Boyce, took possession of the elevators and contracted for their operation; and evidence was given tending to the effect that the objectionable noise arose from the operation of an electric pump placed at the request of the owner, and contrary to the advice of the plaintiff in error.

At the conclusion of the testimony, and upon motion of the defendant, the court directed a verdict for the plaintiff in error to the amount of \$1,218.07, the sum of certain undisputed items, and refused to submit to the jury the right of the plaintiff to recover the unpaid balance upon the contract, amounting to \$8,332.50. The court, with respect thereto, instructed the jury as follows: "I regret that the view of the court as to the law applicable to the contract renders it impossible for the plaintiff to recover upon it in the present form of action in this case. The contract that was entered into between the

Crane people and Clark was a contract that, so far as any evidence before the court or jury goes to show, was deliberately and fairly and understandingly entered into. It was stipulated in that contract that the last payment should not become due or payable until the elevators had been completed to the approval of Henry Ives Cobb, a disinterested architect selected mutually by the parties to pass on that question,—until they had met his approval, and until he had accepted them. There is no evidence in this case, gentlemen of the jury, that that condition of things has happened, and, in the view the court takes of the law, there can be no recovery until that has happened or has been dispensed with or waived, and there is no averment in the pleadings in this case that there has been any waiver. The suit is a straight, square suit, alleging on the part of the plaintiff that the contract has been completed in all its terms, and the proof shows that it has not been. I do not say anything about the evidence as to whether or not the work was such that Henry Ives Cobb ought to have accepted it or not. There might have been a recovery, under a proper state of the pleadings, if that had been the case, but that is not the condition of the pleadings here. That is not the state of the case here. The proof in this case is absolutely clear, without any contradiction, to show that at least that term of the contract has not been performed; and, in the judgment of the court, there can be no recovery under that contract, any more than, if I should execute a note due in sixty days, a party could recover on it before the sixty days have gone by."

Henry W. Prouty, for plaintiff in error.

Cyrus Bentley, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). The contract between the parties provided that one-half part of the contract price should be paid "when the plant is running to the satisfaction of the architect, and has been accepted by him." This clearly constituted him the arbiter of disputes between the parties to the contract with respect to its performance. The general doctrine is not disputed, that, when the payment of the contract price is conditioned upon the obtaining of the umpire's certificate, such certificate is a condition precedent to the right of the contractor to recover the contract price. The question arises, however, in regard to the right of the contractor when he has specifically and in good faith performed his contract, and the umpire refuses to accept the work or to give the required certificate. The English and early American cases held to the doctrine that the completion of the work to the satisfaction and acceptance of the umpire, or the obtaining of his certificate, is a necessary affirmative act of performance, and that the decision of the umpire can be refuted only for fraud, collusion, or bad faith. The later decisions of the courts of some of the states, of which *Thomas v. Fleury*, 26 N. Y. 26; *Nolan v. Whitney*, 88 N. Y. 648; *Weeks v. O'Brien*, 141 N. Y. 199, 36 N. E. 185; *Chism v. Schipper*, 51 N. J. Law, 1, 16 Atl. 316,—are examples, hold to the doctrine that the architect, in his relation as umpire, is the agent of the party for whom the work is to be done and for whose benefit the stipulation is made; that, when the work has been specifically and in good faith performed, a refusal to accept or to issue a certificate is unreasonable; and that a recovery may be had upon evidence other than the architect's certificate of performance. It is not necessary that we should consider the numerous cases to which we have been referred, and which are, perhaps, somewhat in antagonism, because

we are bound and precluded from independent judgment by the decisions of the supreme court. The earliest case upon the subject in that court is *U. S. v. Robeson*, 9 Pet. 319. There the government stipulated to pay under a charter party upon the certificate of the officer commanding the men transported thereunder. A certificate was given, and payment made for the sum covered by the certificate, but recovery was sought for other service than that certified to. It was ruled that the obtaining of the certificate was a condition precedent, the court observing with respect to the right of the contractor (page 327):

"He cannot compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that, by time or accident, he is unable to do so; and, as this was not done by the defendant in the district court, no evidence to prove the service, other than the certificates, should have been admitted by the court. * * * Had the defendant proved that application had been made to the commanding officer for the proper certificates, and that he refused to give them, it would have been proper to receive other evidence to establish the claim."

The court treats the certificate as evidence of performance, which could be otherwise proven if time or accident prevented the obtaining of the certificate, or it had been refused upon application. The force of this decision is possibly somewhat impaired by the rulings in subsequent cases. *Kihlberg v. U. S.*, 97 U. S. 398; *Sweeney v. U. S.*, 109 U. S. 618, 3 Sup. Ct. 344; *Railroad Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035; *Railroad Co. v. Price*, 138 U. S. 185, 11 Sup. Ct. 290; *Railway Co. v. Gordon*, 151 U. S. 285, 14 Sup. Ct. 343. The doctrine established by these cases is this: That, with respect to the subject-matter submitted to the umpire, his determination is final and conclusive; that it may be impeached only for fraud, collusion, or such gross mistake as would necessarily imply bad faith, or for a failure to exercise an honest judgment. This is also the rule of the state of Illinois, where this contract was made. *Canal Trustees v. Lynch*, 5 Gilman, 521; *McAuley v. Carter*, 22 Ill. 53; *Coe v. Lehman*, 79 Ill. 173; *Fowler v. Deakman*, 84 Ill. 130; *Barney v. Giles*, 120 Ill. 154, 11 N. E. 206; *Michaelis v. Wolf*, 136 Ill. 68, 26 N. E. 384; *Arnold v. Bournique*, 144 Ill. 132, 33 N. E. 530; *Gilmore v. Courtney*, 158 Ill. 432, 41 N. E. 1023. The parties have, however, a right to demand that the umpire shall, with respect to every matter submitted to his determination, exercise an independent and honest judgment, and that he shall not arbitrarily refuse to accept performance or to give a certificate. If the work has been in good faith performed, it is his duty to accept; the fact of performance to be determined by him in the exercise of an independent, honest judgment. But arbitrary refusal to determine the fact, or arbitrary refusal to accept performance, constitutes a fraud in the law, availing to dispense with the necessity of his judgment as a condition precedent to the right of recovery by the contractor.

We come then to the question whether there was evidence here of such action by the umpire that the question of the right of the plaintiff to recover the unpaid balance upon the contract should have been submitted to the jury. In the consideration of this question, we must take that view of the testimony which is most favorable to

the contention of the plaintiff in error, resolving all inferences and doubts in its favor. The testimony of the plaintiff below tended to prove the substantial performance of the work contemplated by the contractor, and that, upon a test made, the representative of the umpire had declared his full satisfaction with the work, and that every condition of the contract had been fulfilled. The only objections which the umpire stated upon the trial he had found to the work prior to the test were that the elevators did not start and stop properly, and were too noisy. Whether the imperfect starting or stoppage was owing to a defect in the construction, or to ignorant or unskillful operation of them, is not stated. Nor does it appear that such objection existed at and after the test. In regard to the objection of noise, it is to be observed that the original specification provided for a duplicate steam pump, and that the owner required the substitution of an electric pump and motor; that as early as the month of January, 1893, the Crane Elevator Company notified the owner that it had ascertained that the electrical pumping plant was practicable only for small powers and for small plants, i. e. that an electric pumping plant for one or two elevators can be constructed with belt connection between the pump and the motor, but with larger plants, to pump against higher pressure, it is necessary to use gearing, which was liable to be noisy; and, if noise be objectionable, they recommended the use of the steam pump, and because, also, it was less expensive to operate, and would occupy less room. No answer being obtained to this communication, the defendant directed the plaintiff to put in the electric pump, which was done. Under these circumstances, if the noise complained of arose from the use of an electric pump, the plaintiff cannot be justly held responsible for the noise, and it would be an arbitrary holding for the umpire to say the plaintiff should abate the noise. These objections do not appear to have been urged after the test made. The architect fails to state any objection of his own to this plant. He contents himself with stating objections made by Mr. Boyce, the owner of the building, and to sending to the plaintiff in error, without comment, the instructions of Mr. Boyce to him, forbidding the acceptance of the work; and this after his representative, by his direction, had appeared at the test which was made, and subjected the plant to the various tests usually applied to determine the sufficiency of the plant, and with which test his representative had declared himself fully content and satisfied. There was a failure to produce the report of this representative, which should have stated specific objections, if any existed, and no such report was ever submitted to the plaintiff. The architect does not seem to have exercised an independent judgment touching the performance of the contract. He appears to have contented himself with forwarding the objections of the owner of the building, without judgment by him of the correctness of those objections. Indeed, he entertained an erroneous idea of his duty. He was not an arbiter between the owner of the building and the plaintiff. He was a judge between the plaintiff and the defendant, and it was his duty to investigate and to decide, with respect to the contract in question, whether its terms had been performed, and, failing in

performance, to point out wherein there was failure to perform, or defective performance, that the plaintiff might have opportunity to complete performance according to the terms of the contract. Here the plaintiff claims to have specifically performed. The plant was delivered by the plaintiff to the person in custody and control of the building. The plant was taken possession of by the owner, has been appropriated and enjoyed by him, and has been operated by him in connection with the use of the building; and, although the defendant was merely a contractor with the owner, such a delivery was all the delivery that could have been made to the defendant, who had no right to retain it from the owner, and such delivery, accepted by the owner, absolved the defendant, and is, in effect, a delivery to him. Under such circumstances, there was here a proper question for the jury, whether the refusal of the architect to determine the question submitted to his judgment and to issue his certificate, if there was such refusal, was not arbitrary. He had no right to content himself with objections raised by the owner without investigation and determination by him of the correctness of those objections. He had no right to remain passive. His duty was that of active judgment, not of passive acquiescence in the objections of the owner. His duty was that of impartial judgment between the parties, which was not fulfilled by an arbitrary refusal to judge, or by inaction, because of the owner's objections. It should not be permitted that one may prevent the payment of a debt for a plant which had been constructed in substantial accord with the provisions of the contract, if it had so been, and which had passed into the possession of the owner of the building, and been operated by him, because of an arbitrary refusal of the architect to adjudge performance, or to declare wherein performance was defective. In what has been said, we disclaim any expression of opinion upon the weight of the evidence, or of the conclusion to which the testimony should lead. We have sought only to state to what conclusion the jury might arrive upon the testimony produced, upon a consideration of it most favorable to the plaintiff in error. Viewed in that light, the plaintiff was entitled to the opinion of the jury upon the question involved, and it was error to withdraw the consideration of the question, if the issues were so framed as to permit its presentation.

The declaration embraces a special count upon the contract, alleging performance and the acceptance of the plant by the architect. It also embraces the common counts. The question arises whether it was permissible, under the common counts, to prove that there was either waiver of the condition precedent, or a refusal by the architect to proceed to judgment, or to impeach his determination or refusal to accept for fraud, collusion, or such gross mistake as would necessarily imply bad faith. It is undoubtedly the rule that the plaintiff must declare specially, the contract continuing executory, but when it has been executed, and payment only remains, the plaintiff may, at his election, declare specially or upon the common counts; and so, also, when the work contracted to be done was not performed within the stipulated time or in the stipulated manner, and yet was beneficial to the defendant, and has been accepted and enjoyed by

him, the plaintiff cannot recover upon the contract, because he has departed from it, but may recover upon the common counts. *Dermott v. Jones*, 2 Wall. 1; *Taylor v. Renn*, 79 Ill. 186. In *Catholic Bishop of Chicago v. Bauer*, 62 Ill. 188, it was ruled that when full performance had been waived or been prevented, and the work to be performed had been accepted, recovery may be had for the contract price of the service performed, under *indebitatus assumpsit*. So, also, *O'Brien v. Sexton*, 140 Ill. 517, 30 N. E. 461. In *Fowler v. Deakman*, 84 Ill. 130, the architect certified to the correctness of certain items, disallowing others, and by reason of claims for damages by the owners for delays, imperfect work, and loss of rent, declined to adjust the differences. This was held to absolve the contractor from further effort to procure the certificate; that, under a special count charging bad faith and collusion, the fact of the refusal of the architect could not be proven, because there was no allegation of bad faith or of collusion, but that such evidence could be received under the common counts; the court observing:

"It has always been held in our practice that when a party has fully performed his part of a written contract, and nothing remains to be done but for the other party to pay the money due under the contract, a recovery may be had under the common counts."

We think the question ruled by the decision in that case. If there it was permissible to prove under the common counts that the contractor was absolved from performance of the condition precedent of his contract, it must be equally allowable to prove any fact which would establish such absolution, whether it arises from waiver, acceptance, appropriation and user, or from the wrongful action of the architect. In *Hennessy v. Metzger*, 152 Ill. 505, 38 N. E. 1058, the declaration would seem to have embraced only the common counts, and the question whether the architect acted fraudulently and arbitrarily was deemed a question proper to be submitted under the issue, although the question of pleading would not seem to have been especially considered. The ruling in *Railroad Co. v. March*, *supra*, is not opposed. There a general demurrer was interposed to the whole, and to each count, of the declaration, which embraced a special count upon the contract and a count of *indebitatus assumpsit*. The special count disclosing the condition precedent of the contract failed to set out any certification by the engineer with respect to performance of the contract. The demurrer was overruled, and a trial was had, which resulted in a verdict and a judgment for the plaintiff. The supreme court reversed the judgment because of the defective special count. There is no suggestion that a recovery could not have been had under the general *indebitatus* count, if performance of the contract, and a valid excuse for not obtaining the engineer's certificate, had been shown. It is also to be observed that in the state of Illinois the common-law rule that a general verdict and judgment upon special counts must be reversed if one of the counts be bad, has been changed by Rev. St. Ill. c. 110, § 58, which provides that:

"Whenever an entire verdict shall be given on several counts the same shall not be set aside or reversed on the ground of any defective count, if one or more of the counts in the declaration be sufficient to sustain the verdict." Bond

v. Dustin, 112 U. S. 604-609, 5 Sup. Ct. 296; Santa Anna v. Frank, 113 U. S. 339, 5 Sup. Ct. 536.

If, therefore, the March Case had arisen in the state of Illinois, a different ruling would doubtless have been made. We hold, therefore, that the evidence was receivable under the common counts of the declaration.

It is further to be observed that this contract did not require any certificate from the architect. It was sufficient that the plant should run to his satisfaction, and that it be accepted by him. The special plea alleges such acceptance. Mr. Clark was the representative of the architect in the construction of this building. In the conduct of his business, Mr. Cobb called in the assistance of others competent to act for him. Mr. Clark was his representative and assistant in the construction of this building. He was sent by Mr. Cobb to be present at this test. It does not appear that he was an expert with respect to elevators, but Mr. Cobb declares that he himself was not. The evidence of the plaintiff tended to show that the elevators fulfilled all the tests applied or proper to be applied, and that Mr. Clark declared his full satisfaction with the work. In the absence of evidence showing that Mr. Clark made a written report of his inspection, and because of the nonproduction of such report, and the failure to call Mr. Clark as a witness, we think the plaintiff was entitled to have the case submitted to the jury upon the question whether Mr. Cobb did not in fact, through his representative, accept the work. It is true, he declares, when called for the defense, that he did not authorize Mr. Clark to accept it for him; but he fails to state with what authority Mr. Clark was clothed, or for what purpose he represented Mr. Cobb at the test. It is also true that the defendant was entitled to the personal judgment of Mr. Cobb upon this work, but it was a question for the jury whether that right was not waived by the defendant, who, being present, made no objection to the delegation of authority by Mr. Cobb to Mr. Clark, or to the latter's assumption of authority and judgment. We are therefore of opinion that the question should have been submitted to the jury for its determination, under the special plea, whether, notwithstanding his denial, there was not in fact an actual acceptance of this work by Mr. Cobb, or by one authorized by him to act in the premises. The judgment is reversed and the cause remanded, with directions to the court below to award a new trial.

THOMSON-HOUSTON ELECTRIC CO. v. OHIO BRASS CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 17, 1897.)

Nos. 479, 480.

1. PATENTS—CONTRIBUTORY INFRINGEMENT.

One who makes and sells one element of a patented combination, with the intention and for the purpose of bringing about its use in such a combination, is guilty of contributory infringement, and is equally liable with him who in fact organizes the complete combination.

2. SAME—INFERENCE OF INTENT.

One who makes articles which are only adapted to be used in a patented combination, and offers them for sale to the general public, will be pre-

sumed to intend the natural consequences of his acts, and will therefore be *held* to intend that they shall be used in the combination of the patent, and an injunction will be granted.

3. SAME—VALIDITY—EARLIER PATENT FOR MINOR IMPROVEMENTS.

The granting of a patent for mere improvements pending an earlier application for the broad invention does not invalidate a patent afterwards granted for the latter, though the elements covered by its claims were described and illustrated, but not claimed, in the earlier patent; nor does this result in prolonging the monopoly in the broad invention. 78 Fed. 139, affirmed.

4. SAME—ELECTRIC RAILWAY TROLLEY SWITCHES.

The Van Depoele patent, No. 424,695, which covers the patentee's broad invention of improvements in suspended switches and traveling contacts for electric railways, is not invalid because of the prior issuance of patent No. 397,451 to the same inventor, for certain improvements on the broad invention.

5. SAME—APPEALS FROM ORDERS GRANTING PRELIMINARY INJUNCTIONS.

On appeals from orders granting preliminary injunctions, the case is ordinarily to be treated from the standpoint from which they were viewed by the circuit court; and a decision on the merits by a circuit court of another circuit, sustaining the patent, is therefore usually of controlling weight on appeal, as in the court below.

6. SAME.

The Van Depoele patent, No. 495,443, for improvements in suspended switches and traveling contacts for electric railways, *held*, on appeal from an order granting a preliminary injunction, not to be invalid because of the prior issuance to the same inventors of patent No. 424,695, covering inventions of a similar character.

Appeals from the Circuit Court of the United States for the Northern District of Ohio.

These are appeals in two patent cases between the same parties, that present questions of such a similar character that they were argued together, and may be properly disposed of in one opinion. The appeals are from orders of preliminary injunction made before a hearing upon the merits. The first case was a suit by the Thomson-Houston Electric Company to enjoin the alleged infringement by the Ohio Brass Company of United States letters patent No. 424,695, for certain new and useful improvements in suspended switches for electric railways, issued to Charles J. Van Depoele, April 1, 1890, and assigned by mesne assignment to the complainant below. A preliminary injunction was issued against the making and selling by the defendant below of overhead conductor switches for electric railways for use in the combinations covered by the third, fourth, and eleventh claims of the patent. The second case was a suit by the same complainant against the same defendant for an alleged infringement of United States letters patent No. 495,443, issued to Charles J. Van Depoele, for new and useful improvements in suspended switches and traveling contacts for electric railways, and assigned by mesne assignments to the complainant below. A preliminary injunction before the hearing on the merits was granted, enjoining the defendant from the manufacture or sale of trolleys or trolley bases intended to be used in the sixth, seventh, eighth, twelfth, or sixteenth claims of said patent. It appeared in the first case that in a suit before Judge Coxe, in the Northern district of New York, the validity of patent No. 424,695 was in issue, and the validity of the claims here involved was sustained. 69 Fed. 257. The cause was carried to the circuit court of appeals for the Second circuit, and the order of injunction, so far as the claims here involved were concerned, was affirmed, though the complainant was required to enter a disclaimer as to certain other claims in the patent, to wit, the second, ninth, and tenth, which disclaimer was duly made and filed in the patent office. 18 C. C. A. 145, 71 Fed. 396. In the second case it appeared that the validity of patent No. 495,443 had been at issue in a cause heard upon its merits, and passed to final decree before

Judge Townsend, in the district of Connecticut, and that the claims of the patent here involved were sustained.

There were two principal objections made in this court to the injunctions below. The first was that there was not any proof of actual infringement or of an intention to infringe the combinations covered by the claims set forth in the orders of injunction appealed from. The second objection was that the patents Nos. 424,695 and 495,443 were both void, the latter because the former, a patent of earlier issue, was for the same invention, and the former because patent No. 397,451, a still earlier patent issued to the same patentee, covered and was also for the same invention. Upon the first objection in the two cases, the evidence was substantially the same. The claims in both patents covered combinations of parts used in an electric street railway in which the track, the car, the overhead conductor, and switches, and the trolley or contact device formed elements. The charge of infringement in the first case, involving patent No. 424,695, was based on an admitted sale by defendant of an overhead switch; and the charge as to infringement of No. 495,443 was based on an admitted sale of a trolley, pole, and contact wheel. The sales were made at the same time to an agent of the complainant. The agent of defendant who sold says that he suspected that the purchaser was an agent of complainant. The memorandum of sale of these articles, and receipt for the price, signed by defendant, were as follows:

"Mansfield, Ohio, Feb. 4, 1896.

"The Ohio Brass Co., sold to Edwin W. Hammer, Newark, N. J.

1 Str. Under-Running Adj. Switch, No. 1145..... \$ 2 25

1-12 inch Pole Ohio Trolley Buck Harp T. H. Wheel..... 15 50

"Paid.

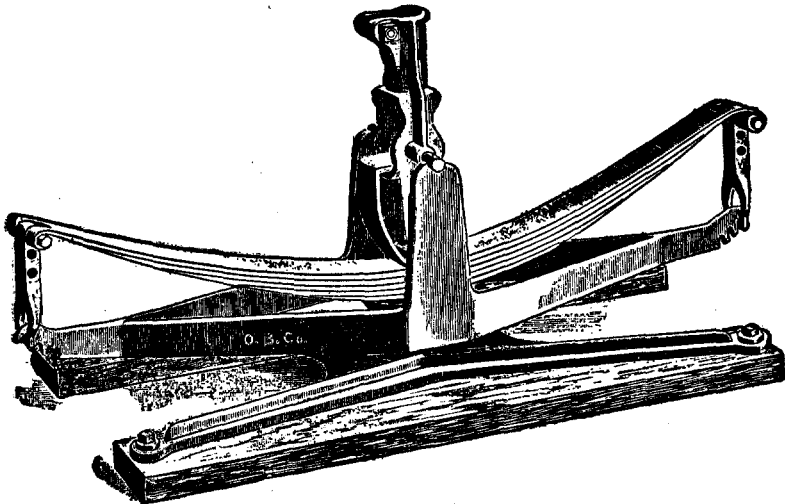
The Ohio Brass Co.,

"Feb. 4, 1896.

"Per L. P. Bennett, Cashier."

A book admitted to be a catalogue printed by defendant, and circulated by it in the trade, was offered in evidence. This purported on its face to be a catalogue of electric railway material and supplies made by defendant, and offered by it for sale generally to the trade. Below are excerpts from the catalogue containing illustrations of the articles exactly like those bought from the defendant by Hammer:

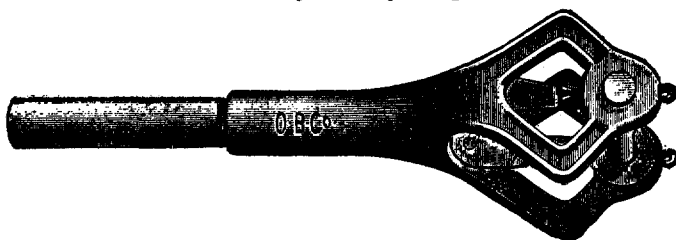
"Ohio Trolley.



"This trolley is one of the simplest and most effective on the market. It is made up of eight pieces, the working parts of which are made of steel, and malleable and wrought iron. The base and stand is 3 feet long, 8 inches wide,

and, when the trolley pole is in a horizontal position, but 13 inches high. The trolley pole can be swung either forward or backward, or in a complete circle. It can be assembled or dismantled in a few minutes' time without the aid of tools. The tension on the pole is least when drawn down, and can be adjusted to suit, making it especially desirable for running under low structures.

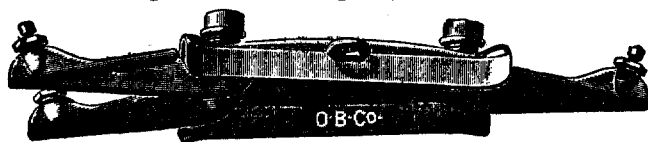
"Buckeye Trolley Harp.



"This style of harp is made for use with steel trolley poles. It is light and strong in construction, and designed to avoid any danger from being caught by the overhead wires.

No. 1347—Harp Complete, Bronze.....	Each	\$1 80
No. 1348— " " Malleable Iron.....	"	1 30
No. 1349—Contact Springs.....	"	09

"Straight Under-Running Adjustable Switch.



"These are similar in design to the Wood's adjustable switch, as shown on the preceding page, except that the tongues are so modified as to make a perfectly straight under-running approach to the switch pan for the trolley wheel.

No. 1145—Two-Way.....	Each	\$5 50"
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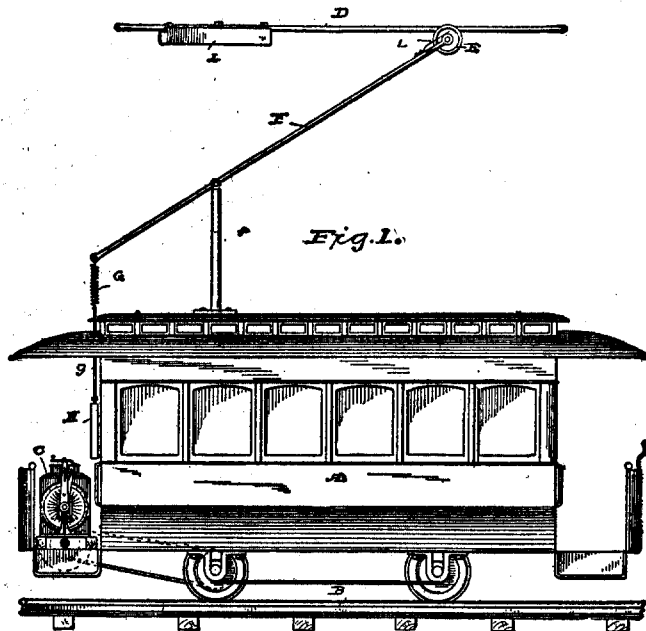
There were also affidavits on information and belief introduced on behalf of complainant that two street-railway companies were using trolleys and switches bought from the defendant. Defendant filed counter affidavits, in which the defendant's agent selling the switch and trolley to the agent of complainant stated that he did not know that they were to be put to an unlawful use, and denied that the defendant had sold switches or trolleys to the street-railway companies named in the complainant's affidavit, but there was no denial that the defendant had sold to others, and no statement that such sales had been made only for use by licensees of complainant.

Patent 424,695 was applied for March 12, 1887, and was issued April 1, 1890. The inventor, in the specifications, refers to his invention as follows:

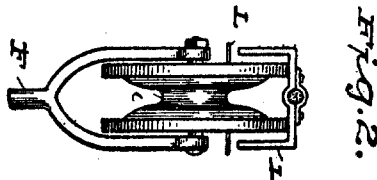
"My invention consists in certain devices and their relative arrangement, by means of which a contact device carried by a rod or pole extending from the car, and pressed upwardly, into contact with the conductor, is switched from one line to another, correspondingly with the vehicle. * * * I also make claims in this application to a switch plate particularly designed for the arrangement which forms the principal subject-matter of this application. More particularly my invention consists in a track switch for the vehicle, a conductor switch for the contact device or 'trolley,' as it is termed, and the trolley itself attached to the vehicle; these elements being so arranged relatively to one another that in operation the vehicle reaches the track switch, and is diverted laterally before the trolley reaches the conductor switch, whereby the trolley, which partakes of the lateral movement of the vehicle, has im-

parted to it a laterally moving tendency before its switch is reached, and it therefore passes through the switch in the proper direction, corresponding to the movement of the vehicle.

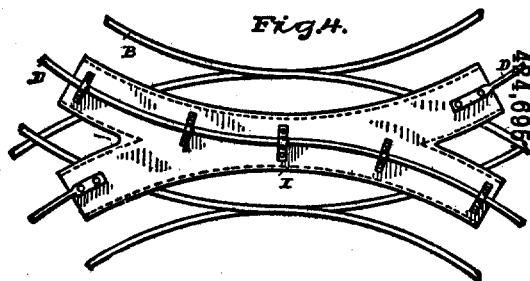
"Fig. 1 is a side elevation of a car provided with my improved contact devices, and otherwise embodying my invention.



"Fig. 2 is an enlarged detail showing the contact wheel in position in the switch box.

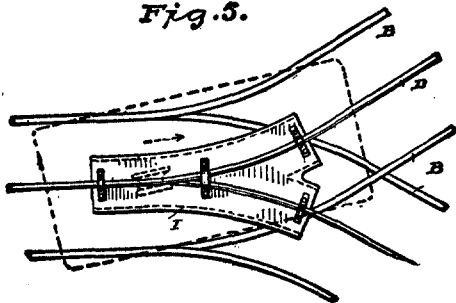


"Fig. 4 is a top plan view of a portion of track, showing the conductor, the switch box, and the rails.



"Fig. 5 is also a plan view, and is similar to the preceding, with the addition of a car shown in dotted lines.

Fig. 5.

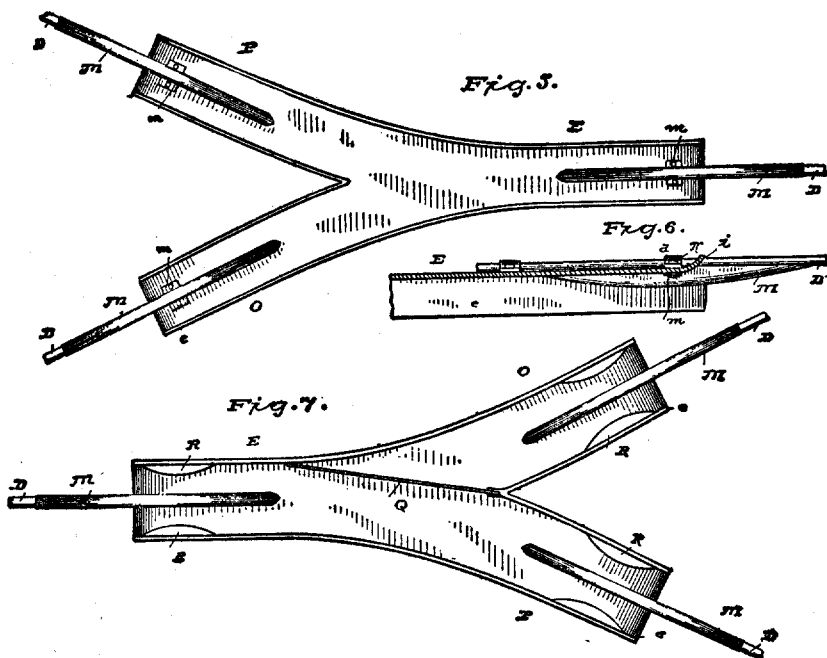


The patentee continues in the specification: "In order that the contact wheel, E, shall be compelled to pass from one conductor to a branch, or one attached thereto leading in a different direction, I provide the inverted open-bottom metallic boxes, I, which are formed with branching compartments, and constructed in the form of switches, conforming to the curves and angles of the track switches by which the direction of the car is controlled. These boxes are in the form of open, smooth, curved passages, and are free from obstructions within, so that the contact wheel, E, which is slightly depressed on meeting the end of the switch box, may roll freely therethrough, and move laterally therein, in the desired direction, without hindrance. Fig. 2 shows how the tips of the wheel flange are received on the undersurface of the switch plate, and how that the depending edges or ribs on the side of the plate are separated a distance greater than the thickness of the contact wheel, so that the latter is movable freely therein. The switch box, I, may take almost any shape, and may be made of thin sheet metal or of cast metal, as is most convenient; but I prefer the castings. The electric switches, I, are to be placed directly over—that is to say, above—their counterparts. The track switches and the contact wheel, as before stated, are to be located so that as the front portion of the car swings in the desired direction, as the front wheels pass the track switch, the contact arm will be deflected, and the direction of the wheel, E, correspondingly changed while still on the straight wire; so that on reaching the switch box the wheel will be depressed and pass therethrough, and naturally pass through and out of the proper compartment thereof. The switch boxes, I, being connected directly to the conductors, D, are similarly charged; and when the wheel, E, is passing therethrough, the current passes through the box, I, and thence into the contact wheel, through its flanges, e, passing thence through the arm, F, or a separate conductor to the motor, C. Since there are no moving tongues or springs or points to catch or impede the progress of the wheel when three or four grooves, as the case may be, exist in one switch box, the wheel will intersect the grooves, and pass along in the desired direction, and go through without any difficulty whatever, its direction being previously indicated by the movement of the front portion of the car."

The claims here involved of the patent are: "(3) The combination with an overhead wire for receiving an underneath contact, of a switch plate attached to the wire in about the same horizontal plane as the wire." "(4) The combination of a track having switches, an overhead conductor above the track, and having switches, and a car on the track provided with a contact-carrying arm, arranged to engage the conductor at a point in rear of the front wheels of the car." "(11) The combination, with an overhead line wire, of a grooved contact device pressed against the wire, and receiving the wire between the flanges of the groove, and a guiding switch plate connected to the wire against which the said flanges bear in passing from one line to another."

The earlier patent claimed to avoid this one is No. 397,451, and was issued February 5, 1889. The application was filed November 12, 1888, more than a year after the filing of the application for patent No. 424,695. The inventor

states in his specifications that the invention for which he seeks a patent is an improvement on the invention described in his application filed March 12, 1887 (on which patent No. 424,695 afterwards was issued). The chief improvement consisted in providing the switch boxes with ribs secured to the underside of the conductor a short distance in advance of where it enters the switch, and continuing into the switch box a short distance, to guide the contact wheel smoothly thereinto. The ribs are narrow, tapering strips of metal, rounded off towards their lower edges to fit the groove of the contact wheel, and the lower edges are tapered from their longitudinal center towards each extremity. Another improvement is a narrowing of the passageway at the extremities of the switch boxes, so as to secure more firmly the movement of the contact wheel in the center of the passageway. Another improvement consisted in a device for lengthening and shortening the trolley pole. The claims covered the new switch and combinations of the elements of the car, the track, the post, the pivotally working trolley, the adjustable pole, and the tension spring for maintaining contact, but each claim includes within its terms one or the other of the improvements above described. The drawings showing the improvements in switch plates covered by patent No. 397,451 are as follows:



Patent 495,443, upon which the second order of injunction appealed from was founded, is said to be void because it covers the same inventions as patent 424,695, already described. The two patents were issued upon the same application, filed March 12, 1887. An interference was declared, and the application was divided, the uncontested portion proceeding to patent, and the remainder being delayed in the patent office until 1893, when a patent was also issued upon it. Patent 495,443 was intended to cover the main invention. In its specifications, the inventor says: "My present invention relates to electric railways of the class in which a suspended conductor is used to convey the working current, a traveling contact carried by the car for taking off the current for use in operating the motor by which the car is propelled, and the return circuit completed through the rails. The invention consists more par-

ticularly in an improved traveling contact, and in improved arrangement and construction of the switches by which the said traveling contact is directed onto the proper conductor. These devices for switching the traveling contact from one conductor to another have been already claimed in my patent No. 424,695, which was issued as a division of this application on April 1, 1890. I therefore do not lay claim to them herein, but the description and illustration of them is retained to show how my traveling contact is adapted to meet one of the essential requirements of railway service, without special arrangements or other complications." He then describes in the same language the same devices and combinations of parts with the same drawings which appear in the specifications of patent No. 424,695, except that he adds three drawings not substantially different from those in the prior patent, but which show the construction in a little more detail. He omits from the specifications in the later patent the following words, which were in the prior patent, and which refer to the use of the spring and weight used to hold the contact device against the conductor: "And while the arm, F, is movable laterally with respect to the vehicle, the spring and weight will constantly tend to restore the arm to its normal contact position, and assist in causing the contact arm to partake of the lateral movement of the vehicle;" and also the statement that, by reason of the weight, "the [contact] wheel has a much greater range of action."

The claims relied on by the complainant below, and upon which the injunction was granted, were as follows: "(6) In an electric railway, the combination with a suitable track, and a supply conductor suspended above the track, of a car provided with a swinging arm carrying a contact device in its outer extremity, and means for imparting upward pressure to the outer portion of the arm and contact, to hold the latter in continuous working relation with the underside of the supply conductor, substantially as described. (7) In an electric railway, the combination of a car, a conductor suspended above the line of travel of the car, a swinging arm supported on top of the car, a contact device carried by one extremity of the arm, and held thereby in contact with the underside of the electric conductor, and a tension device at or near the other end of the swinging arm for maintaining said upward contact, substantially as described. (8) In an electric railway, the combination of a car, a conductor suspended above the line of travel of the car, an arm pivotally supported on top of the car, and provided at its outer end with a contact engaging the underside of the suspended conductor, and a tension spring at or near the inner end of the arm for maintaining said upward pressure contact, substantially as described." "(12) In an electric railway, the combination with a car of a post extending upward therefrom, and carrying a suitable bearing, an arm or lever carrying at its outer end a suitable contact roller, and pivotally supported in said bearing, and provided at its inner end with a tension spring for pressing the outer end of the lever carrying the contact wheel upward against a suitably suspended conductor, substantially as described." "(16) In an electric railway, the combination of a car, a conductor suspended above the line of travel of the car, an arm pivotally supported on top of the car, and provided at its outer end with a grooved contact wheel, engaging the underside of the suspended conductor, and a tension spring for maintaining an upward pressure contact with the conductor, substantially as described."

The claims of patent No. 424,695, which are relied on by the defendant to show that it covers the same invention as patent No. 495,443, are as follows: "(15) In an electric railway, the combination of a car, a conductor suspended above the line of travel of the car, a contact-carrying arm pivotally supported on top of the car and provided at its outer end with a contact roller engaging the underside of the suspended conductor, and a weighted spring at or near the inner end of the arm for maintaining said upward contact, substantially as described. (16) In an electric railway, the combination of a car provided with a pivoted arm, as F, having a contact at its outer extremity, a tension spring, as G, attached at its inner extremity, and a vertically-moving weight connected to said spring for holding the same in operative relation to the arm throughout its entire range of movement, substantially as described. (17) In an electric railway, the combination of the car having suitably-pivoted arm, F, carrying a contact wheel at its outer extremity, a spring, G, secured to its lower extremity, and a connection extending from said spring and provided with a weight at

its lower end, substantially as described." "(31) In an electric railway, the combination, with an overhead conductor and a vehicle, of an intermediate contact device, consisting of a trailing arm having a grooved contact wheel at its outer end, and moving laterally relatively to the vehicle, but provided with a spring tending to retain it in its normal central position. (32) In an electric railway, the combination, with an overhead conductor and a vehicle, of a trailing contact arm, guided at its outer end by the overhead conductor, and movable laterally relatively to the vehicle, but having a normal centralizing tendency by means of a spring or weight. (33) In an electric railway, the combination, with an overhead conductor and a vehicle, of an intermediate contact device consisting of an upwardly pressed trailing arm, having a grooved contact wheel at its outer end, by which it is guided by the conductor, the said arm being free to swing laterally relatively to the vehicle, but tending to remain in its normal central position by means of a spring or weight. (34) The combination, with a vehicle and an overhead conductor, of a trailing contact arm guided normally by the conductor, but having a spring connection with the vehicle, tending constantly to maintain it in a definite position, while at the same time it is free to swing laterally with respect to the vehicle against the pressure of the said spring. (35) In an electric railway, the combination, with an overhead conductor and a vehicle, of an intermediate contact device, consisting of a rearwardly extending arm, guided at its outer extremity by engagement with the conductor, and movable laterally relatively to the vehicle, but having a spring or weight tending to restore it to its normal central position."

Frank T. Brown, for appellants.

Frederick H. Betts and F. P. Fish, for appellee.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

TAFT, Circuit Judge (after stating the facts as above). The catalogue of the defendant shows that it is offering for sale to the public without restriction the switch and trolley to be used as part of the equipment of an electric street railway. Defendant has not shown, and we infer from the evidence that it cannot be shown, that either the switch or trolley and harp can be used in an electric railway except in the combinations described and claimed in the two patents here in suit. The third claim of patent No. 424,695 is for a combination of an overhead wire for receiving an underneath contact and a switch plate attached to the wire in about the same horizontal plane as the wire. The description of the article sold by the defendant in its catalogue is that of an "under-running adjustable switch," and it is said to make a perfectly straight under-running approach for the trolley wheel. It is apparent that the switch plate has no practical utility except in such an arrangement of parts as that stated in the third claim. The same thing is true of the fourth and eleventh claims of that patent. The sixth claim of patent No. 495,443 is a combination in an electric railway of (1) a suitable track, (2) a supply conductor suspended above the track, (3) a car provided with (4) a swinging arm carrying (5) a contact device in its outer extremity, and (6) means for imparting upward pressure to the outer portion of the arm and contact, to hold the latter in continuous working relation with the underside of the supply conductor. The evidence sufficiently shows that neither the trolley nor the harp is adapted to be used on electric street railways except in the above combination. Purchasers buy articles for practical use, and would only buy the switch

and trolley, therefore, for use in complainant's patented combinations. One is legally presumed to intend the natural consequences of his act. Hence the defendant, in offering the switch and trolley for sale to the general public, may be reasonably held to intend that they should be used in combinations in an electric railway covered by the claims of complainant's patents.

It is well settled that where one makes and sells one element of a combination covered by a patent with the intention and for the purpose of bringing about its use in such a combination he is guilty of contributory infringement and is equally liable to the patentee with him who in fact organizes the complete combination. The leading case on the subject is *Wallace v. Holmes*, 9 Blatchf. 65, 29 Fed. Cas. 79. It was cited with approval in *Tie Co. v. Simmons*, 106 U. S. 89, 1 Sup. Ct. 52, and the same doctrine was applied and extended by this court in *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288, to a case where the article sold was not even an element of the patented combination, but was an article the use of which in connection with patented combination was a violation of the conditions of a license, and destroyed the protection the license would otherwise have afforded. The cases in the circuit courts where the same general principle has been applied are legion. We cite a few of them: *Bowker v. Dows*, 3 Fed. Cas. 1070; *Richardson v. Noyes*, 20 Fed. Cas. 723; *Travers v. Beyer*, 26 Fed. 450; *Willis v. McCullen*, 29 Fed. 641; *Alabastine Co. v. Payne*, 27 Fed. 559; *Celluloid Manuf'g Co. v. American Zylonite Co.*, 30 Fed. 437. The contention of the counsel for the defendant, if we understand it, is that the effect of the decision of the supreme court in the case of *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 14 Sup. Ct. 627, is to do away altogether with the doctrine of contributory infringement. If this is a proper reading of the judgment of the supreme court in that case it was a somewhat startling departure from previously understood principles in the law of torts. An infringement of a patent is a tort analogous to trespass or trespass on the case. From the earliest times, all who take part in a trespass, either by actual participation therein or by aiding and abetting it, have been held to be jointly and severally liable for the injury inflicted. There must be some concert of action between him who does the injury and him who is charged with aiding and abetting, before the latter can be held liable. When that is present, however, the joint liability of both the principal and the accomplice has been invariably enforced. If this healthful rule is not to apply to trespass upon patent property, then, indeed, the protection which is promised by the constitution and laws of the United States to inventors is a poor sham. Many of the most valuable patents are combinations of nonpatentable elements, and the only effective mode of preventing infringement is by suits against those who, by furnishing the parts which distinguish the combination, make it possible for others to assemble and use the combination, and who, by advertisement of the sale of such parts and otherwise, intentionally solicit and promote such invasions of the patentee's rights. The *Morgan Envelope Company Case*, so far from departing from the doctrine of contributory

infringement, expressly recognizes it and the authorities in which it is announced and enforced. The court held, however, that the doctrine of contributory infringement could not apply in a case in which the claim of the patent embraces a machine and something to be treated thereby which is perishable in its nature, and the alleged infringer furnishes the latter element to be used with the machine and consumed. Whether this holding is really a limitation upon the doctrine of contributory infringement, or is to be regarded only as in effect deciding that such combinations are impossible in a patent, may admit of question.

In *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288, this court was obliged to consider with much care the *Morgan Envelope Case*. After quoting at length from Mr. Justice Brown's opinion, Judge Lurton, speaking for this court, said:

"It is true that Mr. Justice Brown, in discussing the question involved in that case, assumes that a combination of the machine for delivering the paper with the paper to be delivered was valid. But, before he finishes the argument, he shows that the assumption leads to an absurdity; and the decision, in effect, is that form of argument known as the '*reductio ad absurdum*,' establishing that his original assumption was not founded in reason. The illustration of the result of such a combination shows that what the court was deciding was that a combination of the machine with an unpatentable paper or material to be operated upon by the machine was an impossibility, and the sale of the machine involved and implied the right of use of the material with which it was to be combined; and this is shown by the case of *Wilson v. Simpson*, 9 How. 109, which is cited by Mr. Justice Brown as a case sustaining his conclusion. * * * Thus, with respect to the paper holder, the supreme court in effect held that the sale of the paper fastener with the paper in it contained the implication of a right to renew the paper when that paper sold should be exhausted, and did not require the purchase of the paper from the original patentee, the paper itself not being patented."

We are very clearly of opinion that the *Morgan Envelope Company Case* does not affect the question of contributory infringement before us.

It is said that no concert of action by defendant with any one for the purpose of accomplishing an infringement of complainant's patent rights is shown. As already stated, it does appear that defendant is offering for sale articles that can only be used in combinations covered by complainant's claims. This is an effort to secure a concert of action by which the combinations of complainant's patents may be assembled. If successful, infringement will follow; hence the preliminary steps which are intentionally taken to bring about the injury may be enjoined.

In considering the same point in *Wallace v. Holmes*, 29 Fed. Cas. 79, Judge Woodruff said:

"Here the actual concert with the other is a certain inference from the nature of the case, and the distinct efforts of the defendants to bring the burner in question into use, which can only be by adding the chimney. The defendants have not, perhaps, made an actual prearrangement with any particular person to supply the chimney to be added to the burner; but every sale they make is a proposal to the purchaser to do this, and his purchase is a consent with the defendants that he will do it, or cause it to be done."

Now, it is suggested that defendant had the right to sell parts to be used in complainant's combinations to the licensees of complainant, and to those who, having once bought the articles of the com-

bination from the complainant, it is said, have the implied right to repair and renew parts worn out with use. It being established that defendant is offering for sale articles, intending them to be used in combinations which, if unlicensed by complainant, would be infringements of complainant's patents, we think that it is the duty of the defendant to see to it that such combinations which it is intentionally inducing and promoting shall be confined to those which may be lawfully organized. We are unable to see why any different rule should be applied in such a case from that applicable to a case in which a defendant makes a patented machine to order. He may make such a machine upon the order of the patentee or a licensee, but not otherwise. Upon him is the peril of a mistake as to the lawful authority of him who gives the order. So, he may knowingly assist in assembling, repairing, and renewing a patented combination by furnishing some of the needed parts; but, when he does so, he must ascertain, if he would escape liability for infringement, that the one buying and using them for this purpose has a license, express or implied, to do so. What we have said has application only to cases in which it affirmatively appears that the alleged infringer is offering the parts with the purpose that they shall be used in the patented combination. We have found that it does so appear here, and is a matter of certain inference from the circumstance that the parts sold can only be used in the combinations patented. Of course, such an inference could not be drawn had the articles, the sale or offering of which was the subject of complaint, been adapted to other uses than in the patented combination. In the latter case the intention to assist in infringement must be otherwise shown affirmatively, and cannot be inferred from the mere fact that the articles are in fact used in the patented combinations or may be so used. If defendant avers that he is selling to express or implied licensees of the patentee, the injunction should be granted in such form as shall permit the continuance of these lawful sales. In the case at bar the circuit court offered thus to modify the order, but the defendant declined to apply for the modification. It is hardly in a position now to assign for error the failure of the court to insert such a modification.

The conclusion we have reached as to contributory infringement is supported by the decision of the circuit court of appeals of the Second circuit on similar facts in *Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co.*, 22 C. C. A. 1, 75 Fed. 1005, affirming an order of injunction by Judge Townsend in the circuit court. Judge Wallace dissented, but we think the reasoning of the majority more satisfactory. The learned dissenting judge likened the case to one in which the seller of wire or rails should be enjoined from selling them, because the articles might be used in any unlawful combination on an electric railway. Such articles could, of course, be used in so many lawful ways other than in the combinations of the patent that it would be quite unlikely that the sellers could have an intention to promote infringement of particular patents in their sale, and it would be most difficult to prove such intention. But, where the article can only be used in a patented combination, the inference of the intention of the maker and seller

is certain, and the right of the patentee to injunction ought, we think, to be equally certain.

We come now to the second assignment of error in these cases, namely, that the patents relied on are void because the inventions covered by them were patented in prior patents to the same patentee. The circumstances make this question different as it arises on the two patents, and we shall first consider whether patent No. 424,695 is void by reason of the prior issue of patent No. 397,451. We are clearly of opinion that it is not. The application for No. 424,695 was filed more than a year before that for the patent No. 397,451. The inventor expressly states in his specifications in No. 397,451 that his invention is an improvement on the switch and trolley devices and combinations shown in the application which subsequently resulted in patent No. 424,695. An examination of the drawings and specifications leaves no doubt that this statement is true. With respect to the switch or switch plate, in the patent of later application and earlier issue the inventor added to the simple switch box center ribs and side contractions of the extremities of the passageways for the purpose of more certainly directing the trolley wheel in entering and leaving the switch in the way in which it should go. With respect to the trolley arm, the improvement consisted in making it of adjustable length. The claims, all of them, include and refer to one or the other of these improvements. Now, it is not material to this discussion whether these improvements are patentable or not. They are expressly claimed as improvements, and no attempt is made by the patentee to cover anything but them. If inventions at all, then they are separable from the old switch and trolley combinations, and, if they are not inventions, the patents are void, and cover nothing. Since the case of *O'Reilly v. Morse*, 15 How. 61, 121, 133, it has been well settled that a patent may issue for an improvement on an earlier invention either to the original inventor or to a stranger. Of course, no one can use the improvement without right or license to use the fundamental invention; but, on the other hand, the right to use the original invention does not confer the right to use the improvement without license from the tributary inventor. We do not understand this general doctrine to be denied, but it is said that if, by some chance, the application for the fundamental patent is delayed in its course through the patent office until a patent on the avowed improvement has issued, then the patent on the fundamental invention is void. In cases where the delay in the issuing of the patent for the main invention cannot be charged to the laches or fraud of the patentee, such a rule would be a hard one; and unless it is required by the express words of the statute, or by the express holding of the supreme court, we should be inclined, if possible, to avoid declaring it to exist. The contention of counsel for the defendant in this behalf, instead of having the support of the authority of the supreme court, is in the teeth of two decisions of that tribunal.

In *Suffolk Co. v. Hayden*, 3 Wall. 315, an inventor applied for a patent on improvements in the interior arrangements of an elongated trunk previously in use for cleaning cotton. While this application

was pending, he applied for an improvement on the form of the trunk, i. e. its external form; and in his second application he described the improvement in the interior arrangements of the trunk, without making any claim as to it. A patent issued on the second application before one was issued on the first, and the point at issue before the court was whether the prior patent on the later application describing but not claiming the improvement for which a patent had first been applied for, avoided the later patent on the earlier application for this improvement, and it was held that it did not. In disposing of the contention that the second patent was void, the supreme court said:

"The first point of the plaintiff in error is that the description in the patent of March, of the improvement patented the December following, and on which the present suit is brought, and omission to claim it in such earlier patent, operated as an abandonment or dedication of it to the public, and that for this reason the subsequent patent of 1st December was void. But the answer to this ground of defense is that it appeared that Hayden, the patentee, had pending before the commissioner of patents an application for this same improvement at the time he described it in the specification of the 17th of March, which was doubtless the reason for not claiming it in this patent. The description in no sense affected this application thus pending before the commissioner, and, while it remained before him, repelled any inference of abandonment or dedication from the omission to again claim it."

The same question arose again in the Barbed-Wire Patent Case, 143 U. S. 280, 12 Sup. Ct. 443, 450, and is stated and disposed of in Mr. Justice Brown's opinion in that case as follows:

"The application for the patent in suit was filed October 27, 1873, though the patent was not issued until November 24, 1874. Subsequent to the application for this patent, and on March 14, 1874, Glidden filed an application for an improvement in wire stretchers for fences, upon which a patent was issued May 12, 1874. It is not perceived how this patent could affect in any way the pending application for the later patent. The patentee abandoned nothing he had claimed before, but sought, as an improvement upon the former, to claim a slotted tube midway between the posts, in which was put a coil spring to spread the wires, and automatically tighten them, and keep them at the proper tension, as against expansion by heat and contraction by cold. If the later application had covered the same invention as the prior application for the November patent, the later patent might have been void, under our ruling in *Suffolk Co. v. Hayden*, 3 Wall. 315; but this claim was for a combination of wires with the slotted tube, containing a coiled spring, and perched upon a post. In this application he makes no mention whatever of barbs as a feature of his claim, although in describing his invention he mentions the use of two wires, provided at suitable intervals with spurs coiled around them, and which are spread apart between the coils to keep the latter from moving longitudinally upon the wires. But he says of these spurs: 'I do not claim to have originated the devices known as "spurs" or "prongs" on the wires, they having been used before, but confine myself to the means for holding the spurs at proper intervals on the wires, and to the means for attaining a uniform tension of the wires, as claimed.' This disclaimer, it will be observed, is of spurs or prongs generally (not of the coiled barb either alone or in combination with the twisted wires), and is made with reference to that application only. It is true that this patent was subsequently reissued with a broadly expanded claim for a combination with a fence wire of a barb formed of a short piece of pointed wire, secured in place upon the fence wire, by coiling between its ends, forming two projecting points; but this reissue was held to be unwarranted and void in *Manufacturing Co. v. Fuchs*, 16 Fed. 661, 667. This attempted reissue, however, did not in any way affect his original application, which stood upon its own merits, and, after being rejected and amended three times, was finally passed with a claim substantially identical with the first claim of the original

application, and the patent granted. In legal effect, this was a prior patent, since the date of the application, and not the date of the patent, controls in determining the legal effect to be given to two patents issued at different dates to the same inventor, and the order in which they are to be considered. In any event, the reissue in 1876 of one patent would not affect another patent granted in 1874."

It will be observed that the case at bar is stronger than either of the cases cited, because in the application for the patent on the improvement not only is no claim made for the main invention, but the applicant expressly states that he has an application pending for the main invention necessarily described in describing the improvement, but not claimed, and thus shows beyond peradventure that he has no intention of abandoning or dedicating to the public his main invention. The authority and effect of these two cases counsel for defendant seeks to meet by the claim that the ground upon which he contends that the second patents in the cases before the court must be void was not presented to the court, and was not considered by it. He says that the second patent for the main invention is void, not because it was dedicated to the public in the first patent, but because the effect of the second patent is to extend the monopoly of the first patent beyond the statutory period. The argument runs thus: The monopoly of the first patent, the one for the improvement, can legally be of no longer duration than 17 years. But the improvement cannot be used except as applied to the main invention, and, as the later patent (the one for the main invention) does not expire until some time after the expiration of the patent for the improvement, the monopoly of the improvement patent is in fact extended until the expiration of the later patent (the one for the main invention), and so exceeds the statutory 17 years. It may be conceded that it is doubtful whether the case of *Suffolk Co. v. Hayden* on its facts presented the question thus raised by counsel, because the two patents there under consideration were improvements on different parts of the same machine, and it did not appear that the earlier patent might not have been used without also using the later patent. And, possibly, the same thing is true of the *Barbed-Wire Patent Case*. However this may be, we cannot yield to the argument based on such a distinction, because we cannot accept its minor premise, to wit, that the later granting of the patent for the main invention extends the monopoly of the earlier improvement patent. The patent for the improvement expires in 17 years. After that any one may use the improvement without infringing the patent issued upon it. If he uses the improvement without a license to use the main invention he is liable for the infringement, not of the patent for the improvement, but of the patent for the main invention; and, in estimating the damages for the same, the value of the main invention, and not that of the improvement, would be the basis for estimating the damages.

It can make no difference in considering this question whether the patent for the improvement issues to the patentee of the main invention or to another. The right of the public to use the improvement when the patent on it expires is exactly the same, whether the patentees of the two inventions are the same or not, because in each case

the improvement can only be used with the license of the patentee of the main invention. If the patentee of the improvement is a stranger to the main invention, it is manifest that he can derive no benefit from the limitation upon the use of his invention after his patent expires, because of the patent on the main invention. Why, then, does he derive an advantage if he happens to own the main patent? The only advantage conferred by the issue of the patent for the main invention is the legitimate monopoly for the statutory period of that invention, and of no other. Did the personality of the owner of two different patents affect the validity of either, then the anomalous result would follow that the owner of one patent would avoid it by acquiring ownership of another. According to the argument of counsel, the patentees of the earlier improvement patent and of the later main patent being the same person, the main patent is void. Let us suppose that they were different persons, but that, by mesne assignments, the two patents became the property of one person; the effect upon the public use of the improvement patent is exactly the same as if the now owner had been the inventor and patentee of both. Does the unity of title avoid the main patent, which was valid before? It must do so if the argument of counsel for defendant in this behalf is to be followed, for the effect of the unity of title is "to extend the monopoly" of the earlier improvement patent in the sense in which counsel uses that phrase. To our minds, this conclusion is *reductio ad absurdum*. The fact that a patent for an improvement may expire before the patent for the main invention is the result of several circumstances,—one that a patent may be taken out for an improvement on a patentable invention, another that there is no limitation by statute upon the time within which a patent may issue upon an application after it is filed, provided the applicant is not guilty of violating the two years' restriction imposed by the statute, and a third that the course of an application for a generic or broad invention may legitimately take longer in its course through the patent office than a comparatively unimportant improvement on that invention.

The case upon which counsel for defendant chiefly relies to support his argument is *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310, where it was held that when two patents issued to the same patentee for the same invention the second patent was void for the reason that the new or later patent would prolong the monopoly beyond the period allowed by law. As pointed out by Mr. Justice Jackson, this was not a new doctrine and found support in a number of earlier cases cited by him. The patents under consideration in that case were for a peculiar form of spring, which, when connecting the plow beams of a plow with the upright portion of the axle, assisted the operator in lifting the plow beams when above the level, and in depressing them when below it, and the patent first issued covered the spring thus used. The spring thus used had the additional function of increasing its lifting force and action the higher the beams were raised. The second patent was taken out to cover this feature of the spring. In effect, the only difference between the patents was that the earlier patent covered a spring with both a de-

pressing and a lifting function, while the second patent covered exactly the same spring with a lifting function increasing in force as the spring rose above the level. Now, the function of the spring described in the second patent was necessarily present in the spring as it was shown in the earlier patent, for no change in form of the spring was suggested in either patent by which it might serve the purpose and claim of the first patent, and discharge the functions therein described, without also at the same time discharging the function which was supposed to distinguish the second patent and its claim from the first. In other words, the division of the original application into two patents was nothing more than an attempt to patent, as two separate inventions, the same device when discharging different functions. The opinion of Mr. Justice Jackson distinctly recognizes that "where the second patent covers matters described in the prior patent, essentially distinct and separable from the invention covered thereby and claims made thereunder, its validity may be sustained," and "that an inventor may make a new improvement on his own invention of a patentable character, for which he may obtain a separate patent," and "that a later patent may be granted where the invention is clearly distinct from and independent of one previously patented." It is, of course, true that, if an improvement is an invention separable from the generic invention, the latter is an invention distinct and separable from the improvement. Hence it follows from the propositions above quoted from the opinion in the case of *Miller v. Manufacturing Co.* that a patent for a generic invention is not avoided by the fact that a prior invention has been issued for a distinct improvement on that invention, provided always that the language of the application for the first patent and the circumstances of filing it are not such as to dedicate the generic invention to the public. The case of *Miller v. Manufacturing Co.*, therefore, instead of sustaining the claim made for it, is distinctly an authority to the contrary. We are of opinion that patent No. 424,695 is not rendered void by patent No. 397,451. We are strongly fortified in this conclusion by the most satisfactory opinion of Judge Wallace, speaking for the circuit court of appeals of the Second circuit, upon exactly the same question,—*Thomson-Houston Electric Co. v. Elmira & H. Ry. Co.*, 18 C. C. A. 145, 71 Fed. 396, affirming the decree of Judge Coxe in the circuit court in the same case, 69 Fed. 257.

We come now to the question whether patent No. 495,443 is rendered void by the prior issue of patent No. 424,695. This presents much more difficulty than the question just disposed of. In this case the drawings and specifications of the two patents are substantially alike, and show a car, a track, a post on top of the car, a swinging and hinged arm pivoted in the post, with a contact wheel at its outer end. A spring is secured to the lower end of the swinging arm, and to the spring is attached a weight which works in suitable vertical grooves down through the roof to the front platform, within reach of the driver. The spring and weight maintain the contact of the outer end of the swinging arm with the overhead conductor. Switches in the overhead conductor are maintained immediately over the point in the track where track switches occur. The trolley post and

arm are in such positions and of such size that the point of contact of the outer end of the arm and the overhead conductor is back of the front wheels of the car. This is for the purpose of imparting to the trolley wheel, as it enters the switch in the overhead conductor, the direction already taken by the front wheels of the car in entering the switches upon the track. The spring and weight working in vertical grooves are intended to keep the trolley arm in the vertical plane of the longitudinal center of the car, and thus to make its contact wheel more certain to follow in the overhead switch the direction of the car as it turns into a track switch. It is shown by the evidence that the inventor first used in his combination a spring attached to the top of the car to secure contact, and then a spring attached to the foot of the trolley post, and finally the spring and weight arrangement shown in the drawings of the patents. The claims of the second patent in question are for the broad claims of a combination in an electric railway of a car, a track, an overhead conductor, a post and swinging hinged arm on the car, and a tension spring for maintaining contact between the arm and the conductor; and the language of the specifications shows that it was the intention of the inventor to make this cover the generic invention. The claims of the first patent that embrace the whole combination include the weight as part of the means for maintaining upward pressure of the arm against the conductor. There are five claims of the first patent that cover the whole combination, and include a spring or weight to perform the function of keeping the trolley arm in the center line of the car. Now, this same spring and weight in the drawings discharge the function of maintaining the upward pressure of the swinging arm. The contention of the counsel for the complainant is that the first patent was a patent for the special and improved form of the invention, including the spring and weight with their upward pressure and centralizing tendency, and that the second patent, though using the same drawings and specifications, shows by the language of the latter and its claims that it was intended to cover, and did cover, a combination with a spring without a weight in such a position that it need only discharge the function of maintaining the upward pressure of the arm without the centralizing tendency, and that the modification of the drawings and specifications to show such a tension spring is only the work of a skilled mechanic. To the objection that the last five claims of the earlier patent are exactly the same as the broad claims of the later patent with the mere statement of a necessary centralizing function of the same spring always present in it, it is answered that the second patent was intended to cover springs that had no centralizing tendency, and that the use of the function in describing the spring, therefore, is a limitation of the claim showing it to be a special form of spring. It is argued, therefore, that, as the claims of the first patent do not cover any of the broad claims of the second patent based on a simpler combination of parts than that shown in the drawings, the second patent may be held to be a separate generic invention, while the earlier patent is merely for improved forms of the same invention entitled to a sep-

rate patent. We think the case on these two patents much nearer *Miller v. Manufacturing Co.* than the case on the two patents already considered, but we are unwilling upon an appeal from a preliminary injunction heard upon affidavits, and without a full review of the art, and without a fuller argument and closer consideration of the claims and specifications, to decide the question mooted. The questions are whether, in determining the separability of the inventions, we may consult evidence dehors the record, and whether, in considering the gist of the second patent, we may supply such variations in the form of the combination shown in the drawings and specifications suggested by mere mechanical skill as would make it one not covered by the first patent, but a simpler and more generic form, and whether the claims of the second patent are limited to the devices actually shown by the words "substantially as described." The main invention is confessedly a meritorious one, and we shall be loath to declare it void because of a mistake in the patent office proceedings, if we can, by any reasonable construction of the patents, do otherwise. The second patent was sustained as valid after a full hearing on the merits, before so good and experienced a patent judge as Judge Townsend, of Connecticut. *Thomson-Houston Electric Co. v. Winchester Ave. Ry. Co.*, 71 Fed. 192. This certainly justified the court below in assuming the validity of the patent on a motion for preliminary injunction. It is well settled that, on appeals like this, this court will ordinarily look into the case merely to see whether the discretion of the court below in issuing or withholding the order of preliminary injunction has been abused; and that only in exceptional cases, in which a controlling question of law may be as fully and fairly considered as upon final hearing, and the court has no doubt upon it, will it finally dispose of the injunction and the case on a hearing like this. *Duplex Printing-Press Co. v. Campbell Printing-Press & Manuf'g Co.*, 16 C. C. A. 220, 69 Fed. 250; *Mayor, etc., v. Africa*, 23 C. C. A. 252, 77 Fed. 501. Questions on appeals of this character are ordinarily to be treated in this court from the standpoint from which they were viewed by the circuit court, and the decision on the merits by a circuit court of another circuit sustaining the patent is therefore usually of controlling weight here, as it should be in the court below.

In an appeal from a preliminary injunction on this same patent, the circuit court of appeals of the Second circuit affirmed the order without examining or deciding the validity of the patent, justifying its course in this regard by the statement that in another cause, heard upon a voluminous record by Judge Townsend, the patent had been sustained. *Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co.*, 22 C. C. A. 1, 75 Fed. 1005. The orders of preliminary injunctions appealed from in both cases are accordingly affirmed, at the costs of the appellant, the defendant below.

JANOWITZ v. LEVISON.

(Circuit Court, S. D. New York. April 9, 1897.)

PATENTS—INVENTION AND ANTICIPATION—DRESS STAYS.

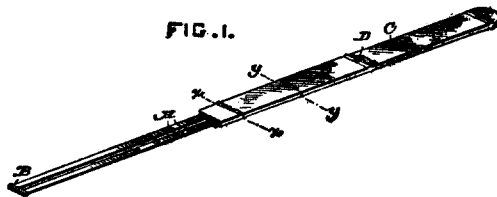
The Janowitz patent, No. 512,113, for a dress stay composed of twin wires covered with a hard, resilient, waterproof coating, such as vulcanized rubber, which also fills in the space between the wires, firmly uniting their inner edges, and having perforations or grooves along the middle for sewing through, discloses a patentable improvement over prior constructions, though the difference seems but slight.

Louis C. Raegener, for plaintiff.

Edwin H. Brown, for defendant.

WHEELER, District Judge. This suit is brought upon patent No. 512,113, dated January 2, 1894, and granted to the plaintiff for a dress stay. In the specification he says:

"This invention relates to that class of stays which are covered with rubber or other suitable compound, and is designed to provide an improvement thereon to prevent their breaking when in use, or rusting after washing or from perspiration of the wearer. Heretofore it has been proposed to cover single steel stays with rubber, and an example of this is shown in my patent, No. 496,313, but such stays cannot be sewed through, as is required in making dresses of the better class, unless the steels are perforated, and if so perforated they are so weakened at the point of perforation as to be almost sure to break under the strain to which they are subjected. To remedy this it has been proposed to use double or 'twin' stays, and cover them with textile material sewed on to the stays. This, however, is also objectionable, as the steels rust under perspiration and after washing, and this destroys the stitching, so that they not only iron mold the clothing of the wearer, but they become loose and annoying beside. To overcome these difficulties is the object of my invention, which I do by imbedding duplex or twin steels in a suitable composition, such as rubber or similar compounds.



"Referring now to the details of the drawings: A represents two steel wires of any approved cross section, but preferably either flat or corrugated. These are united at the ends by metal tips claspings the ends at top and bottom, and the whole is covered with a suitable compound, such as rubber, or other suitable material, which, when it has been vulcanized or hardened, not only forms a hard, elastic coating, but also fills in, or partially so, the space between the two wires, and firmly unites them along their entire length, so as to make them practically one piece. The rubber is preferably perforated at several places along the center between the steels, or the material between the steels may be solid; but, owing to the absence of steel in the middle, it can be sewed through with a needle in the same manner as whalebone or horn, and to facilitate this there is a slight channel in the covering between the steels."

The claims are for:

"(1) A twin wire stay having a hard, resilient, waterproof coating, covering the two members of the stay on all sides, and forming a filling connecting the two contiguous edges of said members, substantially as described. (2) A twin wire stay, covered with vulcanized rubber, having a filling of the same between the wires, firmly uniting their inner edges, substantially as and for the purpose specified. (3) A twin wire stay covered with vulcanized rubber, having a channeled filling of the same between the wires, firmly uniting their inner edges, substantially as and for the purpose specified."

The defense shows abundantly such stays of single pieces covered with rubber, and of two pieces covered with cloth and with paper, but none of twin stays covered with rubber, and perforated or grooved between them for sewing through. The nearest anticipation, and that most relied upon, seems to be the British patent, No. 1,765, granted December 6, 1890, to Henry Manning Knight. The most apt expressions in it towards describing the plaintiff's stay are:

"In the manufacture of artificial or imitation whalebone according to my invention, I use a material known as compounded rubber, vulcanite, ebonite, or such kindred material, and I insert a core in same composed of a strip or strips, piece or pieces of wire alone or combined with some textile fabric. These strengthening pieces should be of or about the length of the 'bones' of imitation whalebone to be manufactured."

"In the manufacture of such artificial whalebone as the above we find the following method of manufacture to answer the purpose well: We run out a thin sheet of suitably compounded rubber, and on it lay at apportioned distances the strips of metal as aforesaid. * * * These again are covered with another thin sheet of rubber, and the whole is then vulcanized under pressure, and in a high degree of heat. The sheet thus made * * * is afterwards cut up into strips of the desired widths, and polished on a revolving buff, when they are fit for market."

When cut into strips of the desired width, some might include two wires, and constitute such a twin stay as they so would make; but this is not shown to have ever been done, and, if done, it would not show such a stay perforated or grooved along the middle for sewing through it there. These differences are slight, but slight differences here are important; and, however slight important differences may be, they are, when newly discovered or invented, by law patentable. *Krementz v. S. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719. The differences between the many patents upon these things are all small, but the practical difference between the plaintiff's stay and any prior ones well appears by the conduct of the infringers in taking it, about which there is no question, and otherwise. Decree for plaintiff.

ZAN et al. v. MACKENZIE.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1897.)

No. 324.

PATENTS—CONSTRUCTION AND INFRINGEMENT—IMPROVEMENTS IN BROOMS.

The Bradshaw & Richardson patent, No. 248,252, and the Bradshaw patent, No. 249,884, both for improvements in brooms, are limited to the precise form and combinations shown, and are not infringed by a broom the ferule of which has neither the serrations of the former patent nor the lugs of the latter.

Appeal from the Circuit Court of the United States for the Northern District of California.

This was a suit in equity by Zan Bros. & Co. and others against George E. Mackenzie for alleged infringement of two patents for improvements in brooms. The circuit court dismissed the bill, and the complainants appealed.

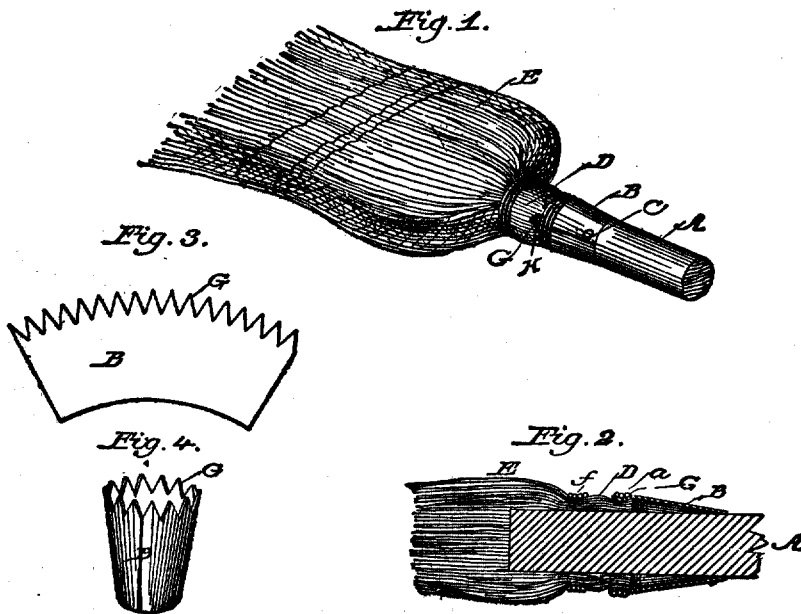
John L. Boone, for appellants.

John Henry Miller, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

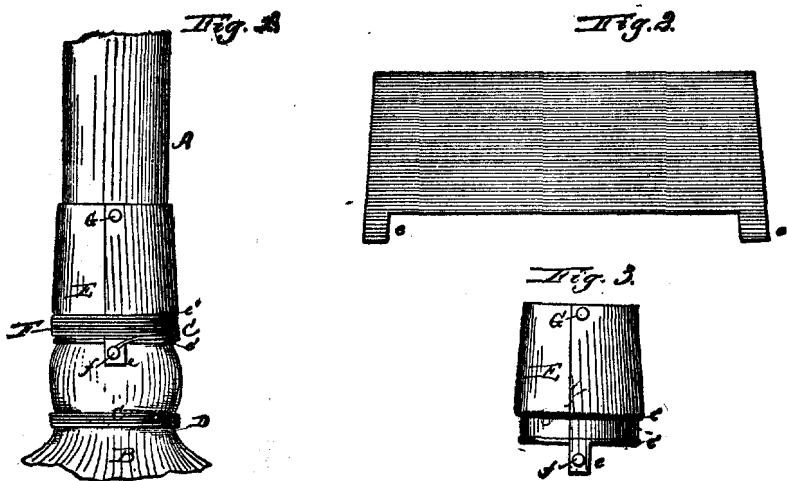
GILBERT, Circuit Judge. The appellants were the complainants in a suit against the appellee, charging him with infringing two certain letters patent for improvements in brooms, to wit, letters patent No. 248,252, issued October 11, 1881, to J. W. Bradshaw and Louis C. Richardson, and letters patent No. 249,884, issued November 22, 1881, to J. W. Bradshaw, both of which were alleged to have been assigned to the complainants. The defense was noninfringement, and a denial of the assignments to the complainants. The first patent has but one claim, which reads as follows:

"In combination with a broom, the slit or open ferrule, B, adapted to contract as the wire is wound round it, and provided with serrations, G, G, all substantially as and for the purpose set forth."



The second patent is for a device which differs from the first only in that the serrations or teeth are cut away, and in their place two lugs are left, one at each end of the metal collar or ferrule which goes around the broom straws. In this patent there are three claims as follows:

"(1) The combination of the open ferrule, E, having lips or extensions, e, e, with wire, C, and tack, f, all substantially as and for the purpose set forth. (2) The broom ferrule, E, formed with the lips, e, e, and with the beads or shoulders, é, substantially as described. (3) The combination with the broom body and its handle of the ferrule, E, formed with the beads or shoulders and with the lips, e, and the wire wrapped around the body below the ferrule, then passed up through the body, and wrapped around the ferrule between the beads, and finally secured by a tack or rivet passing through said lips, substantially as specified."



It was proven that the appellee had used metal collars or ferrules, which differed from those described in the complainants' patents in the fact that they had neither the serrations, G, G, of the first patent, nor the lips or extensions, e, e, of the second patent, nor any equivalent or substitute therefor. On the contrary, it appeared that they were plain pieces of tin or metal, which were placed around the broom, and wrapped thereon with wire. In neither of the complainants' patents is the claim made for an open ferrule. It is doubtful whether, in the state of the art, such a claim could have been made. The claims were for the open ferrule with teeth in the one patent, and with extensions or lugs in the other; the purposes of which are in both patents clearly defined. The patentees were thereby limited to the precise form and combination claimed. *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. 81; *Wright v. Yuengling*, 155 U. S. 47, 15 Sup. Ct. 1. The ap-

pellants contend that an equivalent for the serrations of their first patent is found in the beads or depressions in the appellee's device, which are used to retain the wrappings of the wire, and prevent them from coming off in case the broom straws should shrink, and cause the ferrule to slacken up or loosen. It is clear from the complainants' patent, however, that the serrations perform no such office. In the specification the serrations are called "teeth," and their use is described as follows:

"But the butt ends of the straws extend only under the teeth, and terminate at their base. In order to bind these teeth upon the broom straws so as to clamp the latter upon the handle, we bind a wire, a, around the teeth into a number of coils sufficient to conceal the teeth, and at the lower end of the coil secure a tack, pin, or screw, H, by passing the same through the straws and into the handle."

It will thus be seen that the purpose of the teeth is not to prevent the wire from slipping off the ferrule, but to attach the ferrule more securely to the broom straws. The appellants contend also that an equivalent for the lugs or extensions of their second patent is found in the appellee's device, from the fact that the appellee causes a tack or nail to be driven through the lower corners of the open ferrule to fasten the end of the wire to the broom handle. Here again the appellants must be bound by their claim. They have specifically claimed the extensions for the purpose of inserting the nail therein. If the appellee had the right to use an open ferrule at all, he had the right to drive a nail through it at any point. He was only precluded from using a ferrule with a lug or extension thereto, such as was described and claimed in the complainants' second patent. Inasmuch as the serrations of the first and the extensions or lugs of the second patent are wholly dispensed with in the device which was used by the appellee, there was no infringement. The decree of the circuit court will be affirmed, with costs to the appellee.

A SCOW WITHOUT A NAME.

ROGERS v. A SCOW WITHOUT A NAME.

(District Court, E. D. New York. May 17, 1897.)

ADMIRALTY JURISDICTION—HOUSE BOAT—LIEN FOR TOWAGE.

A scow, which had been fitted up with a cabin and other appurtenances to serve as a house boat, was chartered for the season, the owner agreeing with the charterers to share the profits after a certain date. The charterers engaged the libellant to tow them to New London and back, without informing him that it was a chartered vessel. The answer in the case objected to the jurisdiction, that there was no admiralty lien on such a craft, and that the charterers were liable for the towage. *Held*, that the house boat was subject to admiralty liens, and that the towage was done on the credit of the boat.

This was a libel in admiralty by Robert Rogers against an unnamed scow to enforce an alleged lien for towage. The scow had been fitted up with a cabin and other appurtenances to serve as a house boat. It was then chartered for the season, the owner agreeing to share the profits with the charterers after a certain date. The charterers procured the libellant to tow them to New London and back, without informing him that the boat was chartered. The claimant set up in his answer a want of jurisdiction in the court on the ground that such a craft was not the subject-matter of an admiralty lien, and that the charterers were liable for the towage.

Edwin G. Davis, for libellant.

Goodrich, Deady & Goodrich, for claimant.

BENEDICT, District Judge. I have no doubt as to the jurisdiction of the court to entertain a proceeding to enforce a claim for towage against a house boat, and it seems to me that the evidence shows that the towage sued for was performed on the credit of the boat and her owners, in good faith. There was no bad faith in the transaction, and, in my opinion, the case of *The Kate*, 164 U. S. 458, 17 Sup. Ct. 135, relied on by the claimant, does not apply. Decree for the libellant for the sum of \$200.

PACIFIC CONTRACTING CO. v. UNION PAVING & CONTRACTING CO. et al.

(Circuit Court, N. D. California. May 17, 1897.)

1. FEDERAL COURTS—JURISDICTION IN PATENT CASES—LICENSES.

When there appears to be a subsisting license between the parties to an infringement suit, a federal court has no jurisdiction, under the patent law, to enforce the terms of the license, or to forfeit the license on the ground that its terms have been violated. But, when the existence of the license is alleged by the defendant and denied by the complainant, it is competent for the court to determine whether, at the time of filing the bill, there was a subsisting license between the parties, and until this fact is determined the court has jurisdiction.

2. PATENTS—PRELIMINARY INJUNCTION.

Preliminary injunction granted to restrain infringement of the Rice, Steiger & Thurber patent, No. 319,125, for a process of working and using asphaltum.

Bill in equity for alleged infringement of letters patent No. 319,125, covering a "process of working and using asphaltum." Order to show cause why a preliminary injunction should not be granted. Application for preliminary injunction granted.

Wheaton, Kalloch & Kierce, for complainant.

D. H. Whittemore, for defendants.

MORROW, District Judge. The bill in this case is in the usual form, for an infringement of letters patent No. 319,125, granted to Judson Rice, Andrew Steiger, and Isaac L. Thurber, and which were assigned and are now held by the present complainant. The validity of the invention covered by the letters patent has been adjudged heretofore. *Pacific Contracting Co. v. Southern California Bituminous Pav. Co.*, 48 Fed. 300; *Contracting Co. v. Bingham*, 62 Fed. 281. The invention is described in the letters patent as a "process of working and using asphaltum," and consists, generally speaking, in reducing asphaltum to a plastic condition by the application thereto of hot water or steam, without mixing it with coal tar or any other deleterious substance, and then pressing it under heated rollers or other heated irons. An order to show cause why a preliminary injunction should not be granted was issued on June 6, 1896, and meanwhile a restraining order was granted. The defendants have filed their several answers, to which the complainant has filed its replications, and the case now comes up on the order to show cause. The complainant and the defendants are all citizens of the state of California. The Southern California Bituminous Paving Company, by its answer and affidavits, pleads the right, by a license from the complainant, to use the invention involved in this case; the Union Paving & Contracting Company denies that the process described in the bill is the process covered by the patent; and the three other defendants, officers of the two defendant corporations, deny that they infringed.

It is objected, on the order to show cause, that the court has no jurisdiction of the case, in view of the fact that the rights of the Southern California Bituminous Paving Company to use the inven-

tion under its alleged license are involved. This is substantially the only question involved in this proceeding. The general rule is that, where there appears to be a subsisting license between the complainant and the defendant, the jurisdiction of the court, under the patent law, will not be extended to cover a suit to enforce the terms of the license, or to forfeit the license, on the ground that the terms thereof have been violated. *Hartell v. Tilghman*, 99 U. S. 547; *Albright v. Teas*, 106 U. S. 613, 1 Sup. Ct. 550; *Manufacturing Co. v. Hyatt*, 125 U. S. 46, 8 Sup. Ct. 756; *Marsh v. Nichols, Shepard & Co.*, 140 U. S. 344, 11 Sup. Ct. 798; *Wade v. Lawder*, 165 U. S. 624, 17 Sup. Ct. 425. But, on the other hand, it is also well settled that where a suit is brought for infringement, and the existence of a license is alleged by the respondent and denied by the complainant, it is competent for the court to determine whether, at the time of the filing of the bill, there was a subsisting license between the parties. The determination of this fact is, obviously, necessary in order to ascertain whether or not the court has jurisdiction of the suit for an infringement. *White v. Rankin*, 144 U. S. 628, 12 Sup. Ct. 768; *Hammacher v. Wilson*, 26 Fed. 239; *Oil-Cup Co. v. Manning*, 32 Fed. 625. In other words, the claim by a defendant that he has been using an invention under a license is a defense to the charge of infringement, showing the lawful right to use the invention alleged to have been infringed, and if supported by the facts is a ground for the dismissal of the bill. From the averments of the affidavits it is apparent that the Southern California Bituminous Paving Company held at one time a license from the complainant covering the use of the invention alleged to have been infringed, but I am unable to determine whether or not this license existed at the time the bill was filed; that is, whether or not it had been revoked, upon due notice given by the complainant, for good cause, according to the terms of the license. Until this fact is finally determined, the court has jurisdiction of the suit; for, as stated in *White v. Rankin*, *supra*, "the subject-matter of the action, as set forth in the bill, gave the court jurisdiction, and exclusive jurisdiction, to try it."

The determination of this question will conclude, equally with the Southern California Bituminous Paving Company, the other defendant corporation, the Union Paving & Contracting Company; for the affidavits presented by the latter tend to show that, under some contractual arrangement with the Southern California Bituminous Paving Company, it had employed that company to do certain paving work, and thereby had had the use of the invention alleged to have been infringed. The other three defendants being officers of the two defendant corporations, no further question arises with respect to them. Meanwhile, no such case is presented by the affidavits filed on behalf of the defendants, in view of the counter allegations contained in the affidavits for the complainant, as would justify the court, at this stage of the case, in dissolving the restraining order, or in refusing the application for a preliminary injunction.

The case will be referred to the master to ascertain (1) whether the license between the complainant and the defendant the South-

ern California Bituminous Paving Company was still subsisting when the acts of infringement complained of are alleged to have occurred; (2) if no such license was then subsisting, whether the acts of infringement complained of took place, and to what extent the complainant has been damaged. The complainant gave a bond in the sum of \$2,500 upon the issuance of the restraining order. This sum would seem sufficient to protect the defendants until the further determination of the case. The application for a preliminary injunction will be granted upon the complainant giving a bond in the sum of \$2,500, and it is so ordered.

MORRIS et al. v. CANDA et al.

(Circuit Court of Appeals, Fifth Circuit. May 4, 1897.)

1. REVIEW ON ERROR—MOTION FOR NEW TRIAL.

Alleged error in refusing to grant a motion for a new trial is not reviewable in the federal courts.

2. SAME—TRIAL TO COURT.

When a jury is waived in writing, and the case tried to the court, and the court makes a mere general finding, there is nothing which can be reviewed under an assignment that the judgment entered is contrary to the law and the evidence.

3. SAME—SPECIAL FINDINGS—BILL OF EXCEPTIONS.

A paper purporting to be a bill of exceptions, and which opens and closes in the appropriate forms of such a bill, cannot be considered as a special finding of facts, though it contains an extended statement of the evidence submitted at the trial.

In Error to the Circuit Court of the United States for the Western District of Texas.

W. B. Merchant, John D. Rouse, Wm. Grant, E. Williams, Guy M. Hornor, and Jas. Legendre, for plaintiffs in error.

Thos. J. Beall, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

McCORMICK, Circuit Judge. This is an action of trespass to try title to lands described in the petition. The defendants who answered pleaded the statutory plea,—not guilty. By a stipulation in writing the parties waived a jury, and consented that the matters of law and of fact should be tried by the court. No exceptions were reserved to any action of the judge on exceptions to the pleadings, nor on objection to the admissibility of evidence. There was a general finding and judgment for the defendants. The plaintiffs prosecute this writ of error, and in their assignment say that in the record and proceedings in the circuit court there is manifest error, in this, to wit: First, because the judgment rendered by said court on the 8th day of October, 1894, is contrary to the law and the evidence (stating the evidence relied on); second, because the court committed a material error in refusing to grant the plaintiffs' motion for a new trial. The second error we do not consider, because such action of

the court is not reviewable. The first error we cannot consider, because the judge made no special findings of fact, and, as far as this record discloses, committed no error in the admission or rejection of testimony, and the pleadings are sufficient to support the judgment. *City of Key West v. Baer*, 30 U. S. App. 140, 13 C. C. A. 572, and 66 Fed. 440. The plaintiffs in error insist that the bill of exceptions which is brought up in this record is substantially a statement of the special findings of fact made by the trial judge. We do not so construe it. It purports to be a bill of exceptions. Its opening words are:

"Be it remembered that upon the trial of the above-entitled cause, the following facts being established by the testimony, to wit."

And its concluding words are:

"And thereupon the court rendered judgment against the plaintiffs, and thereafter the plaintiffs moved the court, on the grounds stated in their motion, for a new trial, which motion the court overruled, as appears by record herein, to which judgment the plaintiffs in open court excepted, and now tender this their bill of exceptions hereinbefore fully stated, and ask that the same be allowed by the court, and filed as a part of the record in this cause.

"W. M. Merchant,

"Attorney for Plaintiffs [naming them].

"Signed this 18th day of October, 1894.

T. S. Maxey, Judge."

Between this opening and closing of the bill of exceptions there appears an extended statement of the evidence submitted on the trial, embracing over 50 pages of the printed record; but no note of any exception occurs, nor does it appear that the evidence detailed was all the evidence submitted on the trial. It is manifest upon the face of the paper that it was not the intention of the trial judge to pronounce special findings of fact in the terms which make up this bill of exceptions. It is clear to us that it was not his intention to make any special findings of fact, and that he did not in fact make any. Under the settled rule of this court, and of the supreme court of the United States, construing the statute providing for trials before the judge without a jury when a jury is waived by a stipulation in writing signed by the parties, the record in this case shows nothing that may form a basis for review by this court of the judgment of the circuit court. That judgment is therefore affirmed.

MORRISON et al. v. KUHN.

(Circuit Court of Appeals, Fifth Circuit. April 20, 1897.)

APPEAL.—DECISION ON APPEAL BY OTHER PARTNERS.

Where the record shows that the questions presented were necessarily involved and were decided on a previous appeal by another party from the same decree, and in accordance with such decision the judgment below was modified, the court will simply direct an affirmance of the modified decree.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

M. H. Clift, for appellants.

Foster V. Brown and Mark Spurlock, for appellee.

Before PARDEE and McCORMICK, Circuit Judges.

PARDEE, Circuit Judge. This was a suit brought by William S. Kuhn, in his own right and as trustee for the American Waterworks & Guaranty Company, against Robert Morrison, Carrie P. Morrison, Samuel E. Green, Edward Scott, Moses H. Clift, J. T. Williams, John X. Dickert, and W. T. Page, for the foreclosure of a mortgage upon two tracts of land in Catoosa county, state of Georgia. On final hearing in the circuit court a decree was rendered foreclosing the mortgage on both tracts, but subject to a prior lien held by Samuel E. Green. In the proceedings Robert Morrison and Edward Scott, two of the parties who executed the mortgage, made no appearance, and a decree pro confesso was entered against them. Moses H. Clift, who was the other party who executed the mortgage, and J. T. Williams, who claimed an interest in the mortgaged premises, appeared and contested the right of Kuhn to a foreclosure. Kuhn, not being satisfied with the measure of relief granted by the circuit court, immediately appealed, and on September 14, 1896, perfected his appeal against all the defendants in the case; and citations were duly served on Robert Morrison on the 21st day of September, 1896, and upon Moses H. Clift and J. T. Williams on September 28, 1896. The transcript was duly filed in this court, and the cause assigned for hearing November 24, 1896, on which day it was regularly heard and submitted. No appearance was made for any appellee, except for Samuel E. Green. On December 15th this court rendered its decision (*Kuhn v. Morrison*, 23 C. C. A. 619, 78 Fed. 16), on which a mandate issued in due course. Subsequent to the filing of the transcript of appeal and the assignment of the cause for hearing, Moses H. Clift, Robert Morrison, and J. T. Williams, original defendants in the circuit court, filed a petition in the circuit court for an appeal, which was allowed. None of the other defendants joined in said appeal, nor was there any severance. This appeal was perfected by a bond conditioned that said Moses H. Clift and J. T. Williams should prosecute their appeal to effect, and by service of citation upon W. S. Kuhn, in his own right and as trustee, through his counsel; and the transcript was filed in this court on the 21st day of November, 1896, but no appearance for appellants was then, or has since been, entered. An inspection of the record shows that substantially the same questions are sought to be raised on the appeal of Clift and Williams as were necessarily passed upon by the court on the appeal of Kuhn. On this state of facts, the appeal of Clift and Williams might well be dismissed for the reason that all the parties defendant who are interested in the decree of the circuit court did not join in the appeal, nor was there any summons and severance in order to allow of the prosecution of the appeal by any less than the whole number of the defendants against whom the decree was entered (*Estis v. Trabue*, 128 U. S. 225, 230, 9 Sup. Ct. 58), or for the reason that the appeal being a cross appeal, it was not diligently prosecuted (see *The S. S. Osborne*, 105 U. S. 447; *Hilton v. Dickinson*, 108 U. S. 165, 168, 2 Sup. Ct. 424; *The Tornado*, 109 U. S. 110, 117, 3 Sup. Ct. 78; *Grigsby v. Purcell*, 99 U. S. 505; *U. S. v. Burchard*, 125 U. S. 176, 8 Sup. Ct. 832). As, however, the record shows that the questions now presented were necessarily involved,

and have been settled adversely to the appellants, in our previous decision on the appeal of Kuhn, the affirmance of the decree as modified by this court in *Kuhn v. Morrison* will be proper, and subserve all the ends of justice; and it is so ordered.

ADAMS et al. v. HECKSCHER.

(Circuit Court, W. D. Missouri, C. D. May 15, 1897.)

1. PROCESS—SERVICE OUTSIDE STATE.

Service of summons outside the state, under Rev. St. Mo. 1889, § 2022, is not valid if the summons is not served on the defendant in person.

2. SAME—AFFIDAVIT OF SERVICE.

An affidavit of service of a summons under Rev. St. Mo. 1889, § 2022, made before a deputy clerk, instead of a clerk of court, is insufficient.

3. SAME—SUBSTITUTED SERVICE.

Substituted service of summons, under Rev. St. Mo. 1889, § 2022, is not authorized if it does not appear by the petition or by affidavit that the defendant is a nonresident.

4. SAME—NATURE OF SUIT.

A suit which seeks to require the defendant to perfect his title to certain land, furnish the plaintiff an abstract thereof, convey the land to the plaintiff, and pay him damages, under a contract for the sale of the land, is not one in which the decree can be executed by the court, under Rev. St. Mo. 1889, §§ 2225-2227, without requiring any personal act by the defendant, and accordingly is not so far a suit in rem as to authorize substituted service on a nonresident defendant.

5. SAME—AMENDMENT OF PLEADINGS.

When the nature of a suit as originally brought is not such as to give the court jurisdiction over a nonresident defendant brought in by substituted service, the court has no power to amend the pleadings so as to give jurisdiction over such a defendant.

Thos. M. Jones, for plaintiffs.

Noble & Shields and J. B. Harrison, for defendant.

PHILIPS, District Judge. The case has been submitted to the court upon the motion to dismiss the suit. The action was instituted in the state court of Phelps county, and, on petition of defendant, was removed into this court. In the state court, and prior to the petition for removal, the defendant appeared specially, for the purpose of the motion only, and moved the court to dismiss the suit, for the reason—First, that the court had no jurisdiction of the person of the defendant; second, for the reason that there was no proper service of summons made on the defendant; and, third, for the reason that the defendant, at the time of the institution of the suit, was a nonresident of the state, and attempt was made to bring him in by substituted service by personal summons made upon him in the state of Pennsylvania, and that, the suit being in effect a proceeding in personam, and not in rem, it was not within the provisions of the statute authorizing such substituted service.

The attempted service of summons on defendant in the state of Pennsylvania is clearly bad, for the reasons that process in that state was not served upon the defendant in person, as required by

section 2022, Rev. St. Mo. 1889; and, second, because the affidavit of such service made by the sheriff was not made before the clerk of the court, as required by the statute, but was made before a deputy. *Murdock v. Hillyer*, 45 Mo. App. 287. No such substituted service of process was authorized in this case, for the reason that it neither appears by the petition nor in any affidavit thereto that the defendant was a nonresident of the state, or out of the jurisdiction of the state circuit court, where the suit was instituted.

After the removal of the cause into this court, the case must proceed just as this court finds it when it is removed from the state court. *Tallman v. Railroad Co.*, 45 Fed. 156. Nor is it apparent that on the petition, as it stands, this court could have any jurisdiction to afford the relief sought therein. To give the state court jurisdiction to proceed against the nonresident defendant upon substituted service, without the appearance of the defendant to the merits of the suit, the proceeding must be one essentially in rem. It may be conceded to the plaintiffs that in view of sections 2225-2227, Rev. St. Mo. 1889, an action for specific performance of a contract for the sale and conveyance of real estate may be so maintained, under the state statute, as a judgment therein may be enforced by directing the conveyance of the property, without requiring of the defendant the performance of any personal act. But for this statute, a suit for specific performance would partake essentially of the nature of a proceeding in personam. *Olney v. Eaton*, 66 Mo. 563-567; *Bennett v. Fenton*, 41 Fed. 283. What is the nature and object of this suit? It is predicated on a contract for the sale and purchase of real estate. By the terms of the contract, the defendant was to furnish to the plaintiffs a complete abstract of the title, and to convey to them a perfect title to the land. While the petition in this case is somewhat ambiguous, the gravamen of the complaint is that the deed to the land tendered by the defendant to the plaintiffs was imperfect in its title; that it did not describe the proper land; that the defendant has failed to furnish the abstract as provided in the contract; and that the plaintiffs were damaged in the sum of \$1,000 by reason of having held in readiness the sum of \$10,000 to be paid to the defendant upon his compliance with the contract; and the prayer of the petition is that defendant be decreed "to perfect title to said lands, and furnish an abstract, according to said contract, and to convey, by good and proper warranty deed, the said premises to plaintiffs, and that he pay plaintiffs damages in the sum of one thousand dollars, for the loss of the use of the purchase money of ten thousand dollars from the 24th day of January, 1896." It cannot be controverted that a decree or order of court directing the defendant to perfect title to the land, and to furnish an abstract of title thereto, as also an award of damages, as prayed for, would have to be executed personally against the defendant; and, while a decree of conveyance of title could be executed in rem, it is apparent from the whole body of the petition and the prayer thereof that plaintiffs do not seek to have this done except upon the condition that defendant first furnish the required abstract, and perfect his title to the land.

I have considered the question as to whether the bill does not contain sufficient facts to authorize the court to grant leave to the plaintiffs to file in this court an amended bill, averring sufficient title in defendant to compel him to execute the contract, or aver that plaintiffs are willing to accept such title as defendant has, in fulfillment of the contract, and pray for a specific performance, eliminating from the bill the averments and prayer respecting the failure to furnish the promised abstract, and the requirement that the defendant perfect his title, and also the prayer for damages. But the court is confronted with the legal difficulty that the state court from which this cause was removed had neither acquired jurisdiction over the defendant nor had it jurisdiction over the subject-matter of the relief prayed for in the bill, as against a nonresident defendant not appearing to the merits of the action. On the removal to this jurisdiction, the court must take the case precisely in the condition it was when the order of removal was made. The bill amended as above suggested would be *res nova*. The only way the defendant could be called into this court would be under the provisions of section 8, p. 176, 1 Supp. Rev. St. U. S., which applies to a suit "commenced in any circuit court of the United States." This would be, at best, an experimental and very questionable proceeding. It were better for plaintiffs to go out of court, and begin anew. As against this defendant, they should elect as to what remedy they will pursue. On the breach of such a contract, the vendee may elect to take the title the defendant has, and demand a specific performance, and pray for the conveyance; or he can sue at law for damages as for breach of contract. If the vendor has sufficient or any acceptable title to the vendee, where is the necessity for demanding of the vendor, through the court, a delivery of a completed abstract? It would be a novel procedure for a court of equity to decree that the vendor should deliver such an abstract. If the vendee, by the contract, be entitled to the abstract, it is equally accessible to him, and he could have one made, and sue the vendor for damages.

The contention of plaintiffs' counsel that the appearance of defendant in the state court, for the purpose of removing the cause into this court, is an appearance to the merits of the case, is not tenable. The motion to dismiss, filed in the state court by defendant, expressly stated that it was an appearance only for the purposes of said motion; and it was also expressly stated in the petition for removal that defendant appeared specially and solely for the purposes of such removal. This brings the case within the decision of the supreme court in *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, and was not an appearance to the merits. It results that the motion to dismiss is sustained.

LOUISVILLE, N. A. & C. RY. CO. v. POPE.

(Circuit Court of Appeals, Seventh Circuit. June 12, 1897.)

No. 263.

RAILROAD CONSTRUCTION CONTRACT—INTERPRETATION.

In 1873 the D. R. R. Co., a corporation of Indiana, authorized to build a railroad in that state, and the A. R. R. Co., an Illinois corporation, authorized to build a railroad in that state, entered into a contract by which the D. Co. made over to the A. Co. certain donations made to it for the purpose of building its road, and agreed that the road and all property of the D. Co. should belong to the A. Co. for the purpose of building such road upon condition that the A. Co. should begin construction before a certain date, and thereafter prosecute the same in good faith with such diligence as lay in its power, providing also that the principal condition of the ownership of the A. Co. was the commencement and prosecution of the work of building the road. The A. Co. began the work of construction, and carried it on for a time, expending a considerable sum of money, though this was not shown to be more than the donations to the D. Co., and then discontinued work for want of means to carry it on. In September, 1877, the D. Co., assuming that the A. Co. had failed to prosecute the work, let the contract for completing the road to independent contractors, by whom it was completed, and put in operation. *Held*, that the A. Co., by its agreement with the D. Co., was bound to prosecute the work, not only diligently, according to its ability, but at all events; and, it having ceased work, though from lack of ability to prosecute it, the D. Co. was justified in assuming possession of the road, and contracting with others for its completion, and the A. Co. had no lien on the completed road, or on the part where its work was done, for the amount of its expenditure upon it.

Appeal from the Circuit Court of the United States for the District of Indiana.

The Chicago & South Atlantic Railroad Company was organized September 1, 1873, under the general railroad incorporation law of Illinois, approved March 1, 1872. Its proposed capital stock was \$3,500,000, divided into shares of \$100 each. To this capital stock only a nominal subscription was ever made. It is stated in the argument for appellant, and apparently not disputed in that for appellee, that the total amount of stock subscribed was eight shares. In September, 1872, the Indianapolis, Delphi & Chicago Railroad Company was formed under the act of March 11, 1867, of the legislature of Indiana, to declare abandoned certain unfinished railroads, and to provide for their completion, etc. This company succeeded to the rights of a prior and abandoned corporation of the same name. Its capital stock was \$2,500,000, divided into shares of \$50 each. Its corporate purpose was to build and operate a railroad from Indianapolis, by way of Delphi, a distance of some 140 miles, to a point on the boundary line between Illinois and Indiana in the county of Lake in the latter state, and in the direction of Chicago. The number of shares originally subscribed to the capital stock of this company was 1,068. Just how many were afterwards subscribed, and what was paid for the same, or agreed to be paid, does not clearly appear in the record. On September 5, 1873, these two corporations made a treaty in words following:

"Whereas, the Indianapolis, Delphi & Chicago Railroad Company is a corporation duly organized and existing under the laws of the state of Indiana, and thereby duly authorized to construct and operate a railroad extending from a point on the dividing line between the states of Indiana and Illinois at or near Lake county, Indiana, to Indianapolis, Indiana, commencing at Indianapolis, and extending through or within eighty rods of the following points, to wit, Big Springs Meeting House, Boone county; Kirkland, Frankfort, and Rossville, Clinton county; Delphi, Carroll county; Monticello, White county; and Rensselaer, in Jasper county. Said railroad is intended to pass

into or through the counties of Marion, Hamilton, Boone, Clinton, Carroll, White, Jasper (probably Newton), and Lake (counties); and thence on a route to be chosen by the said corporation to such a point on said county line between said states as may be most practicable; and is also empowered by the laws of the state of Indiana to construct, operate, and maintain an extension of its railroad from any point on the line thereof to any point on the line of the Chicago & South Atlantic Railroad in the state of Illinois. And whereas, the said Chicago & South Atlantic Railroad is a corporation duly chartered, organized, and existing under and by virtue of the state of Illinois, and for the purpose of building and operating a railroad from the city of Chicago, in the state of Illinois, to a point on the boundary line between the states of Illinois and Indiana, and to be hereafter located so as to connect with the terminus of the road of the said Indianapolis, Delphi & Chicago Railroad Company. And whereas, said roads are to be built in the line of and as parts of a railway to be known as the Chicago & South Atlantic Railroad, which said railroad is to be built on a uniform gauge of four feet and eight and one-half inches (4 feet 8½ inches) in a line as near as may be as follows, to wit: Commencing at Chicago, Illinois, in the most direct route practicable over and upon the road of the Chicago & South Atlantic Company to connect with the road of the Indianapolis, Delphi & Chicago Railroad Company on the line dividing the states of Illinois and Indiana, between the counties of Cook, Illinois, and Lake, Indiana; thence to Monticello; thence to Delphi; thence to Frankfort; thence to Indianapolis, over the routes of said Indianapolis, Delphi & Chicago Railroad Company; thence to Shelbyville; thence to Greensburg; thence to the Ohio river, at Vevay, or Rising Sun; thence crossing the Ohio river to Kentucky; thence to Frankfort or Lexington; thence to Loudon or some point near; thence by either or by both by direct route to Knoxville, Tennessee; thence to the Blue Ridge road to headwaters of the Savannah river to Anderson, in the state of South Carolina, or by the route from Loudon, or some point near it, to some point near the Cumberland Gap; and thence to Asheville, in the state of North Carolina, the objective points being Wilmington, North Carolina, Charleston and Port Royal, or Foote's Point, South Carolina, and Augusta and Savannah in Georgia. And whereas, the said Indianapolis, Delphi & Chicago Railroad Company is incorporated as a railroad company, and has been, and now is, obtaining, and is hereafter to obtain, subscriptions and donations for the purpose of building, maintaining, and operating said company: Now, therefore, the said Indianapolis, Delphi & Chicago Railroad Company and the said Chicago & South Atlantic Railroad Company, for the purpose of making the said Indianapolis, Delphi & Chicago Railroad Company a portion of the Chicago & South Atlantic Railroad Company, and for the purpose of securing an early commencement and completion of the work of building and operating said railroad company, do hereby make and enter into the following arrangements and agreements, to wit: (1) The Indianapolis, Delphi & Chicago Railroad Company, with all its property, franchises, and privileges, shall from this day be operated, controlled, and absolutely owned in fee simple by the Chicago & South Atlantic Railroad Company aforesaid as a portion of the grand route from the city of Chicago to the South Atlantic Ocean, upon condition, nevertheless, that the said Chicago & South Atlantic Railroad Company, or their agents or assignee, shall on or before the first day of July, 1874, commence the construction of said Indianapolis, Delphi & Chicago Railroad within the state of Indiana, and shall thereafter prosecute the building of the same in good faith with such diligence as lies in their power until said Indianapolis, Delphi & Chicago Railroad shall be completed. (2) All moneys, lands, stocks, bonds, and other things of value that have been and shall hereafter be contributed, donated, or subscribed by any state, county, city, community, corporation, or individual for the purpose of constructing or maintaining the said Indianapolis, Delphi & Chicago Railroad shall from henceforth belong to and be absolutely owned by the Chicago & South Atlantic Railroad Company aforesaid, or their assignees, subject, however, to such provisions and conditions as shall hereafter be set forth, and to the laws of the state of Indiana, and the Indianapolis, Delphi & Chicago Railroad Company heretofore enacted. The principal condition of the ownership of said things of value by the Chicago & South Atlantic Railroad Company

is fully understood and agreed to be the commencement and prosecution of the work of building the Indianapolis, Delphi & Chicago Railroad by the said Chicago & South Atlantic Company, their agents or assignees, and (in order to more fully secure both parties to this contract, and also the donors and subscribers mentioned) it is hereby agreed that the proceeds of all such subscriptions and donations shall in all cases where it is practicable be deposited in trust with Drexel & Co., bankers of Philadelphia, or George C. Smith & Bro., bankers in the city of Chicago, and in such local banks as may be mutually agreed upon by the Chicago & South Atlantic Railroad Company, their agents or assignees, and the party or corporation making the donation or subscription. All such donations or subscriptions shall thus remain as a special deposit in trust with said banks, until such time as hereafter stated, to wit, whenever and so soon as the Chicago & South Atlantic Railroad Company shall establish the fact (by the sworn statements of their engineers and contractors) that they have by their agents or assignees performed work upon the said Indianapolis, Delphi & Chicago Railroad to the value of (\$50,000.00) fifty thousand dollars, then the Chicago & South Atlantic Railroad shall have the authority and right to draw (through the proper officers of their company) the sum of forty-five thousand dollars (\$45,000.00), and for one hundred thousand dollars' worth of work they shall have the right to claim and own the sum of ninety thousand dollars, and so own for any other specified amount of work; it being the herein-declared intention to prescribe and agree that the Chicago & South Atlantic Railroad Company, or their assignees, shall be entitled and have the right to draw on the above-mentioned deposits, and on all donations and subscriptions of said Indianapolis, Delphi & Chicago Railroad Company, to the extent of ninety thousand dollars, and so for any specified amount of work; it being the herein-declared intention to prescribe and agree that the Chicago & South Atlantic Railroad Company, or their assigns, shall be entitled to have the right to draw on the above-mentioned deposits, and on all donations and subscriptions to said Indianapolis, Delphi & Chicago Railroad Company to the extent of ninety per centum of the value of all the work actually performed by them; and that such donations and subscriptions shall not be obtained under any other conditions, or for any other purpose, and the said Chicago & South Atlantic Railroad Company shall have the right to thus draw upon and own all the donations and subscriptions above mentioned until the entire amount shall have been paid over to the said company on the terms and conditions above mentioned. The details and specific arrangements of making such donations and subscriptions to be hereafter agreed upon in such manner as shall not conflict with the existing laws, and shall best protect the interests of both the subscribers thereof, and those of the Chicago & South Atlantic Railroad Company. Should the work of building the said Indianapolis, Delphi & Chicago Railroad not be commenced by the said Chicago & South Atlantic Railroad Company, their agents or assignees, on or before the first day of July, 1874, then this agreement shall be null and void, and of no effect, and all the subscriptions and donations deposited in trust with the banks as above set forth shall be returned by the said banks to the respective owners or subscribers thereof."

On February 3, 1875, a supplemental compact was made between the two companies in words following:

"Whereas, the Indianapolis, Delphi & Chicago Railroad Company and the Chicago & South Atlantic Railroad Company did by certain articles in writing made and executed between them on the 5th day of September, 1873, but not a consolidation, agree, among other things, that if the Chicago & South Atlantic Railroad Company should well and faithfully perform on its part all the matters and things mentioned in said contract to be performed by said company, then the said Indianapolis, Delphi & Chicago Railroad Company, its stock and donations, became the property of the Chicago & South Atlantic Railroad Company; and whereas there are divers omissions and insufficiencies in said articles in writing: Therefore, we, the Indianapolis, Delphi & Chicago Railroad Company and the Chicago & South Atlantic Railroad Company, do make these further articles of contract, and for union and consolidation to take place in futuro, not in presenti, according to the act of the respective legislatures of the states of Indiana and Illinois, in such case made and provided: First. That the said corporations above named, by force

and virtue of said original article of writing, and by force of these presents, are hereby associated, but not consolidated, for the purpose of jointly promoting the building and running of their respective roads, shall assume a common name, and after the first day of July next shall be known under the name and style of the Chicago & South Atlantic Railroad Company, but nevertheless all the estate, real, personal, mixed, and the rights, privileges, and immunities, together with the stocks belonging to each of the said corporations, shall become vested in the Chicago & South Atlantic Railroad Company of the state of Illinois from September 5, 1873, and the debts and liabilities of each of said corporations shall be deemed and are hereby declared to be the debts and liabilities of the last-named body corporate. Second. All the capital stock of the said Indianapolis, Delphi & Chicago Railroad Company shall be held by the board of directors of said company for the use of the Chicago & South Atlantic Railroad Company of Illinois, and for such purpose shall be held in trust for the board of directors of the said last-mentioned company, to be held by them and their successors in office, or by such other persons as the board of directors of said company may from time to time direct, for the use of said company, and subject to the said control and management, direction, disposition, sale, and disposal of the said board of directors of said last-mentioned company: provided, nevertheless, the stock of the Indianapolis, Delphi & Chicago Railroad Company now out in the hands of subscribers and bona fide holders, or which shall thereafter be issued to counties, townships, municipal corporations, or individuals, shall be entitled to share pro rata in all dividends hereafter made and declared by the Chicago & South Atlantic Railroad Company of Illinois. Third. The board of directors and officers of the Indianapolis, Delphi & Chicago Railroad Company, or their duly-elected successors, shall continue in office for the purpose of preserving and guarding the trusts created in the articles of agreement, and for such other purposes as shall necessarily grow out of or be incident to their respective offices, until such time as said railroad shall be completed, and trains operated upon the same. But the capital stock and business and property of whatever name and kind of said associated company shall be managed and controlled exclusively by the board of directors of the Chicago & South Atlantic Railroad Company of the state of Illinois, and the said directors and all the officers shall be elected and appointed in the manner now provided for by the charter and by-laws of the last-named company. Fourth. From and after the first day of July next all regulations and by-laws now existing, or which may hereafter be established by the said Chicago & South Atlantic Railroad Company of Illinois, which do not contravene any of the stipulations of the agreements, and all rules and regulations necessary for the management and control of the business of the said company shall be and remain in force over the interests hereby to be hereafter consolidated and united as fully as if the same had been established or put in force by either of said companies prior to these articles of agreement. Fifth. All subsidies, public or private, all rights of way now obtained in the name of the Indianapolis, Delphi & Chicago Railroad Company, shall become and now are the property of the Chicago & South Atlantic Railroad Company of Illinois, and all municipal, county, or township subscriptions and other subsidies which are now pending, but not completed, and all judicial and other proceedings now pending for obtaining lands and the rights of way over the same by the Indianapolis, Delphi & Chicago Railroad Company shall be carried on, and said stock shall be issued by said company, in the name of the Indianapolis, Delphi & Chicago Railroad Company to all intents and purposes the same as if this association had not taken place until the same be fully terminated; and in all cases where any municipal subscriptions are made to the capital stock of the said road said stock shall be issued by said road, but the same shall be carried on for the use and benefit of the Chicago & South Atlantic Railroad of Illinois. Sixth. It is also agreed and made obligatory upon the Chicago & South Atlantic Railroad Company to establish the car-repair works in or near the city of Delphi, and to maintain them there, provided said company shall receive a donation in fee simple of not less than (25) twenty-five acres of land in or near said city, suitable for such purpose. Seventh. So much in said original articles in writing as refer to depositing moneys in trust with Drexel & Company of Philadelphia, or Geo. C. Smith &

Co., is hereby declared inoperative, and of no effect. The original articles in writing are to be in no way canceled or annulled by these supplementary articles, but the same are hereby ratified and confirmed in every respect. Eighth. Nothing contained in the articles above written shall be so construed as to be a consolidation or surrender of the franchises of said roads, or either of them, but the said roads are each to preserve their integrity, independence, and identity the same as if no such contract had been made; the true meaning and intent of these presents being that the Chicago & South Atlantic Railroad Company of Illinois are to be the owners of such stock of the Indianapolis, Delphi & Chicago Railroad as had not been sold or subscribed for up to the 5th of September, 1873, together with all its property, real, personal, and mixed, for the purposes hereinbefore expressed, and the Chicago & South Atlantic Railroad Company is to carry on all the business of building, equipping, and operating said road, and at such time, and not until then, as said road is built, and cars running over the same from Chicago to Indianapolis, and then and thereafter the said roads shall be consolidated and united as one corporation, and the Indianapolis, Delphi & Chicago Railroad shall be incorporated with and become merged in the Chicago & South Atlantic Railroad Company of Illinois, and the board of directors and officers of the last-named company shall constitute the directors and officers of said consolidated company. Ninth. And the said parties hereto, for the consideration aforesaid, do mutually agree and declare that the stipulations herein shall take effect immediately upon the due execution of the present articles."

Shortly after September 5, 1873, the work of constructing the road was commenced, and for a time carried on under the administration of the Chicago & South Atlantic Railroad Company pursuant to the contract. On September 29, 1877, the directors of the Delphi Company, assuming as a fact that the Chicago & South Atlantic Company had failed to prosecute the work of building the road in Indiana, in effect declared that the last-named corporation had no further interest or right in the unfinished road, and shortly after let a contract to complete the construction. The contractors, Yeoman, Hegler & Co., at once proceeded with this work. Later their contract was assigned to Yeoman, and afterwards by the latter to a corporation called the Chicago & Indianapolis Air-Line Railway Company. The work of construction was at length finished, the contractors and their assignees treating the unfinished road, upon which construction was resumed as here stated, as the property of the Delphi Company, and disregarding or ignoring any claim or right therein on the part of the Chicago & South Atlantic. About the time of making the contract with Yeoman, Hegler & Co., the Delphi Company mortgaged the entire property to secure bonds. These bonds were subsequently purchased for value by the Chicago & Indianapolis Air-Line Company, and afterwards this mortgage was foreclosed, and the road sold. Later appellant became the owner, and the road is now in use by appellant as part of its line.

On May 14, 1880, one John B. Pettit filed a creditors' bill against the Chicago & South Atlantic Railroad Company in the circuit court of the United States for the Northern district of Illinois. On December 31, 1880, appellee, Pope, was made receiver of, and to him later was assigned, all the property of the defendant in the last-named suit. On July 12, 1881, the bill in the case at bar wherein appellant and a number of other corporations and individuals were made parties defendant was filed. After divers amendments, answers, replications, etc., the cause was referred to a special master. On his report, and in accordance with his recommendation, a decree was entered, wherein it is adjudged that appellee receiver, in right of the Chicago & South Atlantic Railroad Company, has a lien on the road from Dyer, in Lake county, Ind., to Delphi, in Carroll county, to secure the sum of \$168,922.88 as justly due the company last named, with interest thereon at 6 per cent. per annum from the 4th day of March, 1881; and that, unless that sum be paid by a day fixed, the portion of the road referred to be sold. From this decree, appellant, the Louisville, New Albany & Chicago Railway Company, alone prosecutes this appeal.

On September 5, 1873, the date of the first of the two writings set forth in this statement, the Delphi Company had not commenced the work of constructing its road, but it had acquired certain rights of way; and certain subscriptions, for payment of which it held notes, had been made. After the

Initial agreement with the Chicago & South Atlantic, these notes and subscriptions were, according to the seventh finding of the master, canceled, and other or new notes and subscriptions substituted in their place. Shortly after September 5, 1873, the Chicago & South Atlantic surveyed or resurveyed the proposed road from Indianapolis to Dyer; and in June, 1874, grading was commenced in Lake county. Under the direction and control of the Chicago & South Atlantic and its contractors, the construction went on quite continuously in the counties of Lake, Jasper, White, and Carroll until the work, including "rights of way paid for and covered by said work," and including surveying and engineering, amounted in value, as estimated by the master in his nineteenth finding, to \$168,922.88. The thirty-second finding shows that this work—identified in the nineteenth finding as having been "twenty-three miles of grading, grubbing, and bridging of said railroad in Lake county, about six miles in Jasper county, one mile in White county, and nine miles in Carroll county"—was all done some time prior to September 1, 1875. The master states that other work was done by the Chicago & South Atlantic, but he apparently failed to identify the same, and the total value of the work or unfinished road for which he found the Chicago & South Atlantic was entitled to recover, as fixed by him, was the \$168,922.88, with interest, as above mentioned.

The theory of the special master—and his view was adopted by the circuit court—was that any cessation in the prosecution of the work of building the road in Indiana prior to September 29, 1877, was due, not to any want of diligence on the part of the Chicago & South Atlantic Railroad Company, but to inability, caused in a measure by the stringency of the times; that there never was any intent by the Chicago & South Atlantic to abandon the work of building the road; that the action of the Delphi Company in resuming active control and letting the work to its own contractors was wrongful as against the Chicago & South Atlantic; that the unfinished road, as seized by the Delphi Company and its contractors, was still the property of the Chicago & South Atlantic by force of the contract; that appellant and all persons and corporations dealing with the property after September 29, 1877, had or were charged with notice of the rights of the Chicago & South Atlantic Railroad Company; and that appellee, as receiver in right of the Chicago & South Atlantic, was entitled to the recovery and lien already mentioned. Further reference to the report and evidence will be found in the opinion.

E. C. Field, Henry W. Blodgett, Addison C. Harris, and George W. Kretzinger, for appellant.

John S. Miller and William P. Fishbach, for appellee.

Before BROWN, Circuit Justice, and JENKINS and SHOWALTER, Circuit Judges.

SHOWALTER, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

Appellee, being receiver, represents, in a sense, the creditors of the Chicago & South Atlantic Railroad Company. The sum recovered, \$168,922.88, with interest, as allowed, now amounts to more than \$312,000. This money, or a large part thereof, would doubtless be used by the receiver in discharge of the debts of the Chicago & South Atlantic Railroad Company. But it is the right of the company which is in question. No creditor is here asserting any lien in his own right; nor is it anywhere intimated as a theory of the case that certain creditors had liens in their own right, and that by a species of subrogation the debtor company may, in this proceeding, assert such liens. As the record comes before this court, the creditors have no right which transcends that of the company. If there were no creditors, and the purpose were to divide the large sum mentioned above among the few persons who made the trifling

subscription to the stock of the Chicago & South Atlantic, the question of recovery here would be precisely the same as it is. The people of Indiana along the proposed route were much interested in the enterprise which formed the subject-matter of the contracts of 1873 and 1875. By the laws of that state they, in the form of municipal corporations, were empowered to make donations, subsidies, and subscriptions in aid of the franchise granted to the Delphi Company to build the road. Individual property owners could, of course, make such donations as they saw fit. It was hardly expected that any municipal or other subscription to the stock of the Delphi Company would yield direct profit. The scheme evidently was to solicit and obtain donations, subsidies, and subscriptions, and use the same, or the proceeds thereof, in the work of initial construction, and then use the unfinished road as the basis of credit to secure means for completion. The appeal for municipal aid, it was evidently thought, would meet with a more liberal response if the road to be built in Indiana could be represented as part of a continuous line from Chicago to the South Atlantic seaboard; hence the organization of the Chicago & South Atlantic Railroad Company, and the compact between the two corporations shown by the writings of 1873 and 1875. The Chicago & South Atlantic was at liberty, of course, to provide means out of its own proper resources to be used in the construction of the road from the Indiana state line to Indianapolis, but no engagement to do so distinctly appears in either writing. Whether it was possible for the Delphi Company to alienate the franchise to build the road, that company did not do so. Section 8 of the writing of 1875 is explicit upon the point. The liberty and authority of the Chicago & South Atlantic to build the road in Indiana, and solicit, accept, and use in construction work in Indiana donations, subsidies, and subscriptions from property owners and municipal corporations along the route in that state, must be referred to the contract with the Delphi Company. All such donations, subsidies, and subscriptions, together with the stock of the Delphi Company undisposed of at the time of the execution of the writing of 1873, and all other property of the Delphi Company then on hand, was by the contract made subject to a special or limited ownership in the Chicago & South Atlantic. Since all construction work in Indiana was under the Delphi Company's franchise, and would otherwise have been without legal sanction, all donations, subsidies, and aids volunteered towards the work in Indiana, whether before or pending the contract, must have been initially the property of the Delphi Company. It was by force of the contract that these "things of value" were subject to the dominion of the Chicago & South Atlantic Railroad Company. That this was the understanding is apparent more particularly from the last sentence of the first paragraph of the preamble to the treaty of 1873, from the sections marked 1 and 2 of that same writing and from sections 5 and 8 of the writing of 1875. The section, for instance, marked 2 of the paper of 1873 in part reads:

"All moneys, lands, stocks, bonds, and other things of value that have been and shall hereafter be contributed, donated, or subscribed by any state,

county, city, community, corporation, or individual for the purpose of constructing or maintaining the Indianapolis, Delphi & Chicago Railroad shall from henceforth belong to, and be absolutely owned by, the Chicago & South Atlantic Railroad Company, subject, however," etc.

The Indianapolis, Delphi & Chicago Railroad is the road from Indianapolis to the state line, which the Indianapolis, Delphi & Chicago Railroad Company was authorized to build. That company, retaining its franchise to so build, and being deemed, held, and by necessary implication declared, the owner initially of everything given in aid of said franchise, transfers a limited and special dominion over all the "things of value" referred to in the contract as then extant or in expectancy to the Chicago & South Atlantic. It may be here added that profit as to a contractor or in any other way to the Chicago & South Atlantic was not stipulated for or proposed. When, under the administration of that company, the road should be completed, and cars running from Indianapolis to Chicago, the two corporations were to merge into a third, and the entire property was to vest in the consolidated concern. By the third section of the writing of 1875 the directors and officers of the Delphi Company and their successors "shall continue in office for the purpose of preserving and guarding the trusts created in the articles of agreement." By the eighth section of the same writing, after the idea of a surrender or alienation of its franchise by the Delphi Company is excluded, "the true meaning and intent of" the contract is declared to be that the Chicago & South Atlantic shall be owner of the property of the Delphi Company "for the purposes hereinbefore expressed"; that is, to carry on the work of building the Indiana portion of the road in question. In the preamble to the writing of 1873 it is recited that the Delphi Company "has been and now is obtaining, and is hereafter to obtain, subscriptions and donations for the purpose of building" the road in Indiana; and the immediate purpose of the contract is expressed to be "an early commencement and completion of the work of building" the road. The property alienated or put in the dominion of the Chicago & South Atlantic by the contract was, as before noted, all the property which the Delphi Company then had, or which might, pending the contract, be given or subscribed by any person or corporation in aid of its franchise to build the road.

The limitations fixed in the contract on the ownership thus vested in the Chicago & South Atlantic appear to be three in number, and to be limitations in time. Such ownership commenced when the writing of 1873 was executed. It would cease, apparently, first, if the work of construction were not commenced on or before the 1st day of July, 1874; again, if the work were not thereafter prosecuted,—that is, followed up or carried on with substantial continuity; and again, if diligence by the Chicago & South Atlantic in such prosecution should not be commensurate with the means for the time being available. These limitations seem to be set down, the first and third in the section marked 1; the other, in the section marked 2 of the writing of 1873. The learned counsel for appellee does not identify the second of these limitations. He reads in the contract only the

first and third, and he insists that the cessation in the work of construction prior to September 29, 1877, if there were any substantial cessation, was due, not to any want of diligence on the part of the Chicago & South Atlantic Company, but to inability for want of means. It would, of course, follow on this view that a cessation, however indefinite in time, if due to inability, would leave the ownership of the unfinished road in the Chicago & South Atlantic; that the Delphi Company, while liable to lose its charter if it did not build the road, and morally bound that construction work done with means given by Indiana people should, in case of need to forward the work, be a basis of credit, has yet made a contract which, in a contingency not unlikely to happen, would leave the unfinished road in possession of a foreign corporation unable to proceed with the work, and yet in a position, by reason of such inability, to demand in cash the value of what had been done, before the Delphi or any person or corporation succeeding to the rights of the Delphi could go on with the work to completion. The adjudication in the circuit court was, and the contention here, in effect, is, that the Chicago & South Atlantic had to be paid the full value of the unfinished road, even though every dollar used in construction had been given by Indiana people, and even though the Chicago & South Atlantic had neither furnished out of its own resources, nor become liable out of its own resources for, any labor or material which had entered into the construction. This holding and contention would be sound if we take the contract to mean that the limitation on the ownership vested in the Chicago & South Atlantic was only a want of diligence, and not a failure to prosecute the work, due to inability rather than to want of diligence. By the section marked 1 of the writing of 1873 the ownership transferred to the Chicago & South Atlantic is "upon condition that the Chicago & South Atlantic Railroad Company * * * shall on or before the 1st day of July, 1874, commence the construction of the" road in Indiana, "and shall thereafter prosecute the building of the same in good faith with such diligence as lies in their power until said" road "shall be completed." By the section marked 2 all property or "things of value that have been and shall hereafter be contributed, donated, or subscribed for the purpose of constructing" the road in Indiana "shall * * * be absolutely owned by the Chicago & South Atlantic Railroad Company, subject, however, * * * to the laws of the state of Indiana and the Indianapolis, Delphi & Chicago Railroad Company,"—meaning, apparently, subject to any obligation or condition imposed by law on the last-named company,—and also subject "to such provisions and conditions as shall be hereafter set forth." Then follow the words: "The principal condition of ownership of said things of value by the Chicago & South Atlantic Railroad Company is fully understood and agreed to be the commencement and prosecution of the work of building" the road in Indiana. The Delphi Company, as already suggested, was subject to loss of its charter and franchise to build the road if the work of construction were not commenced and prosecuted. The primary and immediate purpose of the contract was the "early commencement and completion of the

work of building." Dominion over all property at the date of the first writing owned by the Delphi Company, or afterwards contributed in aid of its franchise, was turned over to the Chicago & South Atlantic, not as beneficial owner, but for the purpose mentioned. If the Chicago & South Atlantic did not commence the work of construction before the 1st of July, 1874, or if it did not thereafter use in carrying on the work the degree of diligence specified, or if for want of ability or means it ceased to carry on the work,—in any one of these contingencies its dominion or ownership over the things of value comprehended in the contract was to lapse or expire. The prosecution of the work of building the road in Indiana is one thing; diligence in such prosecution commensurate with the means at hand for the time being is another. Prosecution of the work might go on without cessation, but the degree of diligence in such prosecution might be inadequate and out of proportion to the means and instrumentalities available. The purpose here was an early commencement and completion of the work. The language of the contract expresses both conditions. They are not inconsistent. The Chicago & South Atlantic was expected out of its own proper resources to build the road from the Indiana state line to Chicago. It might also quite possibly build and complete the road in Indiana without other means than what was transferred to it by the contract with the Delphi Company. The Chicago & South Atlantic was privileged to pledge the unfinished road in Indiana, but such pledge would, of course, be subject to the conditions under which that company held that property. The Chicago & South Atlantic was also privileged to provide means out of its own resources to complete the work. When completed, the compensation would come in the shape of a beneficial ownership vested in the consolidated corporation. But the failure of the Chicago & South Atlantic to prosecute the work, and its loss on that account of the special dominion given by the contract over the "things of value" therein mentioned and the construction work done with said "things of value," did not necessarily entail pecuniary loss on the Chicago & South Atlantic Company. There was no engagement by the Delphi Company that the "things of value" turned over to the Chicago & South Atlantic would be sufficient to build the road. The risk of failure to prosecute the work, and of the loss on that account of that ownership which was transferred to it by the contract, was left with the Chicago & South Atlantic.

The master states in his report that the seizure or resumption of active control by the Delphi Company in the fall of 1877 "rendered the completion of the road by the Chicago & South Atlantic impossible if it were otherwise able to have completed its construction." He says also that the Chicago & South Atlantic Railroad Company was in 1880, "and had been for some years, without means to complete said road, yet the purpose to build said road had not been abandoned, and efforts were made by said road from time to time to raise means with which to prosecute the enterprise." The total value, so far as the master saw fit or was able to compute, of the construction work done under the administration of the Chi-

chicago & South Atlantic, and for which that company was, according to the master, entitled to recover, was \$168,922.88. This construction work, as stated in the nineteenth finding, "consisted of about 23 miles of grading, grubbing, and bridging of said railroad in Lake county, about 6 miles in Jasper county, 1 mile in White county, and 9 miles in Carroll county." This estimate included also engineering and surveying and "rights of way paid for and covered by said work." From what the master says in the two paragraphs of the thirty-second finding, this work must have been all done prior to the 1st day of September, 1875. On September 29, 1877, the directors of the Delphi Company declared that contract relations with the Chicago & South Atlantic were at an end, and on October 2, 1877, three days later, the Delphi Company let a contract for completion of the road to Yeoman, Hegler & Co.; and these contractors thereupon commenced work on the unfinished road. This action of the Delphi Company at once became known to the officers of the Chicago & South Atlantic. The statement by the master that "the purpose" on the part of the latter company "to build the road had not been abandoned" is immaterial. Intent, one way or another, on the matter of abandonment, was not fixed in the contract as a limitation on the ownership thereby vested in the Chicago & South Atlantic. But this finding by the master is hardly warranted. From the correspondence between the officers of the Chicago & South Atlantic, and from statements made by officers of the latter company to a committee of inquiry sent by the Delphi Company prior to September 29, 1877, and from other matters shown in evidence, the better conclusion would have been that the purpose or expectation of building the road under the contract was, in fact, given up, or at least had become secondary to another policy, namely, to claim ownership over the unfinished road for whatever advantage might result to the Chicago & South Atlantic, its stockholders and creditors. But it is not here meant that this claim was not in good faith. It was made on a construction of the contract evidently deemed sound and defensible. The contractors, Yeoman, Hegler & Co., commenced, and for a year or more carried on, their construction work on that part of the road which lay in White and Carroll counties. Active work under their contract was not resumed in Lake county until later. The conclusion of the master is that the part of the road in Lake county was not "seized" until work was so resumed thereon. He states, in general terms, that the Chicago & South Atlantic did some work on this part of the road after October 4, 1877. He says:

"In November, 1878, lumber was provided by said road to construct a bridge over the Kankakee river to the state of Indiana, and some work was done in the fall of 1878 in Lake county, and some ties were delivered at that time in said county to be used in said road, and ordered by said company."

This is apparently a prefatory statement to what follows:

"And until the appropriation of said part of said line of road as herein set forth in Lake county, the same was in the possession of the Chicago & South Atlantic Railroad Company, though such road was at that time, and had been for some years, without means to complete said road, yet the purpose

to build said road had not been abandoned, and efforts were made by said road from time to time to raise means with which to prosecute the enterprise."

The master does not indicate what the work last referred to was, nor does he give any value to the same, or to the ties or lumber, if any were in fact used. The purpose of the statement is apparently to signify an assertion of right persisted in up to that time by the managing agents of the Chicago & South Atlantic. On March 12, 1876, the president of the Chicago & South Atlantic wrote to the vice president:

"The work must be put under headway this spring, otherwise we will lose our subsidies and the moral effect. * * * Now you should by all means get the road under headway."

Other letters interchanged between the date last mentioned and October 4, 1877, indicate, as the status at the time, substantially a complete cessation of the work of construction. In response to a letter written October 3, 1877, by the president of the Chicago & South Atlantic detailing the action of the Delphi Company on September 29, 1877, and the letting of the contract by that company as before noted, the vice president wrote on October 4, 1877, "My advice is, simply protest and keep quiet." The contention by appellant that for more than two years prior to September 29, 1877, the work of building the road in Indiana had ceased, seems well made. The Chicago & South Atlantic was advised at once of the action taken by the Delphi Company based on the failure to prosecute the work. Whatever the former company afterwards did, if anything, in Lake county, was done with notice that the latter denied any ownership on the part of the former over any part of the road in Indiana.

It is said that the action of the Delphi Company on September 29, 1877, was a forfeiture; that the law abhors forfeitures; that time was not of the essence of the contract; and that there could be no forfeiture or rightful resumption of control by the Delphi without a formal request to the Chicago & South Atlantic to proceed, and a refusal after such request. But the contract declared that the prosecution of the work of building was a principal condition of "the ownership of said things of value by the Chicago & South Atlantic Railroad Company." The contract fixed a limitation upon whatever ownership or dominion vested by that instrument in the Chicago & South Atlantic over said "things of value," or the unfinished road so far as constructed with said "things of value." This ownership ceased by its own limitation. The case is not one of the forfeiture of an estate upon condition. It is an instance, rather, of a conditional limitation. The Delphi Company had to make sure as a fact of that cessation or failure to prosecute the work which by the contract limited the dominion of the Chicago & South Atlantic. In such event, there was no longer any ownership in the Chicago & South Atlantic to be displaced by re-entry. The contract made no provision for any demand or notice. The Chicago & South Atlantic was not prejudiced in any way by want of prior formal demand and notice. On the showing of the record, the un-

finished work had been neglected, and was falling into decay. There had long been nothing more, if anything, than a mere constructive possession in the Chicago & South Atlantic. Such a possession is fictitious. It ceases with the legal ownership. In 1876 a committee was sent by the Delphi Company to inquire of the officers of the Chicago & South Atlantic whether or not, and when, if at all, the Chicago & South Atlantic proposed to go on with the work. One Gould, a member of the committee, testified that at the interview between the representatives of the two companies the statement was distinctly made on behalf of the Delphi Company, in effect, that if the work were not speedily resumed, the latter company would displace the Chicago & South Atlantic, and itself resume exclusive and active control. The vice president of the Chicago & South Atlantic testified that he did not remember any declaration so strongly put on the occasion in question. The testimony of Gould was not otherwise disputed. It makes nothing upon the rights of these corporations, as defined in the contract, that after ownership thereunder by the Chicago & South Atlantic had ceased by limitation, the Delphi Company for a time might have been still willing that the Chicago & South Atlantic should take up the work again. The original bill and the amended bill each contains the following statement: "Your orator further shows that all subscriptions, bonds, subsidies, and assets of every kind and description obtained by the Chicago & South Atlantic Railroad Company, as stated in this bill, were obtained under and in pursuance of either the original agreement or supplemental agreement * * * or both of them,"—meaning the writings of 1873 and 1875. In other words, within the scope of the bill, the subject-matter contended about in this litigation is the property of the Delphi Company on hand when the writing of 1873 was executed, everything which was subsequently given, contributed, or subscribed in aid of the franchise to build the road in Indiana, which franchise always remained, as originally vested, in the Delphi Company, and all construction work done with the means aforesaid. The master found that some portion of the construction work included by him, as already stated in the valuation of \$168,922.88, had not been paid for by the Chicago & South Atlantic. How much he does not state. He does not find any lien on this work in favor of any laborer or contractor or specify any sum as due to any one. He does not show any sum raised by the Chicago & South Atlantic for, or expended on, the work in Indiana, which did not come to that company by virtue of its contract with the Delphi. He shows that donations and subscriptions aggregating some \$300,000 were made in Indiana pending the contract. He does not show that the \$168,922.88 was in excess of the amount actually received by the Chicago & South Atlantic from such donations and subscriptions in Indiana. Moreover, the distinct and specific purpose of the bill, as already said, was to recover the "assets * * * obtained by the Chicago & South Atlantic Railroad Company under and in pursuance of either the original agreement or the supplemental agreement, * * * or both of them" (meaning the writings of 1873 and 1875); and the distinct ground of such re-

covery is stated in the bill to be that the displacement of the Chicago & South Atlantic on September 29, 1877, was on the false and fraudulent pretense that the latter company had failed to prosecute the work of building the road in Indiana. The argument on behalf of appellee proceeds at times on the unconscious assumption that the donations, subsidies, and subscriptions by Indiana municipal corporations and people were never the property of the Delphi Company, but were initially and at all times the property of the Chicago & South Atlantic. These donations, subsidies, etc., in Indiana were, as repeatedly stated herein, in aid of the franchise to build the road. This franchise was vested in the Delphi Company. Building operations were carried on by the Chicago & South Atlantic pursuant to the Delphi franchise, and solely by force of the contract with the latter company. The initial ownership over every aid to the road is, in effect, declared as a term in the contract. Every donation or subsidy, whether pending or in futuro, is by the contract transferred from the Delphi to the Chicago & South Atlantic. The latter company got nothing of the kind except as coming from the former. It had no right, as between itself and the Delphi, to treat anything in aid of the construction work in Indiana otherwise than as initially given to the Delphi Company, and thence transferred to itself by force of the contract. One may not assert a contract and at the same time evade any term in it. A devisee who elects to take under a will must not claim adversely to the testator anything disposed of by such will. The contract between these two corporations is avowedly the foundation of the claim here sued on. The receiver cannot assert, contrary to the section marked 2 of the writing of 1873, that any "thing of value" thereafter "donated * * * for the purpose of constructing * * * said road" in Indiana was not, by force of said section, given to the Delphi Company, and by force of said section transferred from the Delphi Company to the Chicago & South Atlantic. The property here in controversy belonged in the first instance to the Delphi Company. The Chicago & South Atlantic derived its ownership from the contract, and such ownership was subject to the limitations expressed in the contract. One of the conditions of such ownership was "the prosecution of the work of building" said road. The Chicago & South Atlantic failed to prosecute the work. Its ownership, therefore, ceased and determined. The decree is reversed, and the cause remanded, with the direction that as to this appellant the bill be dismissed for want of equity.

Mr. Justice BROWN, dubitante. Upon the argument of this case, I was strongly inclined to the opinion that the cancellation of its contract by the Delphi Company was not made in good faith, particularly in view of the fact that there was a personal consideration passing to Mr. Haymond, and that he appeared to have acted in excess of his authority. While the cessation of the work might have authorized the Delphi Company to put an end to the contract by legal proceedings in the nature of a foreclosure, or perhaps even by notice, it did not seem to me that it could be legally done by a summary seizure and appropriation of the unfinished road, by which it

acquired property of the value of \$168,000, without having paid anything for it, unless the subscriptions made by the Indiana people could be construed as having been made for its benefit. There was no provision in the contract for a forfeiture of the property acquired or the work done by the South Atlantic Company in case the contract were rescinded; and I had assumed the law to be that where a party to a contract for the construction of a building, railway, or other similar work elected to rescind such contract for failure to perform within the stipulated time, he could not take to himself the fruits of a part performance without making compensation in the nature of a quantum meruit. While the application of this rule may be subject to modification to the extent to which the Delphi Company had contributed of its own means to the construction of the work, it seemed to me that, if the receiver was not entitled to recover the whole value of the property appropriated, he was equitably entitled to recover at least to the extent of the claims of the creditors of the South Atlantic Company for the work done or the materials furnished in the construction of the road.

But as my brethren have placed a different construction upon the contract and the acts of the parties, and as the case depends largely upon the view taken of the testimony, which is very voluminous, and no question of law is involved which is likely to become important as a precedent, I am disposed to acquiesce in the opinion of the majority.

ROGERS v. RILEY et ux.

(Circuit Court, D. Kentucky. May 2, 1896.)

1. RECEIVERS—POWERS OUTSIDE OF JURISDICTION.

The general rule that a receiver has no extraterritorial jurisdiction is subject to the exception, arising out of comity, that where the receiver is appointed to collect the assets, pay the debts, and wind up the affairs of a corporation, he may sue for that purpose in another jurisdiction, when by his bill he shows that all the corporate debts have been paid, so that there are no domestic creditors requiring protection, and that there is no infringement of the public policy of the state where the suit is brought.

2. FEDERAL COURTS—JURISDICTIONAL AMOUNT.

Where, by express stipulation, valid in the state where made, a debtor becomes liable for a reasonable attorney's fee in case the debt is collected by suit, such fee may be added to the amount of the debt, for the purpose of making up the jurisdictional amount. Such a fee is not a part of the costs which are to be excluded under the judiciary act of 1887-88.

This was a suit in equity by C. H. Rogers, receiver of the New South National Building & Loan Association, against F. B. Riley and Sarah Riley, his wife. The cause was heard on demurrer to the cause of complaint.

Jesse L. Rogers and R. H. Hill, for plaintiff.

J. A. Craft, for defendants.

BARR, District Judge. This cause is submitted on demurrer to the bill of complaint, and it presents two important questions touching the jurisdiction of this court:

1. The complainant sues as a receiver appointed by a chancery court in the state of Tennessee, and the first question is whether he

can, as such receiver, maintain an action in this court. The general rule is, undoubtedly, that a receiver appointed by a court has no extraterritorial jurisdiction. *Booth v. Clark*, 17 How. 322. But we think there is a well-established exception to this general rule, and the inquiry here is whether the allegations of this bill are sufficient to bring it within that exception. It appears from the allegations of the bill that the New South National Building & Loan Association was a corporation organized under the laws of the state of Tennessee, and that in a suit in the chancery court of Claiborne county, Tenn., the complainant was appointed and qualified as receiver of all the property, business, and assets of said corporation, and that the defendants were shareholders in said company; that a suit was brought by R. N. Nesterson and others against C. E. Boyden and others in said chancery court, and the proceeding was to declare the corporation insolvent and put it into liquidation. It is also alleged in the bill that said chancery court had jurisdiction of the subject-matter and the parties in said cause; that it had jurisdiction of said corporation and of all of its shareholders, whether formally made parties thereto or not; and that said proceedings were sustained and a decree rendered in March, 1892, adjudging said corporation insolvent, and its affairs were directed to be wound up, to the end that its assets might be distributed first in the payment of its debts, and whatever remained to be distributed pro rata among its shareholders; and the complainant, Rogers, was appointed receiver, and was fully authorized and directed to execute said decrees, and to bring any and all suits necessary to be brought for the collection of the assets of said corporation. It is alleged that Riley was and is a shareholder in said corporation. It is also alleged that all of the debts of said association have been paid. These allegations being taken for true, we think that the present proceeding is within the exception to the general rule which limits the powers of a receiver to the jurisdiction of the court appointing him. This because of the comity between the states of the Union, which will allow the maintenance of a suit by a receiver appointed by a court of another state, where there are no domestic creditors, and where it is not against the public policy of the state in which the suit is brought. 2 Beach, Mod. Eq. Prac. § 727; *Hurd v. Elizabeth*, 41 N. J. Law, 1; *Metzner v. Bauer*, 98 Ind. 427; 20 Am. & Eng. Enc. Law, 242, and cases cited. I had occasion in a case pending in this court to examine the record of the suit of *Nesterson v. Boyden* in the chancery court of Claiborne county, and have there maintained the right of Receiver Rogers to maintain an action like this one.

2. It is insisted that as the note sued on is only for \$2,000, and as there are some payments which are allowed as credits in the bill, the amount in controversy does not exceed \$2,000, exclusive of costs and interest, and that, therefore, this court has not jurisdiction. It is true, from an examination of the bill, and a calculation of the credits given for payments which are stated in the bill, that the amount sued on the note is a little over \$1,900. But the bill avers that the contract sued on is a Tennessee contract, and that, by the laws of the state of Tennessee, valid and binding contracts can be entered into between the debtor and the creditor, whereby a debtor agrees

to pay a reasonable attorney's fee to the creditor or his attorney in the event the debt is sued for, and this contract may be made either in the note executed for the debt, or the mortgage to secure the same. It is alleged that the defendant contracted and agreed that if the mortgage indebtedness, or any part thereof, should be collected by or under legal or equitable proceedings, the mortgagor should pay the expense of the collecting, including a reasonable attorney's fee to the mortgagee, and that the lien of the mortgage should extend to and include all such expenses, and that the same should be included in any judgment awarded for the enforcement of said debt, and for the sale of the mortgaged premises. The obligation of the mortgage is in these words:

"Should the said indebtedness, or any part thereof, secured by this mortgage, be collected by or under legal or equitable proceedings, said first party shall pay all expenses of collection, including reasonable attorney's fees; and it is agreed that the lien of this mortgage shall extend and include all such expenses, and the same shall be included in any judgment awarded for the enforcement of said debt, or for a sale of the mortgaged premises."

And it is alleged in the bill that 10 per cent. on the amount sued by the mortgagee would be a reasonable attorney's fee in the case, and the prayer of the bill is that a sale of said property be made to pay said mortgage debt, together with 10 per cent. thereon, as complainant's attorney's fee. The act of 1887-88 gives this court "concurrent jurisdiction with the several courts of suits of a civil nature at common law and equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000"; and the inquiry here is whether or not this attorney's fee which is thus contracted for in this mortgage is to be considered as costs, within the meaning of the act, or should it be calculated as a liability, in estimating the amount in controversy? The acts of congress allow an attorney's fee, which in a case like this is \$20, and provide, also, that the fees of the clerk, marshal, and attorney shall be taxed by the judge or the clerk of the court, and be included in, and recorded as part of, the judgment or decree against the losing party. See Rev. St. §§ 824, 983. This, being a contractual obligation to pay the association a reasonable attorney's fee, is not, we think, in any sense, costs, as mentioned in the act of 1887-88, but is a liability which should be included in estimating the amount in controversy. It is true that in this provision of the contract the attorney's fee is considered as an expense of collection of the mortgage debt, and it might be argued therefrom that it is not an existing liability as of the date of the bringing of the suit, since it was to be an expense of collection; but, construing the entire contract, it is quite clear that the liability for the attorney's fee exists at the time of the institution of either a legal or equitable proceeding, and the fee, when ascertained, is to be included in the judgment for the debt and for the sale of the mortgaged premises. In the case of *Baker v. Howell*, 44 Fed. 114, Judge Caldwell had occasion to consider whether or not the notary's fee of \$3.50 for the protest of a note for the nonpayment of \$2,000 might be added as part of the amount in dispute, so as to give the requisite amount for jurisdiction of his court. He there held—and properly,

we think—that the notary's fee was part of the costs which would be taxed under the general law as costs of the proceeding, and it was therefore not to be included in making the jurisdictional amount to give the court jurisdiction. He there clearly draws the distinction between that which would be included as costs under the statute and the general practice, and that which would be based solely on the contract of the parties litigant. Here the allegation is made that this contract is valid by the laws of the state of Tennessee, and that the contract, being valid in the state of Tennessee, should be enforced in this court. It is distinctly alleged that a reasonable attorney's fee is at least 10 per cent. of the amount due, which, if added—and we think it should be—to the amount due on the mortgage note, would make more than the jurisdictional amount of \$2,000.

We have not overlooked the case of *Dodge v. Tulleys*, 144 U. S. 451, 12 Sup. Ct. 728, in which the supreme court indicates that, in a deed of trust which is sought to be enforced, an equity court might adjudge to the trustee a reasonable attorney's fee as part of the expense of executing the trust, and have it taxed against the trust property, notwithstanding the statute of the state in which the foreclosure proceedings were pending prohibited the allowance of such fees. This is because the state statutes cannot control the equity practice in the federal courts. But this opinion has no application to the present inquiry, since it is quite clear that a reasonable attorney's fee, if allowed at all, must be because of the contract of the defendants in the mortgage, and could not be allowed as costs either by this court, or a state court of Tennessee or of this state. We therefore conclude the demurrer should be overruled, and it is so ordered, and the defendants are given 20 days within which to file their answer.

UNITED STATES SAVINGS, LOAN & BUILDING CO. v. SULLIVAN et al.

(Circuit Court, D. Kentucky. September 12, 1896.)

SAVINGS AND LOAN ASSOCIATIONS—LOANS AND MORTGAGES—DEFAULT—WITHDRAWAL
VALUE OF SHARES.

Defendant made a mortgage to a savings and loan company to secure a loan made upon 40 shares of the stock of the company. The note given for the loan provided that, if the borrower failed to make any monthly payment on said stock, or to pay any installment of interest for a period of three months after it was due, then the whole amount of the note should become due and payable; and the mortgage provided that in the like case the principal sum and interest should, at the election of the mortgagee, become thereupon immediately due and payable upon such default. *Held*, that upon the occurrence of a default in the payment of the monthly dues on the stock an election to declare the debt matured, whenever actually made, must be as of the date of three months after such default, and the amount due on the stock and the withdrawal value of the shares must be calculated as of said date.

Buckner & Jouett, for complainant.

D. W. Lindsey and Dodd & Dodd, for defendants.

BARR, District Judge. This case comes to me upon a demurrer to the bill, and the ground of the demurrer is that the amount in controversy does not exceed \$2,000, exclusive of interest and costs,

so as to give this court jurisdiction. The bill is for the foreclosure of a mortgage for a note dated March 28, 1890, for the sum of \$2,000, bearing interest at the rate of 6 per cent. per annum, interest payable monthly. The following is a part of the note:

"It is understood that this note is given for a loan obtained on 40 shares of stock of said United States Savings Loan & Building Company, and, if the maker hereof fails to make any monthly payment on said stock, or to pay any installment of interest for a period of three months after the same is due, then the whole amount of this note shall become due and payable. But if the maker hereof shall pay all installments of interest which become due hereon, and all monthly payments and fines which become due on said stock until said monthly payments shall have been past due for a period of six months, then, upon the surrender of said stock to said company, this note shall be deemed to be fully paid and canceled. This note is understood to be made with reference to and under the laws of the state of Minnesota."

The mortgage is executed upon real estate in Kentucky, in which it is provided that:

"If the said party of the first part [the mortgagor], his heirs, executors, administrators, or assigns, shall well and truly pay or cause to be paid to the said party of the second part, its successors or assigns, at the office of the treasurer at St. Paul, Minnesota, or at the office of its trustee, Minneapolis, Minnesota, \$2,000 and interest, according to the conditions of one promissory note executed by Charles B. Sullivan [the mortgagor], said party of the first part, to said party of the second part, bearing even date herewith, payable after three years from date and before nine years from date, with interest on \$2,000 before and after maturity at the rate of six per cent. per annum until paid, interest payable monthly, or shall pay or cause to be paid to the treasurer of said company all installments of interest which become due on said note, and all fines and monthly payments which become due on said stock until said stock becomes fully paid in, and of the value of \$100 per share, and before any of said installments of interest or monthly payments shall have been past due for a period of six months, and shall then surrender said stock to said company in payment of said note, then this deed shall be null and void; otherwise to remain in full force and effect. But, if default be made in the payment of said sum or sums of money, or of any installment of interest thereon, or of any monthly payment on said stock for a period of three months after the same shall be due, or any part of either, or in effecting the insurance or in paying the taxes or assessments at the time or times hereinbefore specified for the payment thereof, or in any condition in this mortgage contained, then, and in either or any such case, the whole principal sum or sums secured by this mortgage, and the interest thereon accrued up to the time of such default, shall, at the election of said second party, its successors or assigns, or its or their agent, become thereupon due and payable immediately upon said default; and the said party of the first part doth hereby authorize and empower the said party of the second part, its successors or assigns, the owner hereof, its agent and attorney, at its or their election, and without notice of such election, to foreclose at once this mortgage for the whole of said principal sum or sums and accrued interest and money paid for taxes, assessments, and insurance, as herein provided, or to foreclose for such sum or sums and interest and money paid as may be due and payable by the terms of said note hereby secured; and to sell the hereby said premises at public auction, and convey the same to the purchaser in fee simple, agreeably to the statutes in such case made and provided; and out of the money arising from such sale to retain the principal and interest and fines then accrued on the sum or sums so elected to be foreclosed for, together with any insurance, assessments, or taxes paid as above stipulated, and all costs and charges of such foreclosure, including seventy-five dollars (\$75) attorney's fees for foreclosing this mortgage, and pay the overplus, if any, to the said party of the first part, his heirs, executors, administrators, and assigns."

There are two certificates, each for 20 shares of stock. Certificate No. 22,121 is assigned absolutely to the complainant as a pre-

mium for the loan granted to the defendant, and certificate No. 4,382 for 20 shares is assigned as collateral security for said loan. There is a provision in each of the certificates that the shareholder agrees to pay 60 cents monthly on each share until said share matures or is withdrawn, and this monthly installment is due and must be paid on the second Tuesday of each month. Fifty-three cents of each monthly payment on each share and all fines shall be paid by the treasurer to the trustee on account of the loan fund, and the other seven cents of each installment shall go to the expenses. There is also a provision that there should be a fine of 10 cents due and payable on each share, if not paid when due, and a fine of 15 cents on each share for each subsequent monthly default.

The bill alleges that the contract between the parties was intended to be and is governed by the laws of Minnesota, and that by the Minnesota law any premium for a loan is not to be considered as usury, nor to be counted as interest. It appears from the allegations of the bill and the exhibits that the complainant has agreed to pay more than \$75 for this foreclosure of the mortgage, and he claims a lien therefor. It also appears that by a resolution of complainant's board, not dated, but alleged to have been on the ——— day of April, 1895, this debt was declared matured, defaulted interest as alleged being then payable for a period of 28 months; and directed the principal of said note and mortgage which was in default to be foreclosed, and that the stock which had been assigned to the company as collateral for the repayment of said loan be canceled, as provided in the by-laws of said company, and credit be given of such amount as would appear to be the withdrawal value of such stock after cancellation of same.

The accounts filed for the payment of interest on said note show that the monthly installments were paid, with the exception of one of the months, up to April, 1893, the last payment being \$60, made December 3, 1892. It also shows that there was paid on certificate of stock No. 4,382, \$492.34, the last payment being made December 3, 1892, and the amount \$84.34; and on certificate No. 22,121 the installments paid amounted to \$456, the last payment being on the 3d of December, 1892, for \$72. The total is rendered thus:

Amount of loan.....	\$2,000 00
Ctf. 4,382, stock	323 66
“ “ fines	80 00
“ 22,121, premium	336 00
“ “ fines	83 00
“ “ interest	280 00
	<hr/>
	\$3,102 66
Less book value Ctf. 4,382, 20 shrs.....	979 60
	<hr/>
	\$2,123 06

In this statement there is a balance claimed of \$2,153.06,—more than enough to give this court jurisdiction. But in this account the installments of dues as charged do not stop with the month of April, 1893, but run down to and include the month of September, 1895, on both the certificates of stock, thus including five monthly

installments after the resolution of April, 1895, declaring the stock canceled. There is debited in this account, it will be seen, \$280 interest on the loan, which is the balance after giving credit for \$380 paid; but in this account there is interest charged up to and including September, 1895,—five or six months after the debt is declared to be matured. We think these installments of dues, after April, 1895, and the monthly installments of interest, are not justified by any construction that can be placed upon either the contract of the parties or the resolution of complainant's board. But, beyond this, we think that by the terms of the contract between the parties that, if they elected to mature the debt, it must be as of the date of three months after default, as it will be observed, the language of the note itself is that, "if the maker hereof fails to make any monthly payment on said stock, or to pay any installment of interest for a period of three months after the same is due, then the whole amount of said note shall become due and payable"; and, while the election is given in the mortgage to the mortgagee to mature or not to mature for such default, we see nothing in the language which changes the time at which the default shall be considered when the election is made. We do not think that the election must be made at the end of the three months, but that, when made, it must take effect as of that date, and settlements made accordingly.

We have not overlooked the fact that there is another provision of this mortgage and of the note under which a fine can be fixed for non-payment, which fine can be inflicted for six months, and it may be that the election must be after the three months and within six months after default. This, however, we do not conceive to be the proper construction, but rather that the right to declare the maturity of the debt continued after the six-months default; but it seems to us that the equitable and fair and just construction of the provisions of the note and mortgage require that when the maturity is declared it should be as of at the end of the three months after default. If this be the correct construction of this provision of the contract of the parties, then all charges for dues after three months' default, made in the fall of 1893, as well as monthly installments of interest charged thereon, are incorrect, and the balance due the plaintiff must be much less than \$2,000,—the sum requisite to give this court jurisdiction,—even if we add to such balance the counsel fee of \$75, which the defendant agreed to pay the complainant as costs of the foreclosure. We are strongly inclined to think that this \$75 is proper to be considered on the question of jurisdiction, and to be estimated in making up the requisite sum, as it is not costs, within the meaning of the act of 1887-88, but a liability based upon the contract of the parties. See MSS. opinion of this court in *Rogers v. Riley*, 80 Fed. 759.

If we are correct in our construction as to the time when the withdrawal value of the 20 shares represented by certificate No. 4,382 should be determined, it is quite clear that the court has no jurisdiction. I do not perceive, from anything in the exhibits or the allegations in the bill, how the withdrawal value of this stock, \$979.60, was arrived at; but I have assumed that that was the correct value

at the end of the three months after the default under which the maturity of the debt was declared, and the cancellation had. If I am in error as to this, it may be corrected by an amendment to the bill. The demurrer must, therefore, be sustained, but I will not, at present, make an order dismissing the bill, but shall give the complainants until the October rules to tender an amendment, if they so desire. If none is filed, the bill will be dismissed.

See statement below.

The amount of default should be declared as of the end of the three months after the latest default, which would be, say, October 12, 1893, and would be about thus, viz.:

Amount of loan.....	\$2,000 00
" " dues, stock, No. 4,382.....	48 00
" " fines	16 00
" " dues, stock, No. 22,121.....	60 00
" " fines	19 00
Interest on loan May 12th to October 12th.....	50 00
	<hr/>
	\$2,193 00
By book value, 20 shares, No. 4,382.....	979 60
	<hr/>
Total due October 12, 1893.....	\$1,213 40
Add the attorney's fee.....	75 00
	<hr/>
	\$1,288 40

GUARANTEE CO. OF NORTH AMERICA v. MECHANICS' SAV. BANK & TRUST CO.¹

(Circuit Court of Appeals, Sixth Circuit. October 5, 1896.)

1. FIDELITY INSURANCE—JOINT OBLIGATION.

Where a bank cashier for whom a fidelity insurance bond is executed to the bank joins in the bond merely to enter into certain obligations to the insurance company, their liability is not joint.

2. REMOVAL OF CAUSES.

A suit in a state court upon a joint and several bond cannot, against the objection of plaintiff, be removed by one of two defendants to the federal court, on the ground of diverse citizenship, on the idea that there is a separable controversy, though plaintiff might have sued the defendants separately.

3. SAME.

A suit having, without objection, been removed to the federal court by one of two defendants sued upon a joint and several obligation, plaintiff, by proceeding to trial without protest, and taking judgment against the defendant on whose petition the removal was made, consented to a severance of the joint action into two several actions, as he had a right to do.

4. EQUITY—WAIVER OF OBJECTION TO JURISDICTION.

Where a case is of a class usually cognizable in equity, but lacking only in some one element necessary to justify that jurisdiction, as in the case of a complicated account, in which the defendant's credit items are not numerous enough to make it strictly a case of mutual accounts, a party who has not objected to the forum below cannot urge the want of equity jurisdiction on appeal.

5. FIDELITY INSURANCE—CONSTRUCTION OF CONTRACT.

As the general purpose of a contract of fidelity insurance is full indemnity, and this should not be defeated except by clear and unambiguous limitations

¹ Rehearing denied July 6, 1897.

assented to by the parties, all ambiguities of expression, as in contracts of fire or life insurance, will be construed most favorably to the assured.

6. SAME.

The insurer and insured in a fidelity insurance bond being upon a plane of equal opportunity for information, the insured is not held strictly to the duty of disclosing all the conditions material to the risk, as in the case of ordinary insurance.

7. SAME—NEGLIGENCE OF INSURED.

The obligor in such a bond is not released from liability by the want of even ordinary prudence on the part of the assured in lessening the risk, unless he expressly stipulates therefor.

8. SAME—STIPULATION AS TO SUPERVISION.

A fidelity insurance bond executed to a bank, indemnifying it from loss by the dishonesty of its teller, stipulating that the bank shall observe "all due and customary" diligence in the supervision of the employé for the prevention of default, does not bind the bank to comply with a general banking custom as to taking trial balances from the individual ledgers. 68 Fed. 459.

9. SAME—CUSTOM AS TO SUPERVISION.

The "custom" of the bank as to the character and frequency of inspections, as disclosed by answers to written questions asked by the company in its preliminary investigation, was the "due and customary" diligence in supervision stipulated for, and no other supervision was required. 68 Fed. 459, affirmed.

10. SAME—RENEWAL OF INSURANCE—REPRESENTATIONS AS TO EXAMINATION OF ACCOUNTS.

A certificate, made previously to the renewal of the teller's bond, that his books and accounts had been "examined and found correct," is to be taken as true, however careless the examination may have been, if made in good faith, and the examiners believed the accounts correct.

11. SAME—NEGLIGENT METHODS.

The fact that certain trial balances were discontinued by the teller, as part of his scheme to defraud, does not release the insurance company.

12. SAME—LIMITATION AS TO DATE OF DISCOVERY OF LOSS.

A provision in the bond limiting the risk to a loss sustained "and discovered during the continuance of this bond, and within six months from the employé ceasing to be in the said service," does not bind the company for any loss discovered more than six months after the expiration of the bond, whether the employé had then quitted the service of teller or not.

13. SAME—EMPLOYER'S KNOWLEDGE OF SPECULATIONS.

A condition in the bond, "that the employer shall at once notify the company on his becoming aware of the said employé being engaged in speculation or gambling," was not violated by the failure of the president of the bank to notify the company upon hearing that the teller had engaged in speculative gambling to a small extent, but had stopped; the president acting in good faith. 68 Fed. 459, affirmed.

14. SAME—WARRANTIES.

A fidelity insurance company, previous to issuing to a bank a bond indemnifying it from loss by the dishonesty of its cashier, asked the president the question: "Have you known or heard anything unfavorable as to his habits or associations, past or present? Or of any matter concerning him about which you deem it advisable for the company to make inquiry?"—to which he answered "No," the answer being made to the best of his knowledge and belief. The president had been informed that the employé had engaged in speculative gambling to a small extent, but had stopped. Held that, though the answer of the president be regarded as a warranty, there was no breach of it. 68 Fed. 459, affirmed.

15. APPEAL—OBJECTIONS WAIVED.

It is too late to object upon appeal that judgment upon a fidelity insurance bond includes an item of "overdrafts allowed and not authorized," in the absence of proof showing the facts, as embezzlement or larceny may be committed by overdrafts.

16. SAME—INTEREST.

Under a fidelity insurance bond, interest should be allowed, independent of statute, from the date of embezzlements, or from the end of each year, if the jury or the chancellor choose, to the filing of the proofs of loss; but on this amount there can be no interest for three months after that time, where by the terms of the contract the loss is not due until three months after filing proofs of loss.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

This was a bill in equity filed in the chancery court of Davidson county, Tenn., by the assignee for the benefit of creditors of the Mechanics' Savings Bank & Trust Company against the Union Bank & Trust Company, administrator of John Schardt, deceased, a corporation of Tennessee, and the Guarantee Company of North America, a corporation of Canada, to state an account between the bank and John Schardt, its deceased cashier and teller, to obtain a decree properly applying certain credits to the debt in favor of Schardt, and to recover the balance found to be owed by Schardt to the bank from the guarantee company, on two bonds or fidelity insurance contracts entered into by Schardt and the guarantee company with the bank, indemnifying it from loss by the dishonesty of Schardt; one covering his dishonest acts while he was teller of the bank, and the other for his dishonest acts while he was its cashier. The guarantee company removed the cause to the court below on the ground that there was in the case a separable controversy between the complainant, a citizen of Tennessee, and the guarantee company, an alien corporation. The bonds sued on were joint and several obligations of Schardt and the guarantee company. Schardt's administrator demurred to the bill for want of equity in the state court, and the record shows no further proceeding against it. No motion to remand was made, and the cause proceeded in the court below against the guarantee company alone; the two parties stipulating that the cause should be heard in equity, or, if removed to the law docket, that a jury should be waived, and trial had to the court.

Schardt was teller of the bank from January 16, 1888, until January 1, 1893. He was cashier from January, 1893, until his death, April 17, 1893. The bond covering his acts as teller was given in 1888 for a year, and was renewed from year to year until January, 1893, when a new bond covering his acts as cashier was given. The teller's bond recited that the bank had delivered to the guarantee company a certain statement, and that it was agreed and understood that the statement constituted an essential part of the contract of indemnity. In consideration of \$100 a year, the company then agreed to make good and reimburse to the employer such pecuniary loss as the employer shall have sustained by the fraudulent acts of the employé in connection with the duties of his said office or position, or with any other duties assigned to him by the employer in the said service, committed by him and discovered during the continuance of this bond, and within six months from the employé's ceasing to be in the said service. The bond provided further that: "The following provisions are also to be observed and binding as a part of this bond: That this bond is issued and renewed on the express understanding that the employé has not, within the knowledge of the said employer, at any former period, either in this or other employment, been guilty of any default or serious dereliction of duty. That the employer shall observe or cause to be observed all due and customary supervision over the said employé for the prevention of defaults; and if the employer shall at any time during the currency of this bond condone any act or default on the part of the employé which would give the employer the right to claim hereunder, and shall continue the employé in his service, without notification to the company, the said company will not be responsible hereunto for any default which may occur subsequent to said act or default of said employé so condoned. That the employer shall at once notify the company on his becoming aware of the said employé being engaged in speculation or gambling, or indulging in any disreputable or unlawful habits or pursuits. That there shall be an inspection or audit of the accounts or books of the employé, on behalf of the employer, at least once in every twelve months from the date of this bond. That the company shall not in any wise be responsible to the employer

under this bond to a greater extent than ten thousand dollars." By another provision, Schardt agreed to keep the company harmless from any payment it might have to make under the bond. The bond is signed by Schardt, the guarantee company, and the bank.

The statement referred to in the bond contained twenty questions and answers concerning the bank's knowledge of Schardt's integrity and past business life, the character of supervision to which he was subjected in discharging his duties, and the salary paid him. Of these, the following only are material here: "(7) When was the last inspection of the office at which he was stationed made? A. December 24, 1887. (8) What is your custom in regard to the frequency of inspections? Are they at stated periods, or irregular, and what is the longest time allowed to elapse between inspections? A. Every quarter. (9) Has the bank a duly appointed and authorized inspector or inspectors? If not, by whom are the inspections made? A. The finance committee." "(18) In the event of the employé filling the post of teller, how often, and by what officer, will the teller's cash be checked and counted? A. By the finance committee; quarterly." At the end of each year of the bond the bank received the following notice: "It is necessary, before the bond can be renewed, that you obtain the certificate on the back hereof by your president or cashier, and on its return with the remittance of the premium, the renewal can be immediately effected." The certificate was accordingly filled up and signed by the cashier of the bank at each renewal. Among other things, it stated that the accounts of Schardt, the teller, had been examined and verified by the finance committee of the bank. On such certificate the bond was renewed.

The cashier's bond was given in January, 1893. By its terms, Schardt and the company (the latter relying on a certain guaranty proposal signed by the president of the bank, and on its strict performance and observance thereafter) bound themselves, jointly and severally, in the sum of \$20,000, to reimburse the bank to the extent of \$20,000 for any loss sustained through Schardt's act or fraud in connection with his duties as cashier, and constituting embezzlement or larceny. The bond was made subject to certain conditions indorsed on it, among which were the following: "(1) Any misstatement of a material fact in the declaration within mentioned, or in any claim made under this bond, will render this bond void from the beginning. (2) That the said employer shall use all due and customary diligence in the supervision of said employé for the prevention of default, and to that end shall cause an inspection of his accounts to be made at least once within twelve months." The guaranty proposal contained 19 questions concerning Schardt, and circumstances of supervision, etc. Of these only the following are material: "Q. 4. Have you known or heard anything unfavorable as to his habits or associations, past or present? Or of any matter concerning him about which you deem it advisable for the company to make inquiry? A. No." "Q. 12. Has there been any default in the bank by any employé in applicant's position? A. No. Q. 13. When were applicant's books and accounts (including cash, securities, and vouchers, if any) last examined, and by whom? A. December 31, 1892, by finance committee of bank (Were they found correct?), and found correct. Q. 14. In case of applicant handling cash or securities, how often will the same be examined, and compared with the books, accounts, and vouchers, and by whom? A. Not less than quarterly, and often monthly, by finance committee. * * * The above answers and representations are true, to the best of my knowledge and belief." This was signed by the president of the bank. While Schardt was teller, he kept the general ledger and the cash book, and made the daily statement of the bank. A clerk kept the individual ledger. The individual ledger was correctly kept. Whenever Schardt abstracted money from the deposits, he would place the items correctly in the cash book; but he would make false totals, less by the amount he had taken than the true total, and these false totals he would transfer to the individual deposit account on the general ledger. Until 1890 it had been the practice in the bank every month to take trial balances of the individual ledger accounts, and verify the balances thus shown with those of the general ledger. Schardt directed the clerk to discontinue this, and thereafter, from 1890 until the collapse of the bank, no balance was ever taken from the individual ledger, and no comparison was ever made between Schardt's balances as shown by the general ledger and those which could have been shown by the individual ledger. These two ledgers were out of balance \$2,398 January

16, 1891; \$19,600 January 1, 1892; and \$69,700 January 1, 1893. The discrepancies were caused by Schardt's embezzlement of the deposits. In addition to this amount Schardt embezzled \$3,765.44 in the year between January, 1891, and January, 1892, and \$4,015.44 in the year between January 1, 1892, and January 1, 1893, of money received by him from the proceeds of notes due the bank, and in his custody for collection. The finance committee of the board of directors of the bank made quarterly examinations of the bank. These examinations consisted of checking over a statement made by Schardt of the condition of the bank, with the notes and securities and cash, which he produced, and with statements from other banks of credit balances. There is some doubt as to whether the finance committee saw the cash book, or what purported to be a copy of a statement taken from it. The evidence of the experts is that the account of bills payable shown on the cash book and ledger is correct,—indeed, that every account except the individual deposit account on those books is correct. Neither the finance committee nor the cashier ever asked for a trial balance from the individual ledgers. After January 1, 1893, when Schardt became cashier, he continued his thefts, and between that date and April 17, 1893, the date of his death, he stole \$22,964.17 more; so that his total stealings amounted to more than \$100,000, or double the entire capital of the bank. It was in evidence that it was the universal banking custom in banks, large and small, to take trial balances from the individual ledgers at least once a month, and often every two weeks, and to compare these balances with those of the general ledger. A trial balance of the individual ledgers might have been taken by a clerk in one or two days. It is in evidence that information came to the president and directors of the bank, through their cashier, that Schardt was a partner in what is called "a bucket shop,"—an agency for promoting speculation in small amounts upon the fluctuations of stocks, grain, cotton, and other commodities, in which speculative gambling is done,—and that he was himself speculating. When charged with this, Schardt admitted that he had taken an interest in such a partnership, but that he had sold out. He called his former partners to confirm his statement in this regard. He also admitted, according to one of the witnesses, at another time, that he had speculated to some extent, but asserted that he had always made gains, and had seen the error of his ways and had stopped. Subsequently the cashier received an anonymous letter stating that Schardt was still speculating. He informed the president of the bank. Schardt said it was a lie, and no more attention was paid to it. All this occurred prior to the time when the president signed the guaranty proposal for the cashier's bond referred to. As a matter of fact, Schardt was speculating all the time, and lost the \$100,000 he had stolen in gambling in futures.

Wm. L. Granbery, for appellant.

E. H. East, for appellee.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

HAMMOND, J. (after stating the facts). The first question which arises on this record is one of jurisdiction. Was there a separable controversy between the plaintiff, a citizen of Tennessee, and the guarantee company, an alien corporation? The contracts upon which the action was founded were somewhat different in form. In the bond for Schardt as cashier there is no provision by which Schardt assumes an obligation directly to the bank for his own defalcations. He seems to be made a party merely that he may enter into certain obligations to the guarantee company in case of his defalcation. It can hardly be said, therefore, that the guarantee company's liability to the bank is joint with that of Schardt. In the teller's bond, however, the obligation of Schardt and the guarantee company is joint and several. In suit upon the latter, therefore, the bank and its assignee had the option to begin its action against the obligees jointly

or separately, and the obligee could not control the form of the action in this regard. Therefore it could not be removed as a separable controversy by the guarantee company, when Schardt was its co-defendant, against the objection of the plaintiff. Of course, the plaintiff could, if it chose, at any time dismiss Schardt's representatives from the suit, and make it a several suit against the company. By making no objection to the removal, by making no motion to remand, and by proceeding to trial without protest, and taking a separate judgment against the guarantee company, we must hold that it consented to a severance of the joint action into two several actions,—one against Schardt, which seems to have remained in the state court, or to have been dismissed, and the other against the guarantee company, of which the court below might properly take jurisdiction on the ground of diverse citizenship. Of course, consent cannot give jurisdiction to the federal court over an action not cognizable therein; but when it is cognizable, as its form is joint or several, and a party has the option to treat it as either, we think, in order to maintain the jurisdiction when it has been exercised without objection from him, that he should be held to have elected to treat the action as several as of the time when the removal was effected. Where a petition for removal is filed after the time required by law, and no objection is made before trial, the defect is waived. *Martin's Adm'r v. Railway Co.*, 151 U. S. 673, 14 Sup. Ct. 533. By analogy, in such a case as this, where it is completely within the power of a party to frame or change his action so as to be cognizable in the federal court, and by his silence and affirmative conduct he avoids any question of the jurisdiction, and proceeds to trial, he does thereby elect to change his action to one within the court's jurisdiction.

The next question is also one not raised by the parties, but one to which the court must refer. This is a bill in equity to recover on a contract of fidelity insurance. Equitable jurisdiction was asserted in the bill on the ground that the determination of the liability of the defendant involved the examination of a complicated account, not conveniently to be examined in a court of law, and also on the ground that there were quite a number of credits to be allowed the defendant in the account, the proper mode of applying which required the action of a chancellor. A stipulation filed in the case above shows that both parties preferred the equity jurisdiction, and no objection is made to it in this court. It may be doubtful whether, if the point had been sharply contested by demurrer below, the equity of the bill could have been maintained. It is true that there is a concurrent jurisdiction of matters of account in law and equity. 1 Story, Eq. Jur. § 443. But it is laid down that where all the items of the account are on one side, and no discovery is asked, there is no equity jurisdiction. 1 Daniell, Ch. Prac. 551; 1 Story, Eq. Jur. § 459; *Fowle v. Lawrason*, 5 Pet. 495. It is true that there are a few large items of credits, but it is not clear that they would make the account a mutual one, in the sense in which it is understood in equity. However this may be, we think it our duty to proceed to consider the cause on the merits, under the rule laid down by this court in *Reynolds v. Watkins*, 9 C. C. A. 273, 60 Fed. 824, and *McConnell v. Society*,

16 C. C. A. 172, 69 Fed. 113. In those cases we held (following the decisions of the supreme court) that, where a case with no trace in it of a ground for equitable jurisdiction of it came before the appellate court, it was the duty of this court to reverse the decree and remand the case to the lower court, with instructions to redocket the cause on the law side, but that where the case was of a class of cases usually cognizable in equity, but lacking only in some one element necessary to justify that jurisdiction, it was too late for a party who had consented or not objected to the forum below to urge the objection in this court. We followed in these cases the distinctions shown in the decisions of the supreme court of the United States in the following cases: *Reynes v. Dumont*, 130 U. S. 355, 9 Sup. Ct. 486; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594; *Lewis v. Cocks*, 23 Wall. 466, *Oelrichs v. Spain*, 15 Wall. 211. The feature of the complicated account is certainly present in the case at bar, and thus it is of a class of cases cognizable in equity, and though in fact the defendant's credit items are not numerous enough to make it strictly a case of mutual accounts, we think it within the rule which requires us to enforce a waiver of the question of equitable jurisdiction against a party objecting for the first time in the appellate court, and which a fortiori requires us to maintain the jurisdiction when, as in this case, no objection is made even here. See, also, *Waite v. O'Neil*, 72 Fed. 348.

The defenses to this action involve a proper construction of the language of the bonds, rather than any conflict about the facts. While, in contracts like this, the more natural attitude of a "surety" is assumed by the form, it is, in effect, one of insurance; and whatever indefiniteness of language or ambiguity of expression there may be should be resolved most favorably to the assured, not only because it is the language of the insurer, but also because the general purpose of the contract is full indemnity, and this should not be defeated except by clear and unambiguous limitations assented to by the parties. *Imperial Fire Ins. Co. v. Coos Co.*, 151 U. S. 452, 14 Sup. Ct. 379; *Thompson v. Insurance Co.*, 136 U. S. 287, 297, 10 Sup. Ct. 1019; *National Bank v. Insurance Co.*, 95 U. S. 673, 678, 679; *Supreme Council Catholic Knights of America v. Fidelity & Casualty Co.*, 11 C. C. A. 96, 63 Fed. 48; *Tebbetts v. Guarantee Co.*, 19 C. C. A. 281, 73 Fed. 95, 96; *Indemnity Co. v. Wood*, 19 C. C. A. 264, 73 Fed. 81, 88. And the safeguarding of this rule against any abuse of its application is nowhere better done than by Mr. Justice Jackson when he says:

"But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used; and, if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense." *Imperial Fire Ins. Co. v. Coos Co.*, supra.

It is a familiar rule of interpretation that we shall look to the general purpose of the parties to the contract, to see what they intend to provide. *Waite v. O'Neil* (Ct. App., 6th Cir., Oct. Term, 1896) 22 C. C. A. 248, 76 Fed. 408. The old-fashioned bond to secure fidelity of trust administration being a contract of suretyship, strict-

ly, and not of indemnifying insurance, in the expansion of the modern contrivance of organizing incorporated companies to furnish a guaranty of fidelity these contracts naturally took the form of a bond, as these do, rather than that of a policy of insurance. But as to this subject-matter of indemnity, as well as to the multitude of others formerly covered by bonds to which the principle of insurance is being so comprehensively applied, the general object is that of a protection as broad at least as that afforded by the old-fashioned bond, the form of which has been assumed, and for which the modern contrivance is intended to be a substitute. Marine, fire, or life insurance against the destructive forces of nature is not quite the same thing as an insurance against the dangers of dishonesty; and, the risk being of an entirely different nature, the courts must interpret the contract in view of this difference, applying the words used to the purpose of covering the peculiarities of the risk assumed on the one hand, and on the other intended to be discarded or shifted to others. And if these new contracts, whatever their form, are to be turned into contracts of insurance, the courts will be careful not to again perplex themselves with regrettable technicalities of law such as have sometimes crept into the older contracts of insurance, and have required statutes for their removal. In marine, fire, and life insurance, it is not an unreasonable assumption that the owner knows more intimately than others can know the conditions which are material to the risk assumed, and it is therefore not unreasonable to require him to disclose those conditions to the insurer, and to hold him strictly to that duty. But in an insurance like this the insurer and the insured deal at arm's length with each other, and upon a plane of equal opportunity for information. Indeed, the risk does not depend so much on conditions of fact as upon a mere judgment about human character in the subject of the insurance,—his individuality of moral qualities. About this the insurer can inform himself, and the assured is not presumed to know anything, as in the case of the owner of a property or a life which has been insured. Hence it is not unreasonable to hold the insurer to his risk in the broadest sense that is required to indemnify the assured for any loss by dishonesty which falls fairly within the employment of the person whose honesty is guaranteed, and to permit no escape except by lines of retreat or avenues of deliverance clearly defined, well marked, and mutually understood as part of the contract, evidenced by the use of unambiguous language for that purpose. It would be contrary to public policy to inconsiderately allow the protection afforded by this new insurance to the vast business interests of the country, in public administration, as elsewhere, to be endangered by any lesser indemnity than that of the old form by bond, which is being so rapidly displaced, the new contracts being offered by the companies as superior to the old in safety. The courts should interpret them with a view of accomplishing what the companies propose to secure, by adhering strictly to the rule we have quoted in the language of Mr. Justice Jackson. And we wish further to remark that the business honesty or fidelity insured by such contracts as these is not that kind of enforced honesty which comes of a want of opportunity to be dishonest, but that which

is to be sturdy enough to operate for safety, spite of opportunity and temptation. That is the only kind of insurance worth the premium paid by the assured, or which is a fair consideration for the risk of loss which he opens under the protection of the guaranty, and, in the absence of evidence to the contrary, presumably that which is bargained for in each instance; a kind of honesty which will not take advantage of lapses of watchfulness to construct deceitful appearances adjusted to familiar traits or habits of carelessness on the part of the employer, perhaps indulged because of reliance upon the insurance which has been accepted as a protection. An employer would need no insurance against that close and relentless vigilance which makes stealing impossible, and under these contracts he is bound to no watchfulness except that which he has contracted to use, in plain words, for the benefit of the insurer. The old form of bond and security was usually without covenants for watchfulness or inspection by the employer, or other obligee, and, as that is the highest measure of liability of which the business is capable, it is that which the obligee would naturally seek for his protection, always desiring, presumably, to provide by some such guaranty even against his own negligence and careless business habits. The nature of the risk forbids the idea of any implied or general limitations upon the guaranty against loss by dishonesty, and, in our judgment, these contracts are not to be construed as imposing any by mere inference of an understanding between the parties that the business will be conducted with either ordinary or any degree of diligence or prudence as to watchfulness. The insurer gets what he contracts for in respect of that, and nothing more; and he must provide by express stipulation for even ordinary prudence on the part of the assured in taking measures for minimizing or lessening the broad risk we have indicated as that most desirable to the assured, and, therefore, that which is intended to be covered by the words of insurance in these contracts, except so far as the "provisos and conditions hereinafter contained" shall have limited that broad liability. Nothing is to be implied not necessarily indicated by the words used, as might be in other examples of insurance, where the relation of the parties and the character of the risk are different, and where those relations properly breed implications that would import a meaning not admissible when the thing guarantied is so far disassociated from any duty owing by the assured to the insurer as we find in the subject-matter of insurance here.

Coming now to a critical examination of these contracts, we find that one of them provides "that the employer shall observe, or cause to be observed, all due and customary supervision over the said employé for the prevention of default"; the other, that "the said employer shall use all due and customary diligence in the supervision of said employé for the prevention of default," etc. Much proof was taken to show what kind of supervision is ordinarily and prudently taken by other banks, and generally in the banking business, to prevent default; it being assumed that there was a contract here for that kind of supervision, or at least that which ordinary prudence in any business would require. Certainly these

words may mean that, but not necessarily. They may mean less; for example, they may mean that "due and customary supervision" which obtained in this particular bank, not over all employes, but over the teller; not over all its business in every direction, but only over that which he did. It may mean that which was in vogue when the contract was made, or that coming subsequently into use as affording a better mode of detection. If that supervision which it was customary for the authorities of this bank to keep over the teller was careless and ineffective for detection, it would be none the less "due and customary," and that which they took "to prevent default." The point is argued here as if this were a contract for effective supervision; indeed, as if it were a sort of guaranty by the assured that the insurer should not suffer loss, because he would take care of him by that kind of effective supervision which would be sure to prevent it, thus reversing the real relation of the parties. And we are told in the proof and in the argument how readily the default could have been detected if other supervision had been given than that which was made. After the fact, we can see how easily these frauds could have been prevented if those who were the victims had suspected Schardt, and had watched him and his books, instead of relying on his honesty and these policies guarantying it. But all this is beside the question, which is whether the words of the contract required any other supervision than such as was given. The words of either of the bonds we have quoted are ambiguous, and may embrace any degree or acts of supervision, from the highest and most certainly effective to those which are least so, as long as they were "customary" or "due." The standard of excellence or efficiency is not definitely mentioned, nor is any rule or custom definitely prescribed, whether of this bank or of all banks, or of any business in which cashiers and tellers are employed. By the rule we have laid down, the defendant company should have been more specific in defining the supervision they required; and the contract should have added, if that was the intention, all due and customary supervision in use in the best-managed banks, or generally in use by banks conducted with ordinary prudence and skill, or some words sufficiently designating the general custom now sought to be relied on, if there were at that time any such general custom prevailing in the management of banks,—not words applicable to any prudent supervision in many differing ways, but those pointing out a custom of supervision in the particular way now insisted upon. We might rest the point here, but there are facts in the case which indicate quite satisfactorily what was meant by these words.

The defendant company in its preliminary investigations undertook, by examination with written questions and answers, to inform itself of the "custom" of this bank in regard to frequency of inspections, and it was fully informed by the answers of that "custom." It is, in our opinion, in accordance with familiar, general rules of technical interpretation to read these words by the light of that fact, and to hold that this was the "due and customary" diligence in supervision referred to in these bonds and provided for

by the contracts; and, by the particular rule we have already announced, if any more diligent or other customary supervision was embraced it should have been specified by apt words showing that intention. Courts may acquaint themselves with the persons and circumstances that are the subjects of the written agreement, and place themselves in the situation of the parties who made the contract; view the circumstances as they viewed them, "so as to judge of the meaning of the words, and of the correct application of the language to the thing described." *Goddard v. Foster*, 17 Wall. 123, 143. Here, on the face of this policy, the parties were making these particular inquiries and answers a part of the contract, and presumptively they were referring to these particulars in the phraseology to which naturally they might be applied. "When we have satisfied ourselves," says Mr. Justice Miller, "that the policy is susceptible of a reasonable construction on its face, without the necessity of resorting to extrinsic aid, we have at the same time established that usage or custom cannot be resorted to for that purpose." Again:

"An express contract of the parties is always admissible to supersede or vary or control a usage or custom, for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied or contradicted by a usage or custom, for that would not only be to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow mere presumptions and implications properly arising in the absence of positive expressions of intention to control, vary, or contradict the most formal and deliberate written declarations of the parties." *Insurance Co. v. Wright*, 1 Wall. 456, 470.

Here, as there, the argument made goes upon the assumption that all that was indicated by these questions and answers, and which fixes, ascertains, or suggests the kind of supervision in contemplation, is nugatory, and that the whole field is open, and the power placed in the hands of one of the parties to dictate the extent of supervision by some other custom more efficient to have prevented this loss. We think this cannot be done.

Precisely the same consideration disposes of the alleged misrepresentation founded on the use of the words "examined" and "verified," as contained in the certificate made previously to the renewal of the teller's bond, that his books and accounts as teller had been "examined and found correct," and upon like words as stated in the proposal or statement made on application for the cashier's bond when Schardt was promoted to that employment. As before, the argument proceeds upon the same assumption that an ordinary, prudent, and careful examination would have developed the stealings that Schardt had covered up. This may or may not be so, for we know that such defaulters are very expert in covering up by false entries and appearances, and often none but the most expert examinations and examiners discover the frauds; and we must, in looking at these certificates, take the appearances as then existing, and not as now uncovered after the discovery by such experts. The defendant company was competent to pursue such an investigation. It had a manager or agent at Nashville for the purpose of keeping up and procuring information,

and yet was contented to rely, for reasons we will presently suggest, upon these vague and indefinite representations as to that which was done. Now that it appears that the accounts concealed a fraud which close scrutiny behind their face would have developed, we are asked to imply that these words were used to represent that such a close scrutiny had been made in fact, which representation, it is argued, must have been false, because the frauds were not discovered. This is substantially construing the contract as a guaranty to the defendant company against the bank's carelessness in making the examinations, or that of its agents. However careless the examination may have been, if made in good faith, and the examiners believed the accounts correct, they might truthfully so represent them, albeit they were not correct. The position of the defendant company leaves no margin here, and holds the bank to absolute truthfulness, not of the fact of examination made in good faith, and a belief in correctness, but of the soundness of Schardt's entries and accounts, and their freedom from fraud, no matter how skillfully a fraud may have been concealed by him. The facts do not show any such intentional representation, and the words do not define such a complete assurance. The words "correct" and "verified" may mean that, but also less in any degree. One "verifies" an account by merely adding up or doing the other work of mathematical calculation, and finding the figures correct, or by such comparison of entries and items as one may make and find "correct," and any extent of this is "examination," however superficial. These representations do not say that the examination was skillful or extensive, or by comparison of books and trial balances, but only that such examination as was made disclosed no error or fraud; and if this was done in good faith, as there is no doubt it was, it fully meets the representations made, unless we are to imply that the parties intended such a thorough examination as would save the insurer harmless; and this, we think, was not contracted for in plain and unambiguous language, as it might have been, if intended. As was remarked by the learned judge at the circuit, "So long as the bank officers and the committee acted in good faith, such examination as the appointed committee thought proper and sufficient for the protection of the bank and its stockholders would satisfy the requirements of this contract as made," and, we may add, would be truthfully within these representations; and, "if anything more was wanted, it was a matter for specific agreement."

It is to be observed that the inquiries made by the defendant company did not explore the bookkeeping processes of the bank, nor inquire as to the method employed in the bank; and yet the defendant urges persistently that any departure from the method in use, and any carelessness in bookkeeping, whereby Schardt was enabled to conceal his frauds, is conclusive evidence that the examination and supervision stipulated for was not that which was due and customary, which is to say again that, with proper supervision, stealing is impossible, and which must come at last to mean that the defendant company did not in fact assure anything. It

is also said that Schardt, as part of his scheme to defraud, had ordered certain trial balances to be discontinued, and that they were not taken, as they ought to have been, and that by a comparison of different books and original entries and trial balances the frauds were afterwards, and might have been before, discerned. It is a sufficient answer to all this to say that these contracts did not specifically bind the bank to this efficient bookkeeping, and that it is the common plan of these defaulters to adjust the bookkeeping to the service of their concealment. It is the kind of fraud insured against. Schardt had authority, or usurped it, to order this discontinuance of trial balances; and it was as much a method of his stealing as the false entries, or the putting of the money in his pocket, and in itself was an act of spoliation like the rest. If it had been the policy of the bank to rely on this vigilance as its sole protection, it would need no bonds or insurance; and, if it had been the policy of the insuring company to protect itself by that eternal vigilance in bookkeeping which is the price of safety, it could easily have stipulated for it as a condition of its insurance, not by dragnet generalities to catch any misprisions, but by determinate regulation. It did not do this. And there is a reason for it. If these new companies engaging in this new line of insurance should insist on perfect protection against loss, and demand a stringent, efficient, and unceasing vigilance that would make these frauds next to impossible, they could do no business, and there is no reason why they should exist, or why any one should pay premiums for such limited risks. Business would prefer the old style of bonds, which ask no questions and give a broader indemnity. Hence these solicitors for the new insurance use these vague, indefinite, ambiguous and—tested by the implications now demanded—misleading words and phrases, that customers may not be deterred by too much visible limitation on the risk; and thus they become what Mr. Circuit Judge Lacombe, in one of the cases we have cited, quoting from the books, calls “a snare for the unwary.” The law does not tolerate the spreading of the net, nor help it to enmesh its victims.

If we were to concede that the officials of this bank could not have failed, by ordinary prudence, to have discovered these frauds, or that without some negligence the losses could not have occurred, it would not follow from this that this company, which has guaranteed to the bank and its stockholders the fidelity of the teller and cashier, can escape its liability because of such negligence. It has not limited its risk to one arising only when the bank officials act without negligence. If it wishes to do that, it should use apt words in its policy, and say so in plain and unambiguous terms, and then its customers would know that they were paying for insurances against losses that could not occur, for “due and customary” diligence, in the sense of the argument we are considering, means that kind which always brings discovery the moment the stealing begins. We hold that the proof shows, in respect of this, that all was done which the contract stipulated should be done, and possibly more, since the policy only stipulated for “an inspection or

audit" to be made "at least once in twelve months," and those stipulated to be customary in this bank were made quarterly, as the insurer was informed. Possibly the one enlarges the other, but that point is immaterial, since the greater number of inspections includes the less, and either is thus satisfied.

A separate defense is made on the teller's bond, that it limits the risk to a loss sustained "and discovered during the continuance of the currency of this bond, and within six months from the employé ceasing to be in the said service." By manifest misprision of counsel, there is here a misquotation, by the insertion of the words "of the currency" after "continuance." Whatever the force of this misprision may be, as the bond is written it plainly covers any discovery within the next ensuing six months after Schardt had ceased to be teller, provided, of course, the default occurred while the bond was current. The liability on the bond would cover only such thefts as occurred while he was teller under the bond, and when he quit that employment the "said service" would cease. No other service can be meant, or applicable to the contract, except a service as teller under the bond. If the 12 months of the bond expire, and the teller continue in the employment of teller without a renewal of the bond from this company, yet, in contemplation of this contract, "said service" has ceased; for it means that service which has been insured by this bond and its renewals, and no other service, either as teller or otherwise. That ceases whenever the bond ceases. This relieves the absurdities suggested in the argument based on the misquotation of the bond, and a misconception that the discovery must be made while the bond is current, and also prevents the suggested prolongation of the limitation as to time. Whether, if the teller should leave the position of teller so early during the 12-months duration of the bond that the 6 months allowed for discovery would expire before the bond itself expired, the time for discovery would, nevertheless, by the terms of the bond, continue to the end of the bond, we need not decide. But, if he leave so late that the 6-months limitation would continue beyond the duration of the bond, we have not the least doubt that a discovery made within six months from his actual quitting would be within the limitation. Schardt was elected cashier January 1, 1893. The teller's bond expired January 16, 1893, and the discovery was made in April, 1893. Whether we count the 6 months from January 1st or January 16th seems immaterial, on any facts we know, for either would be within the limitation by a discovery in April next ensuing. If, after his election as cashier, he continued to act as teller, and fraudulently appropriated any money before January 16th, the defendant company would still be liable, but not for any default as teller after that date. The discovery must have been made within 6 months from that date, at the very latest, whether he had then quitted the service of teller, in fact, or not. He had then quitted the service which had been insured, and the bond should read as if it had been written "within six months from the employé's ceasing to be in said service under this bond or its renewals." Perhaps we should notice that the

insuring terms of the bond immediately preceding the above-quoted clause cover defaults "in connection with the duties of said office or position, or with any other duties assigned to him by the employer in the said service." But obviously this does not affect the ruling we have made. It does not enlarge the import of the words "said service" in the limitation clause, as we have construed it. Whether he acts as "teller," strictly so-called, or is assigned to "other duties," no matter what, they, being all covered by the bond, are within the service under the bond, and any acts of any character constitute "said service"; but in either clause, as used, these words do not mean the general service as employé at any and all times whatever, but only that general service as an employé of the bank, in any kind of duty assigned to the "teller and collector," during the 12 months covered by the bond,—that 12 months of service being the "said service" meant in either of these stipulations. It might be difficult, under the terms of the bond, to start the running of the 6 months by any "ceasing of said service," while the employé remained at work in the bank in any capacity, because of the very broad insurance of all duties assigned to him; and possibly all that the defendant company can certainly claim under the words the company itself has chosen to define the limitation for its protection, as applied to the facts of this case (and to them we confine our judgment), is that the 6 months shall commence not later than the expiration of the bond, and they shall be bound for no discoveries after 6 months from that date. Again it is obvious that, under the rules of interpretation we have been applying in this case, it was the duty of the insurer by plain and unambiguous words to have fixed any other limitation it intended than this, which is most favorable to the assured on the words that are used, and most consistent with the general purpose both parties had in view, namely, to protect 12 months of the service of Schardt in this bank, giving a reasonable time for terminating that liability by a limitation fixed by the contract, and not depending on the ordinary statute of limitations, based on public policy, and measuring that limitation of time from the discovery of the frauds, and not from the date of their commission and concealment of the fact. On the one hand, it might be unreasonable to so construe the words "ceasing to be in said service" as to include a service after the bond had expired, thereby prolonging the limitation on discovery indefinitely in its relation to the termination of the 12 months covered by the bond, and on the other to so construe the words "discovered during the continuance of this bond, and within six months from ceasing to be in said service," as including only a discovery within the 12 months, thereby cutting off any possible liability for a fraud committed within the last minute of the duration of the bond, or so late as to furnish no time for investigation; but it is an entirely reasonable construction, which, consistently with the words, avoids either of these extremes, and fairly requires the assured, at the very latest, to find the frauds within 6 months from the termination of the bond. Counsel for the plaintiff denounce these perplexing stipulations as designed to mislead, and they are

clearly not definite, open, and unequivocal, as they should be to express a distinct purpose; but we may point to the fact that our construction is analogous to similar provisions in the ordinary contracts of insurance, and conforms to similar stipulations of this very contract, giving three months for discovery after cancellation, and to one of the cashier's bond, terminating the liability within three calendar months from "the expiring of this bond."

The next defense to be considered is that relating to the "bucket-shop speculations" of Schardt, as it is designated in argument. It applies to both bonds, but in a somewhat different form. The language of the condition in the teller's bond is that of a stipulation to notify the insurer of such conduct, and that of the cashier's bond is a representation, or rather the defense is that of the misrepresentation, of a fact. It is somewhat difficult, without displaying all the proof, with a commentary on the credibility of the witnesses and their opportunities of knowledge, to exhibit the fullest justification of our impression that this defense rests on circumstances comparatively inconsequential, which have become formidable only because of the subsequent developments of Schardt's vast gambling in exchanges called "futures," the knowledge of which he concealed from all who were interested, including the agent of the defendant company, who was one of the community where these transactions took place, and who was there to watch the "habits and associations" of customers of defendant company, like Schardt. But we cannot take the space here to do this, and therefore forego it. There is no proof that Schardt ever confessed to speculation or gambling, except that of Sykes, who is somewhat discredited because he has a litigation with the bank, and an apparent animosity towards it. He is also quite indefinite as to time and circumstances, and does not impress us with the certainty of his recollection, although he uses the language of positive statement. He may confuse what Schardt did admit with what he thus testifies as to his admissions. All the witnesses were speaking about long-past circumstances, which evidently did not make a serious impression commensurate with that importance which these circumstances now assume in the light of Schardt's defalcations. Sykes recommended him to be cashier in succession to himself, and asked for renewals of his bond; and evidently, if he be an honest man, these admissions and circumstances did not affect his own belief in Schardt's freedom from serious objection in this employment. There is not the least evidence of any bad faith on the part of any of these officers of the bank, including Sykes, the old cashier, in not making a disclosure of what was known, but only of bad judgment, in not being more considerably affected by their information. It may be conceded that it was negligence on the part of the officials of this bank, when they first heard of what they did hear, and knew what they did know, not to investigate Schardt's books and accounts with the most rigid scrutiny; and not to have immediately discharged him, unless such an investigation should justify his retention, may have made them and the bank liable to those of their customers who suffered by him; and that to be

a broker for those who speculate and gamble, even in so small a way as Schardt confessed that he was a broker, or to be a partner of such a broker, or to be interested in a "bucket shop" if we please, in any way, as a broker or customer, is for all bank employes a discrediting "habit and association." We agree to all that is said about this in the cases cited. *Preston v. Prather*, 137 U. S. 604, 11 Sup. Ct. 162; *Prather v. Kean*, 29 Fed. 498; *Scott v. Bank*, 72 Pa. St. 479. But this defendant company had not contracted for such a guaranty against negligence as had the depositors and bailees who sustained an action of damages in those cases, and this suggested analogy is neither a legal nor a fair test of the contract duty of the bank to its insurer against Schardt's dishonesty in the premises. Here, again, it must be strictly limited to the words it has used in defining that duty, and none is owed beyond the words by any kind of implications energized by any indignation at the negligence of the bank in not protecting itself, or indignation at the immoral conduct of Schardt. This insurer was insuring the bank for its protection in just such emergencies and against just such negligence, unless the words of this policy speak to the contrary, and had received the consideration for it, while the depositors of the bank, in the cases cited, had contracted for either common prudence, ordinary vigilance, or against gross negligence. It is a reversion of the attitude we have here, and it is a perversion of that principle to apply it here.

If Sykes ever told Baxter, the president, that Schardt had admitted in 1892 that he had been speculating in a small way, but had stopped it, as the learned judge at the circuit remarks, that was "a past event"; and as, by the same story, he had stopped it, the president may have thought it in itself unimportant, and dismissed it, as the cashier, Sykes, himself did. It may have been gross negligence to the depositors of the bank to so treat the information; but as he was not then "engaged in speculation or gambling" (according to the information, but not according to the stupendous fact, as we now know it), or was not then "indulging in any disreputable habits or pursuits" (if these words apply to "gambling" habits that before were so fully provided for by the stipulation, which may be doubtful), there was no obligation, under the stipulation of the teller's bond, to report it to defendant company, whatever may be thought of the obligation to protect the bank in the future by investigating Schardt, and discharging him, as a duty to depositors, who otherwise might sue for negligence. If that which was told was, as Eatherly states it, that Schardt had put \$200 in the bucket shop, as one of the partners or stockholders, that was not "speculation or gambling," or engaging in it, in a strict construction, such as we must make here, but only being the agent of those who were speculating and gambling. It may be considered a "disreputable" habit or pursuit, but however regarded, and whether it be broadly and liberally interpreted as "gambling" or not, it was, too, "a past event" when the bank became "aware" of it, and the habit had been abandoned,—again according to the information, but not the fact, unfortunately for all concerned.

If, also, that which Sykes tells was told to Baxter, the president, it is to be now considered in its relation to the representation made preliminary to the cashier's bond. We have an impression that Sykes is mistaken, and confuses or enlarges what was known and done after the anonymous letter; but take it as he tells it, and it does not appear that Baxter in bad faith withheld the information. He was answering "to the best of his knowledge and belief," and the warranty is not absolute, with such a limitation, and cannot be, necessarily. If, in good faith, he did not believe what he heard to be "unfavorable," because Schardt had ceased to deal in the "bucket shop," or, in like good faith, did not "deem it advisable" that the insuring company should make inquiry, surely his answer was true, because he is made the judge of what is "unfavorable" or what was "advisable," at least within the limits of what reasonable men might think about it. Moreover, it is to be observed that, unlike that which appears in the teller's bond, which we have just considered, no mention is made of "gambling" or "speculation" in this question. It is "habits or associations," past or present, that are called to mind; and we doubt if "dealing in futures" had come to be considered "gambling," in that "plain, ordinary, and popular sense" of which Mr. Justice Jackson has spoken in the quotation we have made, so as to bring it within the common thought expressed in "habits and associations," as gambling at cards, for instance, surely would be, or if "speculation" had come to be considered "unfavorable." A bank president surely should know that "dealing in futures" was unfavorable, but non constat that a single dealing, or small and insignificant dealing, which had ceased, was "a habit," or that it was advisable for the insurer to inquire about it if it had ceased, and he was informed it had. If the information he got was as Eatherly described it, going only to show that Schardt had been a partner in the brokerage agency, then what we have said about the other applies with greater force. Possibly a reasonable man might limit this inquiry to such "habits and associations" and "matters" as the moralists ordinarily condemn as involving turpitude, or as disgraceful and opprobrious, and not include the business sin of wasting one's own money in speculative trading, even in a "bucket shop." If the money be one's own, and not fiduciary money, as to which there was no information, it is still ordinarily, by those not casuists, regarded as more excusable than the common games of chance. At all events, any indefiniteness or uncertainty of language used is to be resolved in favor of the assured and against the insurer; and certainly this "warranty," whatever force it has, leaves the quality of being "unfavorable" or "advisable" to some kind of construction by the mind of him who is answering the question. It is not precisely within the rulings in *Insurance Co. v. Gridley*, 100 U. S. 614, nor in *National Bank v. Insurance Co.*, 95 U. S. 673, because it does not depend wholly on the knowledge of the facts, as there, but is a representation as to what has been "heard" by the one answering. Yet, considering the subject-matter, the principle decided is analogous since the respondent is left to exercise

his own judgment about what he has heard, and there is no warranty that that judgment shall be of the best, or an absolutely correct judgment, and that is what we are asked to include within the warranty by this defense. On the authority of *Mouler v. Insurance Co.*, 111 U. S. 341, 4 Sup. Ct. 466, and *Insurance Co. v. Raddin*, 120 U. S. 183, 7 Sup. Ct. 500, the learned judge at the circuit doubted whether, under the strict rule, this contract should be taken as a warranty, but did not decide that point, as we do not, since we find that, being treated as a warranty, there has been, when properly construed, no breach of it. Baxter, the president of the bank, had heard what we can now see was unfavorable, and that it would have been advisable for the company to inquire about it; but, under the then circumstances, it cannot be said that he reasonably should have known that it was unfavorable, or advisable to make inquiry, and this was left to his determination by the contract. This was a limitation on the warranty itself, and lessened its scope otherwise. We may add to what the learned trial judge said, that under the rulings in *Penn Mut. Life Ins. Co. v. Mechanics' Savings Bank & Trust Co.*, 19 C. C. A. 286, 72 Fed. 413, the strict rule as to disclosures which has been imported from the marine insurance law, and which statutes so often have abrogated as unjust, should not be extended to these new policies; and on this ground all the courts have held that the warranties shall be strictly construed, as we do this.

After the anonymous letter was received, and Schardt had been called before the bank officials, and, denying the charge that he had been speculating, had produced witnesses to disprove it, there may have been rumors afloat, as the witnesses testify, perhaps all traceable to that source; but there was no duty on the bank to run down this kind of information, or to report it. It had not assumed the business of a detective agency by the contract. It was held in *Surety Co. v. Pauly*, 18 C. C. A. 644, 72 Fed. 470, 476, under a policy similar to this, but under another clause, which is also found in this, requiring notice in writing of any act which may involve a loss coming to the knowledge of the employer, that "knowledge" and "suspicion" are not synonymous terms; that the bond does not call for notice of suspicions, but only of a knowledge of some specific fraudulent or dishonest act. The same rule is applicable to the disclosure required under the clause we have in hand, so far as it calls for "knowledge," and to the clause in the teller's bond requiring notice on "becoming aware" of speculation and gambling. Mere rumors and suspicions are not included, certainly, in the teller's bond, and, for the reasons we have indicated, we think not in the other, although it is broader, in requiring notice of things "heard" as well as things known. It is not everything heard that is required to be told, but only unfavorable habits and associations, or matters important enough for inquiry. We have already stated why these are not included, and the proof shows nothing more formidable than what we considered in that connection. In the case of *Supreme Council Catholic Knights of America v. Fidelity & Casualty Co.* (before cited) 11 C. C. A. 96,

63 Fed. 48, 57, the contract could not be affected by loose parol statements or concealment of facts, about which no inquiry was made, or by conduct upon which no reliance was placed, but only by misrepresentation or fraudulent concealment provided against as a part of the agreement. Everywhere this rule is found, that it is open to the insurer to be specific, and therefore mere entrapping generalities will not be tolerated.

Objection is made to an item included in the report of the expert bank examiners, on which the decree was rendered, of \$5,992.35 of "overdrafts allowed and not authorized." It is insisted that this was not embezzlement or larceny. We do not know whether it was or not. It might be, because embezzlement or larceny may be committed through the process of overdrafts. This question was not made by exceptions or passed on in the circuit court, and was, it is said by counsel, only brought to attention there at the time the decree was entered. It is evidently an afterthought, and there being no proof showing the facts in relation to the overdrafts, nor why they were by the examiners included, neither the trial court nor this court can say they were not embezzlements or larcenies. There is no proof to sustain this objection, which comes too late.

Neither do we see any objection to the interest allowed. It is urged that it does not appear that the bank could have made 6 per cent. on the lost money if it had not been stolen, since it did not discover the thefts until 1893, and that the only basis for adding interest is to make good the loss of the use of the money in the meantime. This is a mistaken view of the law of interest. The Tennessee Code allows interest on bonds. Mill. & V. Code Tenn. § 2702. If a policy of insurance be not included in this statutory allowance when it takes the form of a bond as this does, it may be allowed by the jury or the chancellor as "damages" for money detained. Here the defendant company agreed to make good the loss sustained by the fraudulent acts of the employé, and, if Schardt had been sued, the jury or chancellor could have allowed interest against him as part of the damages or "loss," and this the defendant company assured. Interest should be allowed from the date of embezzlements, or from the end of each year, if the jury or the chancellor choose, as he did here, to the filing of the proof of loss, up to the penalty of the bond, but not beyond it, of course. Then on this amount there could be no interest for three months, since that sum is not due, by the terms of the contract, until three months after filing proof of loss. But, if not then paid, it bears interest as a debt due from that date, if allowed by the jury or chancellor, when not given by statute. We think it should be allowed in this case, whether given by statute or not. Being allowed, it should be calculated to the date of the decree, as in other cases. It will be so allowed here.

On the whole, we are satisfied with the decree of the circuit court, and with the reasons given for it, as found in the record, and reported sub nomine Mechanics' Sav. Bank & Trust Co. v. Guarantee Co. of North America, 68 Fed. 459, and it will be affirmed.

W. A. VANDERCOOK CO. v. VANCE et al.
(Circuit Court, D. South Carolina. May 31, 1897.)

1. INTOXICATING LIQUORS—POLICE POWER OF STATES.

Any state may, in the exercise of the police power, declare that the manufacture, sale, barter, and exchange, or the use as a beverage, of alcoholic liquors, are public evils, and, having thus declared, can forbid such manufacture, sale, barter, and exchange, or use within her territory.

2. SAME—INTERSTATE COMMERCE.

But when a state recognizes and approves the manufacture, sale, barter, and exchange, and the use, as a beverage, of alcoholic liquors, and the state itself encourages the manufacture, engages in the sale of, and provides for the consumption of alcoholic liquors as a beverage, and so precludes the idea that such manufacture, sale, barter, exchange, or use are injurious to the public welfare, it is not a lawful exercise of the police power to forbid the importation of such liquors or their sale in original packages for personal use and consumption.

3. SAME.

Such prohibition, under such circumstances, is in conflict with the laws of interstate and foreign commerce.

4. SAME—SOUTH CAROLINA DISPENSARY ACT.

The dispensary act of 1896, as amended by the act of 1897, inasmuch as it approves the purchase and manufacture of alcoholic liquors for the state, and provides for the sale of such alcoholic liquors as a beverage, in aid of the finances of the state, in so far as it forbids the importation of alcoholic liquors in original packages for personal use and consumption, and the sale of such original packages for such use in this state, is in conflict with the laws of interstate and foreign commerce, and is therefore to that extent void.

Bryan & Bryan, for complainant.

Wm. A. Barber, Atty. Gen., and C. P. Townsend, Asst. Atty. Gen., for respondents.

SIMONTON, Circuit Judge. This is a bill in equity, filed by complainant, a corporation of the state of California, against S. W. Vance, who is state commissioner under the dispensary law, and W. N. Bahr and others, who are state constables appointed to put this law in execution. The bill alleges that the complainant is the owner of vineyards in the state of California, and that it manufactured from grapes of such vineyards well-known pure wines, brandies, and other liquors, particularly of clarets, Rhine wine, Burgundies, and champagne; that by its traveling agent the complainant took orders from certain citizens and residents of the state of South Carolina, to deliver to each of them certain original packages of wines, etc., products of its vineyards, filled said orders, and shipped from San Francisco to Charleston, S. C., by rail, a car load of its products, containing 73 separate original packages for each of its said customers, all marked with its name and address in California, adopting this mode of shipping by car load in order to obtain a large reduction in freight; that the goods so shipped arrived in Charleston, passing through the hands of several common carriers in continuous route, and thereupon were seized, without warrant, by defendants Bahr and Scott, and 60 of the packages were shipped by said constables to Columbia, to John F. Gaston, then the state commissioner, got into his hands and then into the hands of his successor, S. W. Vance, with full notice of

the unlawful seizure, and that Vance, notwithstanding, refuses to deliver them to complainant or its agent after repeated demands, and threatens to convert and sell the same to citizens of South Carolina; that these same constables and others, claiming like authority, threaten to seize in like manner all wines shipped by complainant into this state, wherever found and for whatever purpose shipped, arriving in said city of Charleston, and in like manner to ship and deliver the same to said S. W. Vance, who likewise threatens to convert the same, to the great damage of complainant, and to the obstruction and destruction of its lawful business and interstate commerce and trade in its wines, etc., with citizens and residents of South Carolina. The bill then alleges the shipment of another importation of wines, etc., in separate original packages from its vineyards in California, upon orders from residents of South Carolina, the arrival of the same in South Carolina, and the wrongful seizure of the same by state constables; that other orders have been obtained from other residents of South Carolina for separate original packages, and that upon such orders complainant proposes to ship such packages to South Carolina in due course of interstate commerce; and that, in the future, it intends to seek similar orders, and to ship thereupon similar original packages into the state of South Carolina. The bill further alleges that it intends, in the course of its business, further, and in addition to such shipments so ordered by customers in advance, to ship also from San Francisco, Cal., to its agent in the state of South Carolina, and to store and warehouse in South Carolina, and to sell in the state of South Carolina, in the original unbroken packages as imported, as aforesaid, to residents in South Carolina, its wines and liquors, products of its vineyards, in the due and lawful exercise of its rights under the constitution and laws of the United States, and that the defendants threaten to seize, take, and carry away, convert and sell all such shipments. The bill then charges that by the dispensary act of 1897, under which the defendants seek to justify their action, all wines, beers, ales, alcoholic and other intoxicating liquors are the subjects of lawful manufacture, barter, sale, export, and import in the state of South Carolina, and have been and are being and will continue to be lawfully used and consumed as a beverage by citizens and residents of the state of South Carolina, and that the products of its vineyards are lawful subjects of interstate and foreign trade and commerce. The bill then charges that the said dispensary law, in so far as it authorizes the acts of the defendants, or in any way attempts to abridge the right of importation of the products of complainant's vineyards into this state, and there to sell in original packages, or in any wise hinders and prevents its intercourse, commerce, and trade with citizens and residents of South Carolina in the products of its vineyards in such original packages, is in conflict with the constitution of the United States, and is null and void. The bill then alleges facts sustaining the jurisdiction of this court and securing the jurisdiction of the United States supreme court, and prays a temporary, to be followed by a permanent, injunction.

Upon the filing of the bill a rule was issued against the defendants

to show cause why the injunction prayed for in the bill be not granted. The return sets out three jurisdictional exceptions: First, that the bill presents no question arising under the constitution and laws of the United States; second, that the bill is defective in its allegations, and does not state a case coming within the jurisdiction of this court; third, that the bill presents no case for the jurisdiction of a court of equity, as the plaintiff has a plain, adequate, and complete remedy at law. The bare inspection of the bill shows these objections to be unfounded. The return then addressed itself to the merits. It sets out clearly that the shipments made by complainant were made by bill of lading to a gentleman in this state, in this behalf selected as the agent of complainant, for distribution of the packages and perhaps the receipt of the purchase money. It then admits the main facts of the bill, and charges that the shipments made by complainant and those contemplated by it, and the course of dealing in the future which it intends, are in contravention of the act of assembly of 1897, the amendment to the dispensary law, and that, under that act and the other acts which it amends, the course and action of the state officials were justified, and were right and proper.

This case brings up squarely the question: Has a producer of alcoholic liquors in another state the right, under the constitution of the United States, in the present condition of the law of South Carolina, to ship into that state his products in original packages, and to sell them in the original packages, either upon orders sent in advance of shipment or upon purchases made after shipment and arrival? The question is one of grave importance. The very able and exhaustive arguments of counsel on both sides have put the court in possession of every argument which can be used upon it. They have received the careful consideration which they and the question to which they were addressed deserve.

Section 8, art. 1, of the constitution of the United States declares:

"The congress shall have power to * * * regulate commerce with foreign nations and among the several states, and with the Indian tribes. * * *"

The supreme court of the United States have now established by a current of decisions, which cannot be misunderstood, that under this section congress alone has the right to fix, prescribe, and regulate interstate commerce and foreign commerce, and that no one of the states can in any way interfere with such commerce or prescribe any regulation thereof without the consent of congress. While, by virtue of its jurisdiction over persons and property within its limits, a state may provide for the security of lives, limbs, health, and comfort of persons, and the protection of property so situated, yet a subject-matter which has been confided exclusively to congress by the constitution is not within the jurisdiction of the police power of the state unless placed there by congressional action. *Henderson v. Mayor*, 92 U. S. 259; *Railroad Co. v. Husen*, 95 U. S. 465; *Walling v. People*, 116 U. S. 466, 6 Sup. Ct. 454; *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592. Inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as congress does not pass any law to regulate

it or allows the state to do so, it thereby indicates its will that such commerce shall be free and untrammelled. *Mobile Co. v. Kimball*, 102 U. S. 691; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091; *Wabash, St. L. & P. Ry. Co. v. People*, 118 U. S. 557, 7 Sup. Ct. 4.

The application of this doctrine to the effect of state legislation upon the importation of alcoholic liquors into a state came up for discussion and decision in *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681. That case arose under the prohibition laws of Iowa. Section 1523 of the Code of Iowa provided:

"No person shall manufacture or sell by himself, clerk, steward or agent, directly or indirectly, any intoxicating liquors, except as hereinafter provided. And the keeping of intoxicating liquor with intent upon the part of the owner thereof or any person acting under his authority or by his permission, to sell the same within this state, contrary to the provisions of this chapter, is hereby prohibited, and the intoxicating liquor so kept, together with the vessels in which it is contained, is declared a nuisance and shall be forfeited and dealt with as hereinafter provided."

Chapter 71, Acts Iowa 1888, provided:

"That after this act takes effect no person shall manufacture for sale, sell, keep for sale, give away, exchange, barter or dispense any intoxicating liquor for any purpose whatever, otherwise than is provided in this act. Persons holding permits as herein provided shall be authorized to sell and dispense intoxicating liquors for pharmaceutical and medicinal purposes, and alcohol for specified chemical purposes, and wine for sacramental purposes, but for no other purposes whatever."

The act then provides for the issue of permits for this purpose by the district court of the county, which permits hold good for one year.

These provisions being in full force, *Leisy & Co.*, brewers in Peoria, Ill., shipped into Iowa, by rail, to Keokuk sundry barrels of beer in original packages, and sold and offered for sale in Keokuk, only in unbroken original packages, this beer. Thereupon it was seized and held subject to the laws of Iowa above quoted. The cause went up through the several state courts into the supreme court of the United States. By that court the case was held under deliberation, and finally the opinion was pronounced by the chief justice as the organ of the court. The points to be decided are thus put:

"That ardent spirits, distilled liquors, ale, and beer are subjects of exchange, barter, and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of congress, and the decisions of the courts, is not denied. Being thus articles of commerce, can a state, in the absence of legislation on the part of congress, prohibit their importation from abroad or from a sister state, or, when imported, prohibit their sale by the importer?"

In answering these questions the court goes into a full and elaborate examination of all the authorities. The conclusion is expressed in these words:

"The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit [the prerequisites of the Iowa act], but import beer into Iowa, which they sell in original packages. Under our decision in *Bowman v. Railway Co.* [125 U. S. 465, 8 Sup. Ct. 689, 1062], they had the right to import the beer into that state, and in the view we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the state. Up to that point of time we hold that, in the ab-

sense of congressional permission to do so, the state had no power to interfere, by seizure or any other action, in prohibition of importation and sale by the foreign or nonresident importer."

Upon the publication of this opinion, the congress, recognizing its force, enacted the act of August 8, 1890, commonly known as the "Wilson Act." That act is in these words:

"That all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The case of *Leisy v. Hardin* is discussed in *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, and in *Emert v. Missouri*, 156 U. S. 321, 15 Sup. Ct. 367, in which case, also, the act of 1890 is mentioned.

The controlling question in the case before us is: How does the Wilson act affect the South Carolina statute? In the recent case of *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. 265, a case from this circuit under the dispensary law as it stood before the passage of the present act, the supreme court discussed the dispensary law, and condemned it. They hold that the Wilson act did not protect it. This case of *Scott v. Donald* was brought because of the seizure and confiscation of certain alcoholic liquors, products of other states, imported by the plaintiff for his personal use. The conclusion of the supreme court, after full discussion of all the cases bearing upon the question, is:

"In the light of these cases, the act of South Carolina of January 2, 1895 [dispensary law], must, as to those of its provisions which affect the plaintiff in the present suits, be condemned." 165 U. S. 99, 17 Sup. Ct. 272.

This act of 1895 was amended in 1896, and when this decision was published the law was further amended in 1897, and this case will turn on these amendments. Have the amendments cured the objectionable features in the act of 1895? In *Scott v. Donald*, the supreme court say of the act of 1895:

"It is important to observe that the statute does not purport to prohibit either the importation, the manufacture, the sale, or the use of intoxicating liquors. The first section does indeed make it penal to manufacture, sell, barter, deliver, store, or keep in possession any spirituous, malt, vinous, fermented, brewed, or other liquors, which contain alcohol and are used as a beverage, except as hereinafter provided, and declares all such liquors contraband. * * * Yet these enactments are not absolute, but are made subject to the subsequent provisions of the act. When these provisions are examined we find that, so far from the importation, manufacture, and sale of such liquors being prohibited, these operations are turned over to state functionaries, by whom alone, or under whose direction, they are carried on."

The amending act of 1897 contains provisions almost identical in language, exactly identical in effect. The act of 1897 amends section 3 of the act of 1895, and still further amends sections 15 and 23, which had been amended by the act of 1896, removing from these last two sections features of discrimination. But these changes in

no wise meet the criticism of the supreme court of the act of 1895. This criticism was not on these discriminations only. The court says:

"In view of these and similar provisions, it is indisputable that, whatever else may be said of this act, it was not intended to prohibit the manufacture, sale, and use of intoxicating liquors. On the contrary, liquors and wines are recognized as commodities which may be lawfully made, bought and sold, and must therefore be deemed the subject of foreign and interstate commerce."

Section 2 provides that the state board of control shall purchase all liquors for sale in this state. Section 3, after providing for the appointment of a commissioner, prescribes how he shall furnish liquors to the county dispensers for sale. Section 7 provides for county dispensers, who shall sell liquors. Section 15 provides for granting licenses to manufacture liquors. Section 23 provides for a regular quarterly report from all licensed distillers. These sections in the act of 1897 sustain the criticism of the supreme court. It is clear that, before the state can forbid the importation and sale in original packages of alcoholic liquors, it must declare the manufacture, sale, and use as a beverage of all alcoholic liquors to be contraband and forbidden, and so take them out of the category of legitimate articles of commerce. She cannot, for her own purposes, treat these liquors as the subject of foreign and interstate commerce, and declare them not to be such to the rest of the world.

The appalling statistics of misery, pauperism, and crime which have their origin and owe their existence to the use or abuse of alcoholic spirits are the justification for police regulations with regard to them, and place them under the control of the police power. Considerations of public safety, the supreme law, override every other, and measures, however drastic, which prevent the existence of this evil, will be sanctioned and enforced. But when the state herself, for her own purposes, furnishes to her citizens these alcoholic spirits, encourages them in their use, puts them at convenient places within her territory for the supply and distribution of them, enters largely into the business, calculating the profit therefrom as aiding state, county, and municipal treasuries, regulations which would properly be attributable to the police power if used in suppression of the traffic assume the form of measures tending to support the state's monopoly in the business, act as restrictions upon commerce, and infringe the federal constitution. If all alcoholic liquors, by whomsoever held, are declared contraband, they cease to belong to commerce, and are within the jurisdiction of the police power. But so long as their manufacture, purchase, or sale, or their use as a beverage in any form or by any person, are recognized, they belong to commerce, and are without the domain of the police power. The act of 1897, like the act of 1895, is condemned on these principles. Neither of them is within exercise of the police power.

But, while it is true that some of the discriminating features are now removed from the dispensary,—features admitted to be fatal to its constitutionality,—one at least still remains. The markets of this state are closed to the producers in other states. *Minnesota v. Barber*, 136 U. S. 326, 10 Sup. Ct. 862. They are closed, it is true.

to the producers in this state. But the latter may be under the control of the laws of commerce within the state. The former are protected by the interstate commerce law. It is no justification that laws in conflict with interstate commerce press equally on the citizen and the stranger. *Minnesota v. Barber*, *supra*. A resident of the state may, under the present dispensary law, send his orders to a producer outside of the state for liquors for his own personal use and consumption, and a limited importation within a restricted period and under an absolute condition is allowed such resident. The producer is limited to this. He cannot import his goods into this state in any other way. The condition for such importation is this: Any resident who desires to import liquor for his own personal use and consumption shall first certify to the chemist of the South Carolina College the quantity and kind of liquor he wishes to import, with the name and address of the person from whom he wishes to purchase, stating, also, that such proposed purchaser will forward to Columbia, S. C., to said chemist, a sample of the liquor. On receipt of the sample the chemist immediately proceeds to test it, and, if found to be pure and free from any poisonous, hurtful, or deleterious matter, he issues a certificate to that effect, giving names of proposed consignor and consignee, and the quantity and kind of liquor to be imported, sends it free of expense and postpaid to the consignor, and the liquor can be shipped within 60 days after the date of the certificate, which can be used once only.

It will be noted that the use of alcoholic liquors as a beverage is not prohibited, nor is their importation for personal use forbidden, provided such beverages are free from "poisonous, hurtful, and deleterious matter," other than the alcohol in them. The act provides the essential and conclusive test on this point,—the certificate of the chemist of the South Carolina College. The act also declares all alcoholic liquors not tested by the chemist of the South Carolina College, and so found to be free "from poisonous, hurtful, and deleterious matters," necessarily matters other than the alcoholic ingredients, to be of a detrimental character, and their use and consumption to be against the morals, good health, and safety of the state; that is to say, without any regard whatever to their real character, the presence or absence of the certificate is the sole test. This can be sustained only on the fact that it is a valid inspection law.

There can be no doubt that a state can enact laws protecting its citizens in the purchase of articles, imported or domestic, from purchasing something they did not intend to buy, or adulterated, so as to threaten disease or death. *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154. But it must be a law which protects or at least tends to protect the citizen. It must give him security. If it does not do so absolutely, still it must contribute to secure him. The mode of inspection in this act is by sample. Let it be supposed that the sample has been furnished, has been inspected, has been approved, and that the certificate has been sent to the consignor; what sort of assurance does it give the citizen that this liquor he thereupon receives accords with, comes up to, or in any wise re-

sembles the sample? What protection does it give the citizen from fraud from a failure to send liquor according to sample? None whatever. It only subjects him to the seizure and forfeiture of his goods, if, perchance, they should be inspected. The fraudulent seller is out of reach. Upon what, then, must the citizen rely? He can only rely upon the business character, standing, and integrity of the person from whom he buys, without any regard whatever to the inspection. This so-called inspection, furnishing no security to the citizen, cannot thereby be justified. It can operate only as a restriction upon, and hindrance and burden to, his acknowledged right to import for his personal use. It is thus an interference with interstate commerce, and in itself void.

The language in *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, has some application here:

"If a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of courts so to abridge them, and thereby give effect to the constitution."

The same mode of inspection by sample would seem to be used in all the liquors issued by the state commissioner. 22 St. at Large 541.

In *Scott v. Donald* the supreme court, discussing a similar feature in the act of 1895, says:

"To empower a state chemist to pass upon what the law calls 'the alcoholic purity' of such importations by chemical analysis can scarcely come within any definition of a reasonable inspection law."

If, then, this mode of inspection be not reasonable, and be futile, it is a burden on interstate commerce, and in itself makes the provision void. *Railroad Co. v. Husen*, 95 U. S. 465; *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. 454; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862; *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. 213.

It is manifest, therefore, that the same conclusion must be reached with regard to the dispensary act of 1897 which was reached by the supreme court of the United States as to the act of 1895,—that it is not within the scope and operation of the Wilson act. This being the case, the law laid down in *Leisy v. Hardin* controls this case, and the attempt to forbid the importation and sale of spirituous liquors in original packages must fail. The decision of the supreme court of the United States must control all circuit courts. By this decision it is clear that, so long as the state herself engages in the business of importing and selling alcoholic liquors for the purposes of profit, so long as she recognizes that the use of alcoholic liquors as a beverage is lawful and can be encouraged, so long as she seeks a monopoly in supplying these liquors for that use, and in this way looks to an increase in her revenue, she cannot, under her constitutional obligations to the other states of this Union, forbid, control, hinder, and burden commerce in such articles between their citizens and her own.

Let a temporary injunction issue as prayed for in the bill.

HILLER et al. v. LADD et al.

(Circuit Court, D. Oregon. April 16, 1897.)

1. TRUSTS—SALE OF STOCK—AUTHORITY FROM PROBATE COURT.

When stock has been transferred by the owner to a trustee for the purpose of enabling a sale of it to be made, with the stock of other parties, to good advantage, it is not necessary that a sale of such stock, made by the trustee after the death of the owner, should be authorized by the probate court, under the provisions of the California statute.

2. EQUITY JURISDICTION—CONSENT DECREE OF PROBATE COURT.

A court of equity has no jurisdiction to set aside a stipulation of parties pursuant to which a decree of distribution of the estate of a deceased person has been made by a probate court, nor to cancel, set aside, or modify such decree, nor to compel an account for what has been received under such distribution, which would, in effect, set aside the decree by indirection.

3. ACCOUNTING—EVIDENCE.

Upon an examination of the evidence as to the dealings between the parties in this case, *held*, that the complainant established no right to an accounting by the defendants.

Philip D. Galpin and J. B. Cleland, for plaintiffs.

C. E. S. Wood, C. A. Dolph, and T. C. Dutro, for defendants.

BELLINGER, District Judge. This is a suit in equity for an accounting. J. W. Ladd died on the 28th of February, 1871, leaving a widow, the complainant, Sarah F. Hiller, with whom is joined as complainant her present husband, D. Albert Hiller. J. W. Ladd, at the time of his death and for many years prior thereto, resided in San Francisco, Cal., where he was engaged in different enterprises of a speculative character, in many of which he was associated with his brother, W. S. Ladd, of Portland, Or. The latter died on January 14, 1893, leaving a large estate, which was disposed of by will in which the respondents herein were named as executors. Among the enterprises in which J. W. and W. S. Ladd were interested was that of the Oregon Steam Navigation Company, an Oregon corporation, which company they, with a number of other persons, controlled and directed. At the death of J. W. Ladd he was the owner of 7,600 shares in the stock of said company, standing in the name of Alvinza Hayward, of San Francisco, Cal. In his last will, J. W. Ladd expressed the utmost confidence in the ability and integrity of his brother, W. S. Ladd, in whose hands he requested his wife to place her property and estate, to manage and invest for her. The will also contained the following clause: "It is my desire and request that the property acquired before my marriage be considered and treated as community, and not as separate property." Upon probate of this will, W. S. Ladd, J. M. French, and the complainant, now Sarah F. Hiller, were appointed executors of J. W. Ladd's estate.

It is alleged, in effect, that complainant was ignorant of her husband's business, and permitted W. S. Ladd, as executor, to have exclusive control of her husband's estate; that he procured an instrument of trust in his favor, under which he took possession, management, and control of all her property and business; that he fraudulently, and by means of threats of expensive litigation, induced her to sign an agreement by which the will of J. W. Ladd was construed

to give her but one-half of the entire estate, including her community property, instead of one-half of the residue, excluding such property, and that he procured a decree of distribution in accordance with such agreement during her absence in Europe; that he fraudulently omitted from the inventory of J. W. Ladd's estate 7,600 shares of the stock of the Oregon Steam Navigation Company, belonging to it, and standing in the name of Alvinza Hayward, and concealed such ownership from her, except as to 950 shares, which he falsely pretended he had purchased from C. E. Tilton for \$33,250; that on April 2, 1872, J. W. Ladd being then dead, three-fourths of the stock of the company was sold to the Northern Pacific Railroad Company, at 40 cents on the dollar, one-half in cash and the balance in bonds of the railroad at 90 cents of their par value; that the estate of J. W. Ladd was represented at this sale by W. S. Ladd, yet he did not in fact deliver any of the 7,600 shares belonging to the estate until the panic of 1873, when, the Northern Pacific Railroad Company having become insolvent, and its bonds valueless, he craftily attempted to substitute the stock of the estate for his own stock, delivered on the sale, and contrived entries in the books of Mrs. Hiller, kept by him, by which the estate's ownership of the 7,600 shares was concealed, and it was made to appear that the 950 shares were purchased from C. E. Tilton at an expense to the estate of \$33,250; that he deceived her as to the terms of the sale of the 950 shares, which was made to Henry Villard in 1879, with the stock of the other owners, and falsely represented that such sale was for \$50 per share, and no more, although in fact the price paid included an additional \$50 per share in stocks and bonds; that W. S. Ladd subsequently admitted this deception, and delivered the stocks and bonds to which complainant was entitled; that the fraudulent scheme of W. S. Ladd was not discovered by her until 1893; that it was known, when J. W. Ladd died, that he left a large estate, and W. S. Ladd did not dare to omit said 7,600 shares of stock from the inventory of the estate without substituting other values therefor, and he therefore substituted a pretended promissory note of Alvinza Hayward, for \$190,000, dated March 1, 1870, but upon which no payments of interest had been made, thereby pretending that such a note had been given as for a purchase of said stock; that all this was untrue, and was fraudulently planned by W. S. Ladd to conceal the estate's ownership of such stock; that from time to time, while the estate was being administered, W. S. Ladd received dividends on the stock so concealed, which he credited on the note as payments of interest thereon, although in fact no such note was made by Hayward, and no interest was ever paid on account of it. And the complainant further alleges that, shortly after the failure of Jay Cooke, a syndicate was formed to repurchase the stock so sold to said Jay Cooke, in which syndicate were represented W. S. Ladd, S. G. Reed, R. R. Thompson, J. C. Ainsworth, and C. E. Tilton, and at the time of the failure of said Jay Cooke, which took place on the 17th day of September, 1873, the said W. S. Ladd, R. R. Thompson, J. C. Ainsworth, S. G. Reed, and C. E. Tilton were either directors of, or controlled the directors of, said Oregon Steam Navigation Company, and that they so managed or caused the affairs

of said corporation to be so managed that, in the year 1874, by withholding dividends, the value of its stock was greatly reduced, and the syndicate purchased and divided into six equal parts 26,548 shares, at an average price of \$13 per share; that one of the parts or interests was on account of the estate of J. W. Ladd, and was taken in the name of E. Quackenbush or J. C. Ainsworth, trustee; that, if it was true, as W. S. Ladd falsely pretended, that complainant's stock was sold to Jay Cooke, then it became his duty to buy back said stock for complainant upon the same terms on which he bought back stock for himself, for which purpose he had sufficient means belonging to complainant; that, on said stock so purchased for said complainant as aforesaid by said syndicate, said W. S. Ladd received all the dividends which were declared thereon from and after the date of said repurchase down to the time of the sale of said stock to said Henry Villard, and that said dividends amounted to the sum of about \$53,698; that on the 23d of May, 1879, said syndicate sold to Henry Villard said shares of said stock, for which said Villard paid 50 per cent. of the par value thereof in cash, less a small sum reserved to pay prior debts of said corporation, and the other 50 per cent. in stocks and bonds taken at the par value thereof; that the profits of the estate of J. W. Ladd on the purchase and sale of said shares of stock so bought and sold for the benefit of said estate were about \$384,888, besides the dividends which accrued on said stocks from the time of said purchase to the date of the sale to said Henry Villard, with interest on bonds, and dividends and premiums on each received on Villard sale, with interest on the same, which amounted to \$974,334; and the profits on the three-fourths thereof belonging to said complainant is about \$959,417, all of which came into the hands of said W. S. Ladd, and thereafter into the hands of these defendants, and have never been accounted for to said complainant.

The charge, made in the bill of complaint, to the effect that in the sale of stock held by Hayward to Jay Cooke, for the Northern Pacific Railroad Company, none of the 7,600 shares belonging to the estate of J. W. Ladd was delivered, but that such stock was retained until the panic of 1873, when, the Northern Pacific Railroad Company and Jay Cooke having become insolvent, W. S. Ladd craftily substituted or attempted to substitute the stock of the estate in lieu of his own stock sold to Jay Cooke, and contrived entries in Mrs. Hiller's books to that end, is not supported by any evidence in the case; but, on the contrary, these charges are conclusively disproved. It is, in effect, conceded to be the fact that the estate of J. W. Ladd was represented in that sale, and shared in whatever benefits accrued to it equally with all the other parties concerned, and it is beyond dispute that, in that sale, W. S. Ladd did not in fact act for the estate of J. W. Ladd, but that the sale and transfer of three-fourths of the stock of the Oregon Steam Navigation Company was by Hayward, acting for all the stockholders, including himself, and was in pursuance of an understanding had in the lifetime of J. W. Ladd, and concurred in if not planned by him, by which the entire stock of the Oregon Steam Navigation Company was to be sold to the Northern Pacific Railroad Company, if such a sale could be effected upon favor-

able terms. It also appears beyond question and is in effect conceded by complainants, that all the proceeds of that sale have been fully accounted for to the estate of J. W. Ladd, and that the Hayward note for \$190,000, was not a pretended note fraudulently substituted in the inventory of J. W. Ladd's estate by W. S. Ladd, to conceal from Mrs. Hiller the estate's ownership of the 7,600 shares of stock in Hayward's hands, but that J. W. Ladd, being in failing health, himself contrived the expedient of substituting Hayward's note for this stock, so that, in the event of his death, the stock might be held and the proposed sale had without recourse to the probate court, with the attendant publicity and possible complications, which would likely embarrass the pool in its proposed deal. By this contrivance, which was carried out, the note took the place of the stock in the inventory, and the avails of the stock were accounted for to the executors and credited as payments on the note. The explanation as to how these charges came to be made is that complainants were misled by the manner in which the accounts of Mrs. Hiller were kept by W. S. Ladd, and by the refusal of the executors of his estate to permit an inspection of the books of Ladd & Tilton, and were not apprised of the truth as to these matters until it was disclosed by the testimony taken in the case. There is no testimony tending to support the charge that W. S. Ladd, by threats or other means, induced Mrs. Hiller to execute the agreement relating to the construction of her husband's will, or that the trust instrument was because of his undue influence, or that he procured the decree of distribution of the assets of the estate, or that she was in any way subjected to his control. It is contended, however, that the sale and transfer by Hayward of the stock of the estate was illegal, because not authorized by an order of the probate court of the county of San Francisco, having probate of the will of J. W. Ladd, as required by the laws of California, and that W. S. Ladd, because of his relation as one of the executors of the estate, is liable to account for the value of the stock so illegally disposed of, and that this value is to be determined by the highest price for which this stock has subsequently been sold in the market. To this same end is the further complaint that Mrs. Hiller alone of all the owners of Oregon Steam Navigation stock was not allowed to come into the pool formed for the repurchase of this stock and to share in the profits of the sale made to Henry Villard in 1879, except as to the unsold 950 shares remaining at that time, her claim being that it was the duty of W. S. Ladd, as her trustee, to buy back said stock for her upon the same terms upon which he, with others, bought for themselves, as she alleges he could have done with her moneys and securities then in his hands. It is contended for complainant, Mrs. Hiller, that she did not know of the existence of the 7,600 shares in Hayward's hands, and that she was kept in ignorance of the fact, and of the sale of three-fourths of that stock to Jay Cooke by W. S. Ladd, whose duty it was to have apprised her of these matters, and to have prevented the sale to Jay Cooke unless the same was authorized by the court of probate of the county of San Francisco. The correspondence between W. S. Ladd, Mrs. Hiller, the complainant, Joe French, and Charles Tilton, then

of the firm of Ladd & Tilton, covering a period of many years, is in evidence, and is relied upon to prove that W. S. Ladd, Tilton, and French were acting in concert to keep from Mrs. Hiller all knowledge of this property. None of these letters refer in terms to this stock, and to this fact complainant attaches much importance. It is claimed in her behalf that the books of account kept for Mrs. Hiller by W. S. Ladd were obscure, and that the entries were so contrived as to conceal the truth as to this stock, and that to the same end W. S. Ladd mutilated these books by cutting out some of their leaves.

As to these matters the following facts appear: The Oregon Steam Navigation Company had a capital of \$2,000,000, divided into 4,000 shares of \$500 each. Later, and in November, 1868, this stock was increased to \$5,000,000, divided into 50,000 shares of \$100 each. In the meantime the Northern Pacific Railroad Company had been authorized, by an act of congress approved July 2, 1864, to build a branch of its road down the valley of the Columbia to a point near Portland, and, by joint resolution passed in December, 1869, congress authorized the construction of the main line of the road via the Columbia river to Puget Sound. It is probable that the increase of the capital stock of the Oregon Steam Navigation Company was with the view of a sale of that property to the Northern Pacific Railroad Company. The owners of the navigation company feared the effect upon their company of the construction of the railroad line, and took steps looking to a sale to the railroad about this time. The principal stockholders were J. C. Ainsworth, S. G. Reed, R. B. Thompson, W. S. and J. W. Ladd, Coe, Olmstead, Ruckle, and Bradford. In pursuance of a plan arranged between Ainsworth, Reed, Thompson, and the Ladds, it was given out that Alvinza Hayward of San Francisco, a capitalist of much wealth, was buying up the stock of the navigation company with the intention of controlling it, and a letter was written by Hayward to Ainsworth declaring this intention with suspicious bluntness. The holdings of those concerned were speedily transferred, with the exception of a few shares, necessary to qualify the directors to continue in office, to Hayward. Much, if not all, of this stock, being the new issue under the organization,—at least, that of J. W. Ladd,—was issued directly to Hayward by the company. Olmstead, Coe, Bradford, Ruckle, and other holders of stock, acting upon the assumption that Hayward had secured a majority of the stock, sold their holdings to him. There were thus issued to Hayward 48,125 of the 50,000 shares of the navigation company's stock, all of which belonged to the pool, including Hayward, who had 2,500 shares in his own right for the part taken by him in the deal. J. W. Ladd's interest in the pool comprised 7,600 shares. Hayward was the intimate friend of J. W. Ladd, and it is claimed, and is probably the fact, although of no particular importance, that the latter originated the scheme by which the pool acquired the entire stock of the navigation company. It is claimed that one of the objects of this transfer of stock was to facilitate the sale of the property, but the fact that it had the effect to transfer the stock of the other holders to the pool is a sufficient explanation of the object with which it was done. Neither party has any advantage over the other in re-

spect to this transaction, the morals of which are not involved in this suit. There is no doubt but that the stock of the Ladds was continued in Hayward's hands in trust, to be sold by him in the sale for which negotiations were pending. Such an arrangement, so far as the interest of J. W. Ladd was concerned, was important, in view of the precarious state of his health and the necessity of so placing the stock that the proposed sale would not be jeopardized by his death.

Another reason for this trust was suggested by complainant's counsel on the argument, and is supported by testimony in the case. The stockholders had been vexed by litigation, which is frequently referred to in correspondence in the case as the "blackmail suits." Some of this litigation grew out of the construction of a steamship, in which J. W. Ladd had an important part. The fear, and possibly the threat, of other suits made it desirable to these stockholders to conceal their interest in the company. There was a further motive for the course taken in the fact that Ben Holladay was threatening to establish an opposition line of boats. Hayward's relations to Holladay were understood to be of such a character as to remove all danger of opposition where Hayward was concerned. So that there were adequate motives for the transfer to Hayward and for the concealment thereafter in his name of the stock held in trust by him; and this explains the guarded character of the correspondence between the parties with reference to their stock. The letters from W. S. Ladd to Mrs. Hiller were not exceptional in this respect. All that passed between the other parties in interest had the same peculiarity. It is apparent that the writers of these letters were not trying to conceal anything from each other. It is probable that they were guarding against a possible future use of their correspondence as evidence of the real character of the Hayward deal. After a lapse of 25 years, and when all the participators in the transaction, except Hayward, Thompson, and Tilton, are dead, not an admission can be had from either of these except Tilton, who remembers but little. Hayward's memory is a total blank, and Thompson stoutly maintains in his testimony that he knows nothing about the pool, and does not know that Hayward held stock in trust; that the transfer was bona fide; and that the stock he subsequently took from Hayward was by actual purchase.

The removal of leaves from the books of account kept for Mrs. Hiller is explained by the witness Quackenbush. It was in keeping with the course of conduct pursued with reference to the stock of the Oregon Steam Navigation Company by the members of the pool in their correspondence. These books were originally opened by Quackenbush, who was cashier of the bank of Ladd & Tilton. The sale to Jay Cooke had taken place, and the proceeds of the sale were being collected by Tilton. It was not desirable to have it appear that the money received from Tilton for the estate came from the Oregon Steam Navigation stock, and the books as opened by Quackenbush would lead to this disclosure. So the account was changed to its present form, and three of the first leaves in the ledger kept for one of the parties, and four in the ledger kept for the other, were cut out

by Quackenbush. W. S. Ladd suggested the change in the form of the account, but had nothing to do with the removal of the leaves. Only two items of the account were changed. Quackenbush gives a transcript of the missing leaves, showing the account as it was originally entered. The stock and bonds appearing in the original account is in large part transformed in the altered account into an indebtedness due the estate from Charles Tilton. The assets of the estate were not in the least diminished by the change, which was merely one of form. The effect of the removal of these leaves from the two ledgers was of no consequence, except to those who might try to use these books to prove ownership of the stock in question in a proceeding to establish liability against such owners, or to set aside transfers induced by the device of the pretended Hayward sale. The mutilation of books of account is not a promising means of concealing the misappropriation of funds. It is not probable that W. S. Ladd would resort to such an expedient to conceal a fraud. Such an act on the part of a man of business shrewdness does not indicate a consciousness of wrong, but the reverse.

As to the point, urged in complainant's behalf, that the sale by Hayward of three-fourths of the stock held by him in trust for J. W. Ladd without an order of the probate court was illegal, and that W. S. Ladd, having permitted such a sale, is to be held as for a conversion of this stock, I am of the opinion that an order of the probate court was not necessary. This stock had been issued to Hayward, and he was its legal owner as trustee. No act of J. W. Ladd, if living, could add to the completeness of that title. If the right to revoke the trust existed, this "does not in any degree affect the title to the property. That passes to the donee, and remains vested for the purposes of the trust, notwithstanding the existence of a right to revoke it." *Stone v. Hackett*, 12 Gray, 227. The case of *Huse v. Den*, 85 Cal. 390, 24 Pac. 790, is cited in support of the contention that an order of the probate court authorizing this sale was necessary to its validity. That was a case where the executors of an estate undertook to sell it without the authority of the probate court. The court held that the will in that case gave no power to sell real property. Moreover, the deceased had in his lifetime executed a deed conveying the property to his brother and himself in trust for the benefit of the grantor's children. It was held that the intent of the grantor must govern, and that this deed was intended to be, and must have the effect of, a settlement for the benefit of such children. This intention was not affected by the will. The purchasers knew of the deed of trust and the provisions of the will, and of the want of power of the executors to sell without an order of the probate court, and purchased in the face of this knowledge. Of course, no title could pass under such a sale, nor could any equity arise in favor of the purchasers. In the case of *In re Radovich's Estate*, 74 Cal. 536, 16 Pac. 321, also cited by complainants, there was a sale of stock which came into the executor's hands without an order of the probate court, and the court held that there was a conversion, and that the executor was liable to the estate for the value of the stock with legal interest. In the present case the sale was by a trustee having the legal title.

Hayward was in law the owner of this stock. There was no limitation upon his power to sell. On the contrary, the stock was held by him for that express purpose. And this trust included the stock of other persons, by whose concurrent action the trust was created. The rights and interests of the several beneficiaries were mutual. Hayward had an interest, coupled with the trust. He was a beneficiary in the sale which he was authorized to make of the stock pooled in his hands, and therefore it was his right, as well as his duty, to sell. In the case of *Bedell v. Scoggins* (Cal.) 40 Pac. 954, the supreme court of California held that the payment of money to be expended in payment of the funeral expenses of the person making the payment, where the expenditure had been made in good faith, created a trust in the person to whom the payment was made, which was not extinguished by the death of the trustor. The court, in its opinion, referred to the fact that the probate court had not disapproved the payments made by the trustee. In that case the question was whether the trustee should be answerable for the money paid him by the trustor, and applied by him after her death as she had directed, and this question was decided in favor of the trustee. The principles of this decision apply in the case on trial. J. W. Ladd's intentions were to place the trust property beyond the reach of probate administration, and to secure the advantages of such a sale as his trustee and his own associates in the enterprise in which the property had been earned might approve and be able to make. In a letter to Tilton, of December 28, 1869, he says:

"I deem it prudent to arrange my little affairs, so if I should drop out it will not necessarily bring to light matters we desire to remain dark. If I can get you, William, and Hayward together a day or so, can arrange for any contingency."

It was, therefore, an important consideration with J. W. Ladd that his affairs should be so arranged that his death might not lead to a disclosure of matters that it was important to all the parties concerned should "remain dark." And this trust was carried out in good faith, precisely as the trustor intended, and it does not appear that the county court has ever disapproved what has been done.

But, if complainants' contention is conceded, that the death of J. W. Ladd revoked the power of Hayward as to said Ladd's stock, and thenceforth the control and disposition of this stock was in the executors of the estate, subject to the direction and control of the probate court, this in no wise affects the accounting for which this suit is brought. The recovery of this stock is not involved in this proceeding; but an accounting is sought for its value, and in this accounting complainants admit that they should be charged with the proceeds of the Hayward sale received by the estate. It is obvious that, in the matter of an accounting, the value of the property to be accounted for is not in the least affected by the question of legal formality or power of sale. That question could only be material where the value of the property or the price for which it was sold is claimed to have been affected by doubts as to the power of the trustee to make sale in the absence of authority by the county court; but this is not such a case.

The contention of the complainants is (1) that the sale in this case

was unauthorized because the county court did not order it, and, being unauthorized, W. S. Ladd must be held as for a conversion, and the title of the estate allowed to attach to such shares of Oregon Steam Navigation stock as W. S. Ladd is found to have been possessed of at any time after the sale to an amount equal to what was sold by Hayward of the stock of the estate; or (2) that the value of the stock sold is to be determined by the highest price at which stock of this character was sold at any subsequent time. There is no relation whatever between these two propositions. They serve, however, the single purpose of enabling Mrs. Hiller to share in the profits of what is known as the "Villard deal,"—a deal which was had some seven years after the Hayward sale, and by means of which the stock of the Oregon Steam Navigation Company, sold by Hayward in April, 1872, at \$40 per share, one-half in cash and the other half in bonds of the Northern Pacific Railroad Company, repurchased by the pool in the fall of 1875 at \$15 and \$13 per share, was sold by the pool to Villard in May, 1879, at \$100 per share, one-half cash and the remainder in stocks and bonds. As already suggested, the standard by which the value of this stock is determined does not depend upon an order of the probate court. Upon an accounting, the only question is one of value. Has this stock been accounted for to the estate? To what is the estate entitled, in equity, that it has not received? It is not questioned but that the Hayward sale was a good one at the time. It was so regarded by the owners of the stock of the Oregon Steam Navigation Company, who spoke of it as a very desirable sale. It was made in good faith. The Oregon Steam Navigation Company's line was menaced at the time with the construction of the Northern Pacific road down the Columbia. The building of the railroad involved the destruction of the navigation company as a property. The owners of the stock in question, including J. W. Ladd, were apprehensive that their investments would become practically lost. They henceforth devoted themselves to the effort to sell their stock in a lump. All the facts in evidence tend to show that the pool acted with prudence, and that the sale was in fact "a desirable one." Under the conditions as they existed, the sale realized the value of the stock sold. It was a matter of regret to the members of the pool that the purchaser refused to take more than three-fourths of the stock offered. No question is made as to the fact that the Hayward sale realized the full value of the stock at the time, and the testimony shows beyond question that the sale was in pursuance of the plans formed in the lifetime of J. W. Ladd, and to which he was a party.

But there are other considerations in the way of any relief to the complainant. Upon the contention that W. S. Ladd should have prevented the sale by Hayward, in his capacity of executor or trustee for Mrs. Hiller, or both, the fact appears that the part taken by W. S. Ladd in the execution of the will of J. W. Ladd was merely perfunctory. He was residing in Portland. Mrs. Hiller and Joseph French, two of the three executors, resided in San Francisco. They were active in the administration of the estate. The lawyer engaged to act as legal adviser was E. E. Haft, who had been the legal ad-

viser of J. W. Ladd. But it is urged in Mrs. Hiller's behalf that she was weak, inexperienced in business, confiding in others, and especially in W. S. Ladd, and was ignorant of her husband's ownership of the stock in question. It does not appear, however, that her ignorance, if she was ignorant, is attributable to W. S. Ladd, or that he knew of it. It does appear, from the testimony of Charles Tilton, that several months before the sale was finally made, and while it was in contemplation, she discussed it with Tilton, and said it would increase the value of her half of the estate. In a letter written to W. S. Ladd on June 4, 1872, just before her departure for Europe, she says, "I am much pleased with the late sales, and to have things settled up before going away." There was no other sale or transaction to which this letter could refer than the one in question, and she attempts no explanation of these statements. It is shown that she knew in her husband's lifetime that he owned this stock. In the summer of 1870, J. W. Ladd and his wife, the complainant, were in Denver, where they had gone in consequence of the former's failing health. On the 13th of June, complainant wrote a letter to Charles Tilton entreating him to come to Denver and go back with them to San Francisco. J. W. Ladd's health was failing, and he was despondent and homesick, and his wife was anxious to have some one there whose presence would "cheer him." Tilton thereupon went to Denver, and accompanied J. W. Ladd and complainant to San Francisco, and he testifies that on that occasion he told both J. W. Ladd and complainant of Ainsworth's failure to make the sale of Navigation stock (the first negotiations for the sale of the stock of the pool were conducted by Ainsworth, and were unsuccessful); that they understood it fully, and were both very much disappointed. There is no contradiction of this testimony, and it is very natural that these three persons should, under the circumstances, have discussed matters of business in which they were all deeply concerned. Tilton also testifies that, after the death of J. W. Ladd, the complainant Mrs. Hiller came East, in April, 1871, and remained there a month or two. During this time, Tilton saw her quite often. He testifies that she spoke of her stock. Both were interested in the subject. She inquired of him what he thought she could get for it. There is other testimony showing knowledge of this stock on Mrs. Hiller's part. In a letter by W. S. Ladd, written in March, 1871, to Tilton, he speaks of the Hayward note for \$190,000, and says it will all be arranged; that his brother (J. W.) talked to both himself and "Sadie" (Mrs. Hiller) about it. None of this testimony is contradicted by Mrs. Hiller. She was particularly examined as to this knowledge on her part, and testified as follows:

"Q. In this forecast of death,—this gradual approaching death of your husband,—did he not discuss with you the fact, and how you were to be left, and what would be your means of livelihood? A. It would be natural for him to. Q. Yes, I think it would be natural. But the fact is, did he? A. Well, I could not give any exact words, or anything of that sort, but I would not say that he did not, because it is more than probable that he did. Q. You had no particular property when you married him, had you? A. No, sir. Q. Then did he not give you some idea in what his wealth or income-making property consisted? A. Yes, sir. I think he did; but I could not tell you now."

In the correspondence between W. S. Ladd and complainant appear statements that imply a knowledge of the matters in question on Mrs. Hiller's part. In one of these letters, written by W. S. Ladd to Mrs. Hiller, on May 27, 1872, the writer says:

"The interest on your half of the bonds will be some \$4,577.10. What may be realized from the balance cannot now say, but, as before stated, I will advise you when can do so."

There was not a single bond of any kind in the inventory of the estate, and there were no bonds to which this letter could refer other than those derived from the Hayward sale, the proceeds of which were covered by the \$190,000 Hayward note. That note was inventoried as an asset of the estate, and was in lieu of the proceeds of that sale, of which these bonds were a part, as it had been of the stock in Hayward's hands before the sale. Unless Mrs. Hiller understood this, the reference in this letter to her half "of the bonds" would have been inexplicable. The language of this letter implies an understanding between the parties as to these bonds, and it cannot be reconciled with any theory of deception upon the part of one of the parties or of ignorance upon the part of the other.

There is testimony, as has been seen, tending to show that among the reasons for the transfer of stock of the Oregon Steam Navigation Company to Hayward by Ainsworth, Thompson, Reed, and the two Ladds, was the desire to conceal the interest of these owners, and thus avoid, or make it easier to compromise, liability in certain pending or threatened litigation, and that these matters were, in fact, compromised by payments for which the different owners of stock were assessed. As to these matters, Mrs. Hiller testifies that she presumes she was familiar with them at the time, and in one of her answers, she says: "Yes, sir. I have heard of O. S. N. stock, and of those sorts of things before." When asked if she did not know at the time of the Northern Pacific sale—or what is known as the "Jay Cooke deal"—that she had some of the O. S. N. stock, or an interest in some, she answered: "Well, I presume I knew at that time. My letters will show." Later in her testimony she says she cannot tell whether she knew that certain bonds of the Northern Pacific Railroad Company, which she thinks or presumes she had, came from the sale of Oregon Steam Navigation Company stock; that she is not sure that she did not know, and has no impression on the subject; that she supposes she had a talk with Mr. Tilton about it, but don't know as to that. If this testimony, taken as a whole, is given a construction most favorable to Mrs. Hiller, it amounts to a denial of any recollection as to whether or not she knew of the ownership of this stock by her husband's estate at the time the estate was being settled up in 1872. When she is asked the question as to such knowledge, she answers, "I could not tell you, now, whether I knew it then or not." If there was nothing to show that she had knowledge, her inability to say that she was without it would preclude relief to her upon the ground of ignorance. In other words, she cannot recover on the ground of ignorance unless she was ignorant, and, if she does not know that she was ignorant, no one else can know it. The court cannot find that she was ignorant against

her own denial of any recollection on the subject; and when, in another part of her testimony, she says that she thinks it more than probable that her husband, when his death was impending, discussed his business affairs with her, and that she thinks he gave her an idea of what his income-paying property consisted, the conclusion that she knew of the existence of this stock and that Hayward held it for her husband, and that as one of the executors of her husband's estate she acquiesced in its sale, becomes irresistible. This testimony supplements that of her letter to W. S. Ladd expressing her satisfaction at the late sales, and the opportunity thus afforded for a settlement of her husband's estate, and it corroborates the testimony of Tilton and of members of W. S. Ladd's family, who testified in the case, to statements by Mrs. Hiller, showing her knowledge, although corroboration, in the absence of contradiction, is not necessary.

It is true that, after the 15th of May, 1872, W. S. Ladd was invested by her deed with a trust to manage her affairs for her; but this trust did not involve an assumption by him of the responsibility devolving upon Mrs. Hiller as executor of her husband's estate. She and French were active in the administration of the estate prior to her departure for Europe. She controlled the selection of an attorney for the estate, and declined to permit the employment of Gen. Barnes, because she thought his charges would be too great. The inventory of the estate was made and filed before W. S. Ladd qualified as executor, and it included the Hayward note for \$190,000, given by Hayward to J. W. Ladd as a cover for the latter's stock, as one of the assets of the estate. These were her acts jointly with French. W. S. Ladd was in the meantime in Portland, and, so far as appears, did not attempt to control or influence the action of the San Francisco executors. As to this ground of her complaint, Mrs. Hiller is in the attitude of trying to recover from the representatives of W. S. Ladd, because he did not prevent the execution of a trust created by her husband, although what was done was of advantage to her husband's estate, and was to her interest, and was with her acquiescence. If the death of J. W. Ladd revoked the trust in Hayward, and subjected the shares in his hands to administration in the probate court, so that the sale subsequently made without an order of the probate court was illegal, then it is Hayward who is liable. If the liability results as a matter of law from the acts of Hayward, he, and not W. S. Ladd, must account. Why has no claim been preferred against him? Why should W. S. Ladd's representatives be proceeded against, because he, with the complainant and French, permitted Hayward to sell this property, while the party whose act furnishes the ground of complaint is not called to account?

Upon the sale to Villard in 1879 of the 950 shares of Oregon Steam Navigation stock belonging to the estate of J. W. Ladd, these shares being Mrs. Hiller's half of the unsold one-fourth of the 7,600 shares in Hayward's hands after the Jay Cooke sale, W. S. Ladd represented to Mrs. Hiller that these shares realized \$50 per share, and no more. He concealed from her the fact that she was entitled to

an additional \$50 per share of the stock sold in stocks and bonds. Mrs. Hiller became acquainted with this deception in January, 1880, and requested W. S. Ladd to forward these stocks and bonds to her. This he did, with a frank acknowledgment that he had not disclosed to her the full consideration received for the stock sold, and an explanation of the motive for his conduct. A great deal of importance is attached to this feature of the case by the complainant, although the matters involved were settled more than 13 years ago, and no charge is now made in respect to them, except that this deception shows a purpose on the part of W. S. Ladd to defraud complainant in the management of her affairs. The explanation which W. S. Ladd gave to the complainant for withholding from her the full consideration for which her bonds were sold is contained in his letter to her of February, 1880. In that letter he says:

"An inspection of your account renders any remarks concerning the management of your affairs wholly unnecessary. At the same time, such inspection will disclose the motive which actuated me in reporting to you only the cash transaction in the sale of the O. S. N. Co. stock. You have drawn \$151,645.18 (one hundred and fifty-one thousand six hundred and forty-five and eighteen one-hundredths dollars), in addition to the allowance by the probate court during the years 1871-1872 of \$8,500 (eighty-five hundred dollars),—some \$160,145.18,—and the investments made by you so far as I have any knowledge do not exceed \$25,000 (twenty-five thousand dollars). I therefore conclude that, should you become apprised of the full avails realized upon the sale referred to, it would serve to stimulate the extravagances against which I have heretofore taken pains to caution you. To prevent any complications in the event of death, I had taken the precaution of placing the bonds and stock in a package, indicating thereon the interest I had therein as your attorney, as trustee for legatees, and personally. Besides, your books would have disclosed the true condition of your affairs. The trouble you seem to have taken to ascertain the terms of sale were wholly unnecessary, as they are familiar to nearly every business man in this city."

The truth of the statements contained in this letter is not denied. Mrs. Hiller's fortune was being rapidly dissipated. She was conscious of her weakness in this respect, and was at times extremely penitent on account of it. In a letter written June 16, 1875, to W. S. Ladd, she says:

"With regard to the \$81,239, I have lived and invested the best I knew how under all the circumstances, and if I have learned, like hundreds of others, to shun stocks as a 'pestilence or a ravening death,' why, I have no one but myself to blame for any foolish act of mine. In looking back upon my whims and its consequences, I can wring my own hands in my own little anguish, and exclaim, wonderingly, all to my little self (when too late), 'Who'd a thought it!' Never mind! I can console myself with the fact that but very few philosophers, even, have enough common sense, or honesty, either, to last them over night, seeing that they preach a great deal more good than they practice."

Nearly four years later, in a letter written March 28, 1879, to W. S. Ladd, she says:

"No person realizes the error of my ways more keenly than does my individual self."

And further on she adds:

"But wait a little longer, William. It may not all be lost. Meanwhile I will earnestly hope to escape out of the only loophole that is at present my salvation in financial affairs. If it is ruled otherwise, you will not be apt to hear any murmur from me about it. While, on the other hand, should there be

a favorable issue, I should only be too happy to report, and rest assured there is no one living whose approbation I should feel prouder to earn than yours. This is truly the feeling I have in my heart of hearts."

She was wasteful of her money in other ways than in the purchase of stocks. When she went abroad she took a valet with her, and within a short time she lost \$2,000 in a bank failure. On this trip she loaned \$2,000 to a French doctor, who was a casual acquaintance, and lost it. At the same time she expended \$2,000 for laces, and was talking of keeping a carriage. She described herself as "a gay widow" and an "extravagant piece." Tilton wrote to her that she would soon be at the "end of her pile." These extravagances were the subject of comments in the correspondence between W. S. Ladd, Tilton, and French. Even after her marriage, it was suggested in the letters between Ladd and Tilton that they would yet have her to support. Upon her return from Europe in 1874, Tilton suggested to W. S. Ladd, so he testifies, that he should "cover" some of her property, because, if he did not, he would have her on his hands to support. The fact is suggestive that, notwithstanding her statement in her letter to W. S. Ladd of June 16, 1875, that she had learned to shun stocks as a pestilence or ravening death, yet, in her letter of March 28, 1879, she unmistakably indicates that she has again gone into the whirlpool of stock gambling as the only "loophole" of "salvation" in her "financial affairs," and that this was upon the eve of the Villard sale. The suggestion of Tilton to "cover" something for her would have especial weight in this state of affairs, and the Villard sale seemed to offer the last opportunity to save something, for at least the present, out of the wreck of her fortune. It is not disputed that she had, as stated in the letter of W. S. Ladd, expended above \$160,000. It was hers to spend, but if he intended to withhold from her a remnant of her estate, while she was in the act of throwing dice, however temporary the effect might be, she cannot complain. The statement in his letter that nearly every business man in the city was familiar with the terms of the Villard deal, is probably true. Certainly the terms of that deal were not confined to a few persons. They were known to all the members of the pool on the one side, and to all those interested with Villard on the other. The street knew all about the Villard deal, and it was not possible that the complainant and her husband could very long be ignorant of it, or that W. S. Ladd could have supposed so. The books kept for Mrs. Hiller and for Ladd himself disclosed it. So did the books of Ladd & Tilton. Quackenbush, the cashier of Ladd & Tilton, testifies that he remembers distinctly the receipt of the stock and bonds that belonged to Mrs. Hiller, and that they were placed in an envelope, and put in the tin box where Mrs. Hiller's papers were kept, and marked "W. S. Ladd, Trustee." He knew to whom they belonged. W. S. Ladd wrote to Tilton, saying that, if anything should happen to him (Ladd), Tilton would always find the tin trunk in Ladd's safe, containing Mrs. Hiller's matters, and he requested Tilton in such an event to go to Quackenbush and get the key and attend to it himself. All this was arranged with the thoughtfulness of a prudent business man. The evidence of the ownership of Mrs.

Hiller of these stocks and bonds was thus carefully provided, and such instructions given as to avoid the possibility of mistake, and prevent any confusion of this trust property with his own. As stated in his own letters to Tilton, written with evident sincerity, and in the confidence that existed between them, he was doing for his brother's widow what he should have expected his brother to do for his own. There is much evidence bearing conclusively upon the question of the good faith of W. S. Ladd, but the matter is left so free from doubt upon the facts already considered that further comment is unnecessary.

The contention that it was the duty of W. S. Ladd to take complainant into the repurchase pool, which led to the Villard deal, shows, after all, the end sought in the suit. It is to this end that the claim was made that none of the stock of J. W. Ladd had in fact been sold to Jay Cooke. In this way it was sought to trace this stock in the subsequent sale to Villard. So, too, of the claim that, in any event, W. S. Ladd, having funds, as is claimed, belonging to J. W. Ladd's estate in his hands, available for that purpose, it was his duty to have preserved an interest in the repurchase scheme for the estate. It does not appear, however, that there were funds of the estate in the hands of W. S. Ladd available for any such purpose. If there were such, it does not follow that W. S. Ladd should have employed them in this way. Nor does it appear that W. S. Ladd in any way controlled the repurchase pool, or that he could have secured an interest for the estate, unless he devoted his own interest to that object. There was no obligation upon him to take the estate into the pool, if he could have done so. He may as well have been expected to share in all his other investments with the estate. There was no connection between the sale to Jay Cooke and the repurchase and sale to Villard. There was an interval of years between the two. Wright and Villard were both interested in the latter, and had nothing to do with the former, while Hayward, who was a member of the first pool, was not concerned with the second. The question as to who should comprise the pool could not, in the nature of things, be determined by one member. It was a matter for all concerned, and only those were included who could serve their joint interests.

The court is asked to decree against the writing by which Mrs. Hiller agreed to a construction of her husband's will by which she received but one-half of the entire estate, instead of three-fourths. Since by the laws of California she was entitled to one-half as community property, without the will, it is contended that, under the will, she should have one-half of the remaining half. This agreement was executed in May, 1872, and final distribution of the estate was had by order of the probate court of San Francisco in September of that year. If this decree of distribution is not final, still this court has no jurisdiction. It is a matter exclusively of probate jurisdiction, over which no court of equity has cognizance. This is settled by a long line of cases, including the case of *In re Broderick's Will*, 21 Wall. 503. The agreement was in effect a stipulation for the action of the probate court in making its decree. It is merely

the means to the proceedings that have taken place, and neither those proceedings nor the subject to which they relate are cognizable here. And, besides this, in a matter within the equity jurisdiction, this court would still be bound by the decree of distribution that has been made. It certainly will not be contended that this court can cancel, set aside, or modify the decree of distribution made by the probate court of San Francisco. No more can it compel an account for what has been received under that distribution, for that would be to annul the decree of probate by indirection, and make a decree of distribution of its own. I am of the opinion that the claim made at this late day as to the agreement by which the will was construed is merely to reinforce the other grounds of complaint. Mrs. Hiller cannot and does not pretend ignorance for more than 20 years of the agreement of May 16, 1872, and of what was done in pursuance thereof. Furthermore, I am of opinion that she knew what her husband's wishes were in respect to a division of this property. In July, 1871, she discussed with Tilton the proposed sale of stock, and said it would increase the value of her half of the estate. If it was then in her mind that she was the owner of three-fourths of the entire estate,—one-half as her community share, and half of the remaining half as legatee,—it is not probable that she would have expressed herself in this way. The proposed sale would have benefited her community half in equal proportion with the other, and it amounted to twice as much in value. In the will the words "one-half my estate" were used, in my opinion, in their general acceptance, by which is included the entire property accumulated, managed, and used as a single property by the deceased. It is said that by such an interpretation, Mrs. Hiller takes nothing under the will; but the will gives to the community property the separate property of the husband owned by him at the time of the marriage. How much that was does not appear; but it was assumed in the case that the husband was possessed of property at that time, while the wife had none. But, whatever the fact may be as to this, the other objections to the relief sought as to the distribution that has been made are conclusive.

The question of limitation of Mrs. Hiller's right of suit by reason of her delay in bringing it is not considered. But her delay, under the circumstances, affects the question of her good faith. The facts upon which she bases her claim for relief were known to her for more than 20 years before this suit was begun. She knew that her husband owned the 7,600 shares of Oregon Steam Navigation Stock in Hayward's possession, and the object of that trust. She not only knew of the proposed sale, but she kept informed of the progress of the negotiations in respect to it. She was disappointed when Ainsworth failed to make the sale in her husband's lifetime, and in May, 1872, was pleased that the sale had been effected. She was an intimate friend of Hayward's, and, as one of the executors of her husband's estate, knew that the inventory, prepared and filed by herself and French, before W. S. Ladd qualified as executor, included a note of Hayward's for \$190,000. Hayward could not have forgotten that note, nor have been ignorant of the fact that it ap-

peared as an asset of his dead friend's estate. It is incredible that this note was regarded by both Hayward and Mrs. Hiller as a matter so usual or inconsequential as not to be mentioned, if not discussed, between them, and that Hayward has forgotten whether he knew of it and cannot recollect what it was for. There was probably never a case where so much was forgotten. The reasons for the suit are easily understood. Thirteen years before it was begun, the complainant, then a widow, was urged to a like course by the witness Alexander, who was anxious to marry a cause of action of such uncommon magnitude, and who employed a lawyer and had a complaint drawn for her signature; but complainant at last refused to embark in the enterprise planned for her. With the death of W. S. Ladd, the most formidable obstacle in the way of such a suit was removed. It may have seemed reasonable to complainant's husband, by whom, according to the testimony of Van Bokkelin, the expert accountant who testified for complainant, the suit was "instigated," that out of the abundant estate of W. S. Ladd some repairs should be made of the business misfortunes of J. W. Ladd's widow,—that she should have some profit out of the Villard deal. Her first husband was a pioneer in this particular field. Complainant and her husband, nominally a complainant himself, may have suspected that the prosperity of W. S. Ladd was in part at their expense, and that he had secured an interest in the Villard deal on account of his brother's estate, and kept it himself. The same witness testifies that it was the discovery about "the repurchase pool matter" and the division of Oregon Steam Navigation Company stock into six interests that started this investigation. Hayward, not being in the repurchase, the existence of a sixth interest suggested that an interest had been taken for the estate with those of Thompson, Reed, Ainsworth, Tilton, and W. S. Ladd. Wright's interest was not suspected. Villard's interest was not disclosed. In this way the investigation started with the belief that the then unexplained sixth interest in the repurchase pool belonged to the estate of J. W. Ladd.

The other grounds of complaint are later developments to the end of securing an interest in the Villard sale, upon the theory that none of the 7,600 shares in Hayward's hands were actually sold to Jay Cooke; or, if they were so sold, that W. S. Ladd, after the Jay Cooke failure and when the stocks and bonds comprising a part of the price of sale became worthless, fraudulently substituted his own stock for that of J. W. Ladd's estate, so that the estate's stock, after all, remained, and went in the Villard sale; or, if those shares were sold and delivered by Hayward to Jay Cooke, that the sale, being unauthorized by the probate court, was illegal, and, W. S. Ladd not having prevented it, the title of the estate attached to the shares in the hands of W. S. Ladd, or to those afterwards purchased by him in the repurchase,—so that, upon any one of these theories, complainant continued the owner of three-fourths, or at least of one-half, of 7,600 shares of Oregon Steam Navigation stock, and is entitled to follow it into the Villard sale, and thus share in the profits of that sale, or, on failure of these various theories, that she is still entitled in equity to a share in the Villard sale, upon the ground that W.

S. Ladd ought to have secured her an interest in the repurchase pool. This combination of diverse and groundless complaints is probably due to the fact that the expert witness, Van Bokkelin, had, as he himself testifies, a contingent interest in the result; and I think it my duty to add in this connection that the spectacle of a witness testifying for an interest in the recovery which his testimony is relied upon to secure is an unusual one, and it is to be hoped that it will remain so.

Upon the facts appearing in this case, the respondents are entitled to a decree in their favor that the bill of complaint be dismissed, and it is so ordered.

CONSOLIDATED STEEL & WIRE CO. v. MURRAY et al.

(Circuit Court, N. D. Ohio, E. D. May 8, 1897.)

No. 5,638.

INJUNCTION—INTIMIDATION OF WORKMEN BY LABOR UNIONS.

An injunction will be granted where members of labor organizations conspire unlawfully to interfere with the management of the business of a corporation, and to compel the adoption of a particular scale of wages, by congregating riotously and in large numbers, at and near the works of the corporation, for the purpose of preventing persons not members of said organizations from entering the employ of the corporation or remaining therein, by intimidation, consisting in physical force, or injury, actual or threatened, to person or property. The jurisdiction of equity is not ousted because the acts complained of may also be the subject of indictment.

This was a suit in equity by the Consolidated Steel & Wire Company against Patrick Murray, Daniel Murray, Patrick Ryan, and others, and the P. J. Mundie Lodge, No. 1, and Banner Lodge, No. 2, of the Rod-Mill Workers of America, etc., to enjoin them from interfering with complainant and its employés.

Squire, Sanders & Dempsey, for complainant.

Meyer & Mooney, for defendants.

SAGE, District Judge. The complainant is a corporation organized under the laws of the state of Illinois, with its principal place of business in the city of Chicago. It is engaged in the state of Illinois, in the city of Cleveland, Ohio, and elsewhere, in the manufacture of steel wire and wire nails. In the city of Cleveland it owns and operates a large plant and mill, having about a half million dollars invested in its business, and employing, when running up to full capacity, about 500 men as operatives. Prior to April, 1896, it had contracted with a full complement of men for the operation of its mill and plant, and, it is set forth in the bill, had made a satisfactory agreement with each of said men as to the price of his labor for the period of one year. Complainant's contracts were sufficient to continue its mill and plant in full operation for that period. The bill sets forth that for several weeks prior to April, 1896, the defendants, including P. J. Mundie Lodge, No. 1, and Banner Lodge, No. 2, of the Rod-Mill Workers of America,—voluntary organizations,—through

their officers, agents, members, and employés, notified complainant and its employés that complainant was not paying wages to its employés in accordance with the so-called "Cleveland Scale," and undertook to compel said employés to become members of said lodges, or one of them, and to enforce the payment of wages by complainant in accordance with the "Cleveland Scale"; that the complainant refused to recognize the right of said defendant lodges, or their members, officers, agents, or employés, to interfere with it in the management of its said business, and the employés of complainant refused to become members of said lodges, or either of them; that thereupon the said lodges, through their officers, members, agents, or employés, declared a strike in the mill and plant of complainant, and attempted to, and did, by force and violence, restrain many of complainant's employés from entering the complainant's works and engaging in the duties which they had contracted to perform; and that in many cases said employés were by the defendants assaulted and beaten, and by force and violence prevented from approaching or entering upon the complainant's premises.

By reason of the acts aforesaid, and of continuous, uninterrupted attempts of defendants to compel complainant to recognize the said lodges or unions, and the scale of prices dictated by said lodges or unions, and to coerce its employés to become members of said lodges, or one of them, complainant, in the month of April, 1896, determined to, and did, close indefinitely its mill and works in the city of Cleveland, and they remained closed until about the 1st day of March, 1897, when they were opened, and complainant offered employment to such laborers as might be acceptable to it for the positions which it had at its disposal. Thereupon the defendant lodges, acting through their officers, agents, members, and employés, began to attempt to coerce the laborers and employés engaged in the operation of said mill and works to become members of said lodges, or one of them, and to force complainant to pay wages according to the "Cleveland Scale," arbitrarily fixed by said lodges, and other lodges, of said Rod-Mill Workers of America, and they have continuously since that time, without interruption, persisted in attempting to so coerce and force complainant and its laborers and employés.

It is further averred in the bill that no contract rights existed between the complainant and said lodges, their officers, agents, members, or employés; that complainant at all times refused to recognize in any manner whatsoever said lodges, their officers, agents, members, or employés, none of whom are now employés of complainant, nor have they been in complainant's employment, "at least since the month of April, 1896."

It is further averred that the defendants and others daily congregate in large numbers, in and about complainant's works, in their attempt to coerce complainant's employés to become members of said lodges or one of them; that in numerous instances complainant's employés have been attacked by defendants and brutally beaten; that, by threats and otherwise, defendants and others have endeavored to compel said employés to desist from performing their contracts with complainant, and to refuse to work for complainant; that defend-

ants and others persisted in following complainant's employes on their way home, and in intercepting them in lonely places, beating and maltreating them, greatly endangering life and limb, and depriving them of the freedom guarantied to them by the constitutions of the United States and of the state of Ohio; that defendants have been engaged and are engaging in said acts solely for the purpose of compelling complainant to recognize said organizations or lodges, and to submit itself to their dictation in the matter of the payment of wages, and also in the matter of hiring and discharging employes. The bill then proceeds to allege a conspiracy on the part of defendants for the unlawful purpose of preventing complainant from operating its mill and works in the city of Cleveland, excepting by the employment of persons members of said lodges, or other lodges, of said Rod-Mill Workers of America, and by the dismissal of its present force of employes, who are willing and anxious to work for complainant, and that in furtherance of said conspiracy the defendants, with others, are and have been congregating each morning and evening, at and near the mill and works of complainant and in the streets leading thereto, and in large numbers, for the avowed purpose of inducing complainant's employes to leave its employment, threatening personal violence if they refused, and that in furtherance of said conspiracy they continuously maltreated, attacked, and injured complainant's employes; that the police powers of the city of Cleveland have been invoked, and, although a detail of policemen was in constant attendance for three days prior to the filing of the bill in and about said works, it was unable to restrain or prevent said violent and unlawful acts.

Complainant further avers that at the time of the filing of the bill it had at work in its mill and works about 275 sober, industrious men, who were satisfied with the wages they were receiving, and willing and anxious to continue in complainant's employment; that defendants have threatened and were threatening to blow up and destroy, by the use of dynamite and other dangerous agencies, complainant's mill and works, and that by reason of the aforesaid violent and unlawful acts and threats it is unable properly to operate its mill and works; that the lives and limbs of persons in its employ were constantly threatened and in danger, as was its property; that the said authorities were unable to protect said employes and said property from the damage and injury constantly done and threatened by defendants.

The bill further sets forth that the complainant and its employes are entitled, under the constitutions and laws of the United States and of the state of Ohio, to the free and unrestricted exercise of their personal rights; that is to say, to the right of complainant to employ such persons as it may see fit in connection with its said mill and plant, and the right of its employes to work and labor for complainant if they so desire, without the let, hindrance, or disturbance of any person, persons, or associations whatsoever. The bill further sets forth that said employes desire to continue in its employ, and are in need of the wages stipulated for their labor for the support of themselves and their families, and that there are large numbers of

other men who are out of employment, and are seeking employment from complainant, and who are in need of the wages they would earn thereby, which complainant is ready and willing to pay, provided said men can be protected from the violent and unlawful acts of the defendants.

The bill further sets forth that the complainant has outstanding large contracts for its products to various persons and companies, which it will be prevented from fulfilling if defendants be permitted to continue so as aforesaid to unlawfully interfere with complainant's business, and that, unless complainant is permitted to operate its works in accordance with law, damages accruing by reason of complainant's inability to fulfill said contracts will be very large, and cause great loss to complainant; that the defendants, and each of them, are financially irresponsible and insolvent, and the complainant is without adequate remedy at law against any and all of them for any damages it may suffer by reason of their unlawful actions as aforesaid. The bill concludes with a prayer for an injunction and for other proper relief.

Upon complainant's application, on the 9th of April, a preliminary restraining order was issued in accordance with the prayer of the bill, to continue in force until the hearing and disposition of complainant's motion for a temporary injunction, which was set for hearing on the 22d of April. For the complainant 38 affidavits are filed, and for the defendants 47 affidavits. The affidavits for the complainant fully support the averments of the bill, and the circumstances of many cases of assault and maltreatment are detailed with the names of the defendants concerned therein. On account of their number and length it will be impracticable to refer specially to each affidavit, either of those for the complainant or of those for the defendants. Each individual defendant makes affidavit denying any acts of intimidation or violence attributed to him, and enters upon a general denial which is substantially the same in all the affidavits. It is that at no time during the periods mentioned in the bill did he congregate, with others, at or near the entrance to the complainant's works, for the purpose of intimidating or threatening or using violence or force upon any of its employes, agents, or servants, and that at no time has he hindered or delayed the complainant, or its agents, servants, or employes, in the operation of its mill or the conduct of its business, or entered upon its premises for any purpose whatever, or molested or interfered with any of its property, or with its employes or machinery, or solicited or endeavored to coerce any of the employes of the complainant to join the Rod-Mill Workers' Association of America, or any of its lodges, or in any manner interfered with or molested any person or persons employed by the complainant in the operation of its mill and plant, or while engaged in the discharge of duties in connection with said employment, either while they were upon the premises of the complainant or at any other place; that he has not induced other persons to do any unlawful act or thing against the complainant company, or its employes or its property; that he is not upon any strike, but that he is an employe of the American Wire Company (or of some one

of the other wire companies of the city of Cleveland, as the fact may be), and engaged in the performance of his duties as such. That any threat was made by him to blow up complainant's works with dynamite or other explosive; or that he has entered into any conspiracy or combination for that purpose; or that he has carried any revolver or deadly weapon, in or about complainant's works, for the purpose of intimidating or injuring employes, or for any other purpose; or that he has threatened them, or attempted to coerce complainant to pay the Cleveland scale, or any other scale, of wages to its employes; or that the police power of the city has been invoked, and been found ineffectual to restrain violence to complainant's property, or to its employes,—is denied by each individual defendant, and like denials on behalf of the defendant lodges are made by their officers and agents. On the contrary, it is averred that at no time have more than four or five policemen been present at or near the complainant's works, and that the usual detail was one or two; that no occasion existed for invoking the powers of the city of Cleveland, the county of Cuyahoga, or the state of Ohio to keep the peace, and prevent trespassing, violence, molestation, or injury to property or person. Three policemen of the city—Paul Weis, Jeffrey Gibbons, and John J. Connell—make affidavits that they were on duty at and near complainant's works and plant at dates beginning March 24, 1897, and reaching to April 20, 1897, and that they never saw any disorder or disturbance of any kind, that the defendants whom they saw around and near the works were orderly and peaceable, that no acts of violence occurred, no additional force of policemen was required, and none was present, excepting on one occasion, when there were five extra policemen there. Why they were present is not explained. There are two Gibbonses and there is one Connell in the list of defendants. Whether they are relatives of the policemen of the same name, who are affiants, does not appear. It is enough to say of these affidavits that they are so overwhelmingly contradicted as to be utterly discredited. If the affiants are not forsworn, they are, to put the matter in the most charitable light, gifted with such facility for appealing from their knowledge to their ignorance as to be altogether unworthy of belief.

On the other hand, more than a score of affidavits, by complainant's employes and others, including persons entirely disinterested, recite acts of intimidation and violence by the defendants, and by others of a mob, assembled morning and evening and day after day, at and about the entrance to complainant's mill, preventing employes from going to their work, assaulting, beating, wounding, and maltreating them, and as they came out from the mill following them, and falling upon them, and making unprovoked, brutal, and outrageous attacks upon them, so that they went bruised and bloody to their homes, where many of them remained, fearing to attempt to go again to their work.

The affidavit of John T. Kane, grand president of the National Association of Rod-Mill Workers of America, and for six years last past an employe in the rod-mill department of the American Wire

Company in the city of Cleveland, denies all charges of the commission of violent and illegal acts by him. Admitting that he has on several occasions requested employes of the complainant company not to work for that company until it should pay a reasonable rate of wages in its rod-mill department, so as not to prejudice the interests of employes of the other mills in the city of Cleveland in like departments, he affirms that he has at all times conducted himself peaceably and quietly towards the complainant's officers, agents, and employes, and has used his influence to cause others to act in like manner. He denies that he has ever requested or sought to induce complainant's employes to join the association of which he is president, or to organize a lodge thereof, and avers that it is a matter of absolute indifference to him whether said employes are so organized or not, so long as they are receiving a rate of wages equal to that received by himself and his co-employes. He denies that the complainant has suffered any injury to its property or business at the hands of the defendants in this cause, and avers that, if any such injury has come to complainant, it has been caused by its own acts in attempting to secure men to do its work at less than a reasonable rate of wages, and less than is usually paid in the city of Cleveland, and in attempting to force down the wages of its employes to a point below what is reasonable and fair for the services rendered. He denies that the prices fixed by the complainant company in April, 1896, were satisfactory to the men in its employ, avers that several of its employes quit its employment for the reason that the prices were not satisfactory, and that they asked the association of which he is president to assist them in obtaining a fair rate of wages, and, as to the men who remained in the employ of the complainant company at the rate fixed by it, they did so because they were compelled by their necessities.

He denies that the association declared a strike in the complainant's mill, or that he or his fellow members sought to coerce the complainant to adopt the "Cleveland Scale," but admits that he and his co-defendants have sought by all lawful means to prevent the depression by complainant company of wages in its mills below those ordinarily and usually paid in other mills in Cleveland for similar services. He admits that they have sought to induce the employes of complainant to exercise their right to abandon complainant's service. He denies that said employes were under any time contracts, and declares that his efforts were limited to pointing out to them what they were doing to both employer and employe by continuing in the service of complainant at less than a fair rate of wages.

He further affirms that the complainant company, through its superintendent, held repeated conferences with affiant and other members of said association on the subject of the differences between complainant company and the defendants,—twice at the superintendent's own house, twice at the office of the complainant company, and once at the Forest City Hotel, in the city of Cleveland,—and that said negotiations were always conducted in a friendly and cordial spirit, and that, by mutual concessions by the defendants and by the complainant's superintendent, "the differences between said company

and defendants had reached a settlement, except to receive formal ratification by the lodges of said defendants, and would have been so settled in an amicable and friendly manner, and without the intervention and extraordinary process of this honorable court, but for the hasty and ill-considered action of the president of complainant company in ordering the commencement of these proceedings."

He further denies that the defendant lodges and the other defendants, or that he himself and the other defendants, have congregated morning and evening at the works of the complainant, or in the streets leading thereto, and declares that, except three or four of the defendants, all are engaged at other mills in the performance of their regular work, "and that three or four men have been placed at intervals in the public streets leading to said works for the purpose of seeing that order was preserved, and to observe who entered and left the works of said complainant."

The statement in this affidavit that friendly and cordial negotiations between the defendants and the complainant's superintendent had reached a settlement, needing only formal ratification by the defendant lodges, and that they would have been so settled but for the institution of this suit, is remarkable. Why this complainant company, if it desired settlement as represented, should, just when it had been fully agreed to on both sides and was on the eve of final consummation, break it off, and resort to proceedings in court which must inevitably put an end to all negotiations, is to the court so entirely inexplicable as to be simply incredible. In the affidavit of defendant Patrick Murray he states that he "has been present on several occasions in the public highway leading to said company's works, under instructions of the supreme officers of the Rod-Mill Workers' Association, to do all in his power to preserve order, and to prevent any act of violence, or any threats or intimidation of the employés of said company while said employés were going into or coming out of the works of said company; that his duties on those occasions consisted in observing who went in and came out of the works of said company, and take a report thereon to the supreme officers of said Rod-Mill Workers' Association, and also, in as far as he could, prevent any interference with said employés while going to or returning from their work in said company's works."

The averments of these last two affidavits,—taken in connection with the fact that in none of the defendants' affidavits (excepting the affidavits of the policemen, to which reference has already been made) is there any denial of the specific averments of the bill, or of the affidavits filed for complainant, that there was continuously a riotous assemblage, which, through one or more of the persons composing it, threatened, intimidated, abused, and maltreated complainant's employés, at times preventing their going to their work, at other times turning them back bruised and bleeding to make their way to their homes,—are tantamount to an admission of the averments of the bill, notwithstanding the denials of the defendants that they participated in the unlawful acts of the rioters. In no other view can it be understood why the affiant Murray was sent, under instructions of the supreme officers of the Rod-Mill Workers' As-

sociation, to do all in his power "to preserve order, and to prevent any act of violence, or any threats or intimidation of the employes of said company while said employes were going into or coming out of the works of said company." The statement which follows, that his duty on those occasions was to observe "who went in and came out of the works of said company, and take a report thereon to the supreme officers of said Rod-Mill Workers' Association, and also so far as possible to prevent any interference with employes while going to or returning from their work for complainant," amounts to an admission that the association was keeping complainant's mill and its employes under close surveillance.

These averments, taken together, make it clear, not only that there was continuously a riotous assemblage known to the association, but that for some reason it was the object of the association to keep up at least the semblance of preservation of law and order, while, for some purpose, not disclosed, its object was also to have a complete list of all who went into or came out from the complainant's mill.

When we consider these last two affidavits, in connection with the fact, about which there is no question, that upon the issuing of the temporary restraining order herein, the causes of complaint mentioned in the bill at once ceased, that everything at and about plaintiff's mills has from that time until now been quiet, and the complainant's employes have been unmolested and undisturbed, the conclusion is irresistible that the defendants were in close relations with the mob, and were in fact the ruling and controlling spirits, without whom there never would have been any disturbance whatever.

Counsel for the defendants, upon the argument of the motion, assured the court that the defendants were well-disposed, orderly citizens, and that it had not been their intention, in anything that they had done, to exceed their rights, or in any respect to violate the law. In *Barr v. Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881, the court of errors and appeals of the state of New Jersey, referring to a similar assurance, said:

"The defendants claim, and they are entitled to be credited with being sincere in the contention, that they believe they have, in all matters complained of, acted strictly within the lines of their legal rights. This position justifies us in assuming that, if they had not believed so, and had not been satisfied they were correct in law, the acts challenged would not have been committed, and, if now convinced they are wrong, will not again be attempted."

This court, accepting the statements of counsel in this case, as the like statement was accepted in the New Jersey case, will be at some pains to refer to the authorities, and to set forth the principles of law here applicable, proceeding, first, to consider the cases which have been decided by state courts,—for among these are the earlier cases,—in order that it may be made fully to appear that the federal courts have not been making any new law in reference to strikes or boycotts or labor agitations, but have been following well-established precedents. It will appear later in the opinion that the state courts had for every principle involved and every rule of law stated ample precedent in well-recognized authorities promulgated long prior to their decisions.

In *State v. Glidden*, 55 Conn. 46, 8 Atl. 890, the defendants were prosecuted for a conspiracy having for its object to compel a newspaper publishing company against its will to discharge its workmen, and to employ such persons as the defendants and their associates should name. This case was decided in February, 1887. It is the first American case in which the word "boycott" is used. That word originated from the efforts of certain Irish tenants to exclude Capt. Boycott from all intercourse with his neighbors because he endeavored lawfully to collect his rents. The supreme court, in *State v. Glidden*, said:

"It seems strange that in this day, and in this free country,—a country in which law interferes so little with the liberty of the individual,—it should be necessary to announce from the bench that every man may carry on his business as he pleases, may do what he will with his own, so long as he does nothing unlawful, and acts with due regard to the rights of others, and that the occasion for such an announcement should be, not an attempt by government to interfere with the rights of the citizen, nor by the rich and powerful to oppress the poor, but an attempt by a large body of workmen to control, by means little, if any, better than force, the action of employers."

The court further said that the defendants in effect said to the publishing company:

"It is true we have no interest in your business, we have no capital invested therein, we are in no wise responsible for its losses or failures, we are not directly benefited by its success, and we do not participate in its profits; yet we have a right to control its management, and compel you to submit to our dictation."

The court declared that the bare assertion of such a right was startling, and that:

"Upon the same principle, and for the same reasons, the right to determine what business others shall engage in, when and where it shall be carried on, etc., will be demanded, and must be conceded. The principle, if it once obtains a foothold, is aggressive, and is not easily checked. It thrives by what it feeds on, and is insatiate in its demands. More requires more. If a large body of irresponsible men demand and receive power outside of law, over and above law, it is not to be expected that they will be satisfied with a moderate and reasonable use of it. All history proves that abuses and excesses are inevitable. The exercise of irresponsible power by men, like the taste of human blood by tigers, creates an unappeasable appetite for more."

The court sustained the verdict of guilty against the defendants.

The case of *State v. Stewart*, 59 Vt. 273, 9 Atl. 559, was a prosecution for conspiracy to hinder and prevent the Ryegate Granite Works, a corporation, from employing certain granite cutters, and to hinder and deter certain laborers from working for said corporation. The court, sustaining the indictments, held that:

"The labor and skill of the workman, the plant of the manufacturer, and the equipment of the farmer, are in equal sense property; every man has the right to employ his talents, industry, and capital as he pleases, free from the dictation of others; and, if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy, whether the means employed are actual violence or a species of intimidation that works upon the mind."

The court further said:

"The exposure of a legitimate business to the control of an association that can order away its employes and frighten away others that it may seek to employ, and thus be compelled to cease the further prosecution of its work,

is a condition of things utterly at war with every principle of justice, and with every safeguard of protection that citizens under our system of government are entitled to enjoy. The direct tendency of such intimidation is to establish over labor and over all industries a control that is unknown to the law, and that is exerted by a secret association of conspirators, actuated solely by personal considerations, and whose plans, carried into execution, usually result in violence and the destruction of property."

The same court in *State v. Dyer*, decided at the October term, 1894, and reported 67 Vt. 690, 32 Atl. 814, held:

"That a combination of two or more persons to restrain an employer to discharge a particular workman by threatening to prevent his obtaining other workmen, or to constrain a workman to join a certain organization by threatening to prevent him from obtaining work unless he does so, is a criminal conspiracy at common law."

The supreme court of Pennsylvania, in *Murdock v. Walker* (Jan., 1893) 152 Pa. St. 595, 25 Atl. 492, decided that a court of equity will restrain by injunction discharged employes, members of a union, from gathering about their former employer's place of business, and from following the workmen whom he has employed in place of the defendants, from gathering about the boarding houses of such workmen, and from interfering with them by threats, menaces, intimidation, ridicule, and annoyances on account of their working for the plaintiffs.

The court of errors and appeals of the state of New Jersey, at its October term, 1894, in the case of *Barr v. Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881, very thoroughly and elaborately considered the questions involved in this case. Before entering upon the discussion the court said:

"No unprejudiced person at this day wishes to place any obstacle in the way of labor organizations conducting their operations within lawful limits. It is unfortunate that, despite the warning and counsel of accredited leaders, the reckless and revengeful among the members, with the vicious and lawless always to be found among the idle, so often take advantage of labor demonstrations to commit acts of violence against persons and property, and thus weaken the sympathy of the public with the system. Yet every one must acknowledge that organization has accomplished much in the past for the benefit of the workingman, and recognize its possibilities to secure to him, in the future, enjoyment of other privileges. But while engaged in this laudable purpose, those who give direction to affairs should not attempt to secure their ends by infringing the lawful rights of others."

The suggestions contained in this quotation are well worthy of consideration by all labor organizations. No class of men stands more in need of the protection of the law and of its safeguards than do laboring men, nor to any class is public sympathy and the support of public opinion more desirable; and to no class will both these be more cordially extended so long as these organizations keep themselves within the limits of law and order. Whenever they exceed such limits, they greatly weaken themselves and the cause they represent, for an overwhelming majority of the American people are so thoroughly in favor of the maintenance and supremacy of law that they will defeat any attempt to pervert or overturn it.

The court, in *Barr v. Trades Council*, declared that a man's business is his property, and that the right to acquire, possess, and protect property is a natural and inalienable right, which all men have,

with those of enjoying and defending life and property, and of pursuing and obtaining safety and happiness. The court said that this was an echo of Magna Charta, and quoted from Mr. Justice Bradley in the Slaughter-House Cases, 16 Wall. 36, at page 116, where he says:

"For the preservation, exercise, and enjoyment of these rights [life, liberty, and the pursuit of happiness] the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of the government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed."

The court also said:

"This freedom of business action lies at the foundation of all commercial and industrial enterprises. Men are willing to embark capital, time, and experience therein, because they can confidently assume that they will be able to control their affairs according to their own ideas, when the same are not in conflict with law. If this privilege is denied them; if the courts cannot protect them from interference by those who are not interested with them; if the management of business is to be taken from the owner, and assumed by, it may be, irresponsible strangers,—then we will have to come to the time when capital will seek after other than industrial channels for investments, when enterprise and development will be crippled, when interstate railroads and canals and means of transportation will become dependent on the paternalism of the national government, and the factory and the workshop subject to the uncertain chances of co-operative systems."

The court found that the acts of the defendants practically infringed upon the exercise of this right by Mr. Barr. The defendants were 18 bodies known as "labor unions," embracing many trades in the city of Newark, affiliated in a society or representative body known as the "Essex Trades Council." One of these unions was incorporated; the others were not. The Essex Trades Council itself was a voluntary association, composed of delegates or representatives chosen thereto by each of the 18 different unions or associations. Mr. Barr, as proprietor of the daily morning newspaper in Newark, determined to employ plate or stereotyped matter in the making up of his paper for publication. All the employes were members of the local typographical union, which had declared against the use of plate matter in the city of Newark, as Mr. Barr well knew. The Essex Trades Council then undertook to boycott Mr. Barr's newspaper, by distributing circulars, by issuing an official bulletin, and by undertaking to persuade the public to withhold support from the paper. The defendants denied that they had made any threats, or attempted to intimidate or coerce any of the advertisers or patrons of the Times, and claimed that everything was done in a peaceable and orderly manner, but the court said:

"It is true, there was no public disturbance, no physical injury, no direct threat of personal violence, or of actual attack on or destruction of tangible property, as a means of intimidation or coercion. Force and violence, however, while they may enter largely into the question in a criminal prosecution, are not necessarily factors in the right to a civil remedy. But, even in criminal law, I do not understand that intimidation, even when a statutory ingredient of crime, necessarily presupposes personal injury or the fear thereof. The clear weight of authority undoubtedly is that a man may be intimi-

dated into doing or refraining from doing, by fear of loss of business, property, or reputation, as well as by dread of loss of life or injury to health or limb; and the extent of this fear need not be abject, but only such as to overcome his judgment, or induce him not to do or to do that which otherwise he would have done or left undone. There can be no reasonable dispute that the whole proceeding or boycott in this controversy is to force Mr. Barr, by fear of loss of business, to conduct that business, not according to his own judgment, but in accordance with the determination of the typographical union, and, so far as he is concerned, it is an attempt to intimidate and coerce."

The court then proceeded to a review of the cases, and the discussion of the jurisdiction in equity, and awarded an injunction as prayed.

The case of *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307, was decided in June, 1888. It was there held that banners displayed in front of a manufacturer's premises, with inscriptions calculated to injure his business and to deter workmen from entering into and continuing in his employ, constituted a nuisance, which equity would restrain by injunction. The court said that the plaintiffs were not restricted to their remedy at law, but were entitled to relief by injunction; that the scheme in pursuance of which the banners were displayed and maintained was to injure the plaintiff's business, by intimidating workmen, so as to deter them from keeping and making engagements with the plaintiff. The banners were a standing menace to all who were or wished to be in the employment of the plaintiffs, to deter them from entering his premises, and maintaining them was a continuous unlawful act, injurious to his business and property, and a nuisance such as a court of equity would grant relief against.

The latest case in Massachusetts is *Vegeahn v. Guntner*, decided October, 1896, and reported in 44 N. E. 1077. The defendants in that case conspired to prevent plaintiff from getting workmen, and thereby to prevent him from carrying on his business, unless and until he would adopt a certain schedule of prices. The means adopted were persuasion and social pressure, threats of personal injury or unlawful harm conveyed to persons employed or seeking employment, and a patrol of two men in front of plaintiff's factory, maintained from half past 6 in the morning until half past 5 in the afternoon, on one of the busiest streets of Boston. The court said that intimidation was not limited to threats of violence or of physical injury to person or property; that it had a broader signification, and there might be a moral intimidation, which was illegal, including patrolling or picketing, under the circumstances stated in the case. The court further said that the patrol was an unlawful interference both with the plaintiff and with the workmen, within the principle of many cases, and, when instituted for the purpose of interfering with his business, it became a private nuisance. The defendants in that case contended that the acts complained of were justifiable, "because they were only seeking to secure better wages for themselves, by compelling the plaintiff to accept their schedule of wages." The court was of opinion that that motive or purpose did

not justify maintaining a patrol in front of the plaintiff's premises, as a means of carrying out their conspiracy, and added:

"A combination among persons merely to regulate their own conduct is within allowable competition, and is lawful, although others may be indirectly affected thereby. But a combination to do injurious acts, expressly directed to another, by way of intimidation or constraint, either of himself or of persons employed or seeking to be employed by him, is outside of allowable competition, and is unlawful."

In support of this proposition the court cited a long list of cases.

Upon the point, urged, also, in argument in this case, that the defendants' acts might subject them to an indictment, the court said that that fact did not prevent a court of equity from issuing an injunction. "It is true that, ordinarily, a court of equity will decline to issue an injunction to restrain the commission of a crime; but a continuing injury to property or business may be enjoined, although it may also be punishable as a nuisance or other crime." In support of this proposition the court cited a long list of cases, including the following: *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307; *Cranford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514; *Gilbert v. Mickle*, 4 Sandf. Ch. 357; *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 115, 4 South. 106; and the following English cases: *Emperor of Austria v. Day*, 3 De Gex, F. & J. 217; *Loog v. Bean*, 26 Ch. Div. 306; *Monson v. Tussaud* [1894] 1 Q. B. 671.

The court further held that such a conspiracy, in order either to prevent persons from entering plaintiff's employment or to prevent persons in his employment from continuing therein, was unlawful, even though such persons were not bound by contract to enter into or continue in his employment. *Moores & Co. v. Bricklayers' Union No. 1*, 23 Wkly. Law Bul. 48, decided by the superior court of Cincinnati in general term, is a case much quoted, in which it was held that a combination by a trade union and others to coerce an employer to conduct his business with reference to apprentices and the employment of delinquent members of the union, according to the demand of the union, by injuring his business through notices sent to his customers and material men, stating that any dealings with him will be followed by similar measures against such customers and material men, is an unlawful conspiracy. Judge Taft, in delivering the opinion of the court, said:

"We are of opinion that, even if acts of the character and with the intent shown in this case are not actionable when done by individuals, they become so when they are the result of combination, because it is clear that the terrorizing of the community by threats of exclusive dealing in order to deprive one obnoxious member of means of sustenance will become both dangerous and oppressive."

The latest case in any state court—*Charles Curran against Louis Galen*, as president (known under the title of "Master Workman") of *Brewery Workingmen's Local Assembly 1796, Knights of Labor*—was decided March 2, 1897, by the court of appeals of the state of New York, and will appear in 152 N. Y., at page 33, 46 N. E. 297. The court there held—First, that the organization or co-operation of workingmen is not of itself against any public policy, and must be

regarded as having the sanction of law, when it is for such legitimate purposes as that of obtaining an advance in the rate of wages or compensation, or of maintaining such rate; second, if the purpose of an organization or combination of workmen is to hamper or restrict the freedom of the citizen in pursuing his lawful trade or calling, and, through contracts or arrangements with employers, to coerce other workmen to become members of the organization, and to come under its rules and conditions, under the penalty of the loss of their positions and of deprivation of employment, such purpose is against public policy, and unlawful; third, the fact that a contract between the workmen's organization and an employers' association was entered into on the part of the employers, with the object of avoiding disputes and conflicts with the workmen's organization, does not legalize a plan of compelling workmen not in affiliation with the organization to join it, at the peril of being deprived of their employment. With reference to organizations of workmen the court said:

"The social principle which justifies such organizations is departed from when they are so extended in their operation as either to intend or to accomplish injury to others. Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workmen be to hamper or to restrict that freedom, and, through contracts or arrangements with employers, to coerce other workmen to become members of the organization, or to come under its rules and conditions, under the penalty of the loss of their positions, and of deprivation of employment, then that purpose seems clearly unlawful, and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges. It would tend to deprive the public of the services of men in useful employments and capacities."

The court, further along in the course of the opinion, said:

"The sympathies or the fellow feeling which, as a social principle, underlies the association of workmen for their common benefit, is not consistent with a purpose to oppress the individual who prefers by single effort to gain his livelihood. If organization of workmen is in line with good government, it is because it is intended as a legitimate instrumentality to promote the common good of its members."

The English cases are in accord with the American cases above cited. Lord Campbell, C. J., in charging the jury in *Reg. v. Hewitt*, 5 Cox, Cr. Cas. 162, said:

"By law every man's labor is his own property, and he may make what bargain he pleases for his own employment. Not only so; masters or men may associate together. But they must not, by their association, violate the law. They must not injure their neighbor. They must not do that which may prejudice another man. The men may take care not to enter into engagements of which they do not approve, but they must not prevent another from doing so. If this were permitted, not only would the manufacturers of the land be injured, but it would lead to the most melancholy consequences to the working classes."

In *Reg. v. Druitt*, 10 Cox, Cr. Cas. 592, Bramwell, B., said:

"No right of property or capital, about which there has been so much declamation, is so sacred or so carefully guarded by the law of this land as that of personal liberty. * * * But that liberty is not liberty of the body only. It is also a liberty of the mind and will; and the liberty of a man's

mind and will—to say how he should bestow himself and his means, his talents, and his industry—is as much a subject of the law's protection as is that of his body. * * * And if any set of men agree among themselves to coerce that liberty of mind and thought by compulsion and restraint, they would be guilty of a criminal offense, namely, that of conspiring against the liberty of mind and freedom of will of those towards whom they so conduct themselves. * * * The public has an interest in the way in which a man disposes of his industry and his capital; and if two or more persons conspired, by threats, intimidation, or molestation, to deter or influence him in the way in which he should employ his industry, his talents, or his capital, they would be guilty of a criminal offense."

In *Steamship Co. v. McGregor*, 23 Q. B. Div. 598, Lord Justice Bowen said:

"Of the general proposition that certain kinds of conduct, not criminal in any one individual, may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise; and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights."

Coltman, J., in *Gregory v. Duke of Brunswick*, 6 Man. & G. 953, illustrates the proposition by the act of hissing in a public theater, which is *prima facie* a lawful act, and, "even if it should be conceded that such an act, though done without concert with others, if done from a malicious motive, might furnish a ground of action, yet it would be difficult to infer such a motive from the isolated action of one person, unconnected with others."

In *Reg. v. Rowlands*, 17 Adol. & E. (N. S.) 671, where there was a combination to prevent certain workmen from continuing in the service of their employers, and thereby to compel the employers to change the mode of conducting their business, the court of queen's bench approved of the charge given to the jury by Mr. Justice Erle that:

"A combination for the purpose of injuring another is a combination of a different nature, directed personally against the party to be injured; and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the hurt of another. The rights of workmen are conceded; but the exercise of free will and freedom of action, within the limits of the law, is also secured equally to the masters. The intention of the law is, at present, to allow either of them to follow the dictates of their own will, with respect to their own actions and their own property, and either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their mutual advantage."

All these and many other English authorities will be found among the citations in the American cases referred to in this opinion, and they fully support those cases. Without referring to a single federal case, there is ample authority upon all the questions involved in the consideration of the motion which has been argued and submitted to this court. Nevertheless, it will be instructive, and I trust beneficial, to review, briefly as possible, some of the decisions of the federal courts.

In *Casey v. Typographical Union*, 45 Fed. 135, decided January 31, 1891, it was held that a combination or a conspiracy, by a trades

union, to boycott a newspaper for refusing to unionize its office, was illegal, and would be enjoined by a court of equity. The court, in considering the contention, for defendants, that no threats were used and there was no intimidation, only courteous requests, and "fair, although sharp and bitter competition," cited *In re Wabash R. Co.* 24 Fed. 217, where, during a strike organized to resist a reduction of wages, a printed notice was sent to the several foremen of the shops of the railway company as follows:

"You are requested to stay away from the shop until the present difficulty is settled. Your compliance with this will command the protection of the Wabash employes. But in no case are you to consider this as an intimidation."

The court, in holding that that was an unlawful interference with the management of the road by the receiver, and a contempt of court, said that:

"The statement in all these notices that they are not to be taken as intimidations goes to show beyond a reasonable doubt that the writer knew he was violating the law, and by this subterfuge sought to escape its penalty."

The court, in *Casey v. Typographical Union*, also cited *U. S. v. Kane*, 23 Fed. 748, where Judge (now Justice) Brewer, by way of illustrating what is a threat, supposes that one of two workmen is discharged. The other is satisfied with his employment, and wishes to remain. The discharged workman comes, with a party of his friends, armed with revolvers and muskets, and says: "Now, my friends are here. You had better leave. I request you to leave." In terms there was no threat, only a request; but it was backed by a demonstration of force intended and calculated to intimidate, and the man leaves really because he is intimidated. "Again," said the judge, "armed robbers stop a coach. One of their number politely requests the passengers to step out and hand over their valuables. To the charge of robbery the defense is made that there was no violence; there were no threats; there was only a polite request, which was complied with." Judge Brewer properly said that any judge who would recognize such a defense deserved to be despised.

In *Pettibone v. U. S.*, 148 U. S. 197, 13 Sup. Ct. 542, it was held that a combination of two or more persons to accomplish, by concerted action, either a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means, is a conspiracy.

It was held in *Thomas v. Railway Co.* (the Phelan Case) 62 Fed. 803, that a combination to incite the employes of all the railways in the country to suddenly quit their service without any dissatisfaction with the terms of their employment, thus paralyzing all railway traffic in order to coerce the railroad companies and the public into compelling an owner of cars used in operating the roads to pay his employes more wages, they having no lawful right so to compel him, is an unlawful conspiracy, by reason of its purpose, whether such purpose is effected by means usually lawful or otherwise. That the employes of the receiver of the road had the right to organize into or to join a labor union, which should take joint action as to their terms of employment, was conceded; the court stating that, as they had

labor to sell, if they should stand together they would be often able to command better prices for their labor than when dealing singly with rich employers, because the necessities of a single employé might compel him to accept any terms offered him. In illustration the court said that if, when the receiver made a reduction of 10 per cent. in the wages of his employés, Phelan had come to Cincinnati, and urged and succeeded in maintaining a peaceable strike, he would not have been liable to contempt, even if the strike seriously impeded the operation of the road under the order of the court, and that his action in giving advice or issuing an order based on unsatisfactory terms of employment would have been entirely lawful, but that his coming to Cincinnati, and his advice to the employés to quit work, had nothing to do with their terms of employment. They were not dissatisfied with their service or their pay. His coming was to carry out the purpose of a combination of men, and as a part of that combination to incite the employés of all Cincinnati roads to quit work. The plan of this combination was to inflict pecuniary injury on Pullman by compelling the railway companies to give up using his cars, and in the event of their refusal so to do to inflict pecuniary injury on them by inciting their employés to quit their service and thus paralyze their business. That combination, the court held, was for an unlawful purpose, and was conspiracy; citing *Angle v. Railway Co.*, 151 U. S. 1, 14 Sup. Ct. 240. The court also held that the combination was unlawful without respect to the contract feature, because it was a boycott. The court recognized that the employés had the right to quit their employment, but declared that they had no right to combine to quit, in order thereby to compel their employer to withdraw from a profitable relation with a third person for the purpose of injuring him, when that relation had no effect whatever on the character or reward of their service. Phelan was held guilty of contempt, and sentenced to imprisonment.

The supreme court of the United States, in the *Debs Case*, 158 U. S. 564, 15 Sup. Ct. 900, held that the jurisdiction in equity to apply the remedy by injunction when any obstruction was put upon highways, natural or artificial, to impede interstate commerce or the carrying of mails, was not ousted by the fact that the obstructions were accompanied by or consisted of acts in themselves violations of the criminal law, or by the fact that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt, inasmuch as the penalty for a violation of such injunction is no substitute for and no defense to a prosecution for criminal offenses committed in the course of such violation. This authority, which is conclusive in this court, disposes of the objection, made in this case, that if the defendants had committed the acts charged against them they were amenable to the criminal laws and should be put upon trial.

The remedy by injunction was not first applied in the United States, either by state courts or by the federal courts. Mr. Stimson, in his handbook on the Labor Law of the United States, at page 315, says that it is traced back to the leading case of *Spinning Co. v. Riley*, L. R. 6 Eq. 551, decided in 1868, which was prior to any of the American cases. He adds that that case did not announce any new doc-

trine, but rather the revival of a very old one, referring to the exercise of the chancellor's authority in the reign of Richard II. to repress disorderly obstructions to the course of law. *Spinning Co. v. Riley* was overruled by the court of chancery appeals in *Assurance Co. v. Knott*, 10 Ch. App. 142, in 1874; Lord Chancellor Cairns deciding (and Sir W. M. James, L. J., and Sir G. Mellish, L. J., concurring) that the court in chancery has no jurisdiction to restrain the publication of a libel, as such, even if it is injurious to property. The court, in *Spinning Co. v. Riley*, enjoined the issuing of placards and advertisements intending and having the effect to intimidate and prevent workmen from hiring themselves to the plaintiffs; that being the only act complained of, and the court finding that the plaintiffs were thereby prevented from continuing their business and that the value of their property was thereby seriously injured. Vice Chancellor Malin's opinion is a strong presentation of the doctrine recognized by him, but no American court, state or federal, has gone to the length of that case, nor beyond the doctrine stated by the supreme court of the United States in the *Debs Case*.

It conclusively appears, from the authorities above referred to, that the English courts, the American state courts, and the federal courts are in perfect harmony, and that, while they recognize the right of employés of whatever rank or degree to combine for the purpose of resisting any measures of oppression or coercion by their employers, and even for the purpose of instituting strikes and adopting other measures for their own protection or for the bettering of their condition, they are agreed that they must not interfere with the rights of employers to manage their own business in their own way, so long as they do not trespass upon the rights of others.

Counsel for defendants in this case insisted that his clients had the right as individuals to solicit and persuade employés of complainant to give up their situations, insisting, also, that the employés were under no contracts to labor for any specified period. Counsel then advanced the proposition that, if defendants had the right singly to persuade complainant's employés to quit work, they had the right to do so in companies or in mass, and that they had the right to congregate for that purpose in the public streets, and that therefore the congregating in the vicinity of complainant's mill and plant was lawful, and should not be restrained by the court. That complainant's employés were under no term contracts is, I think, established by the evidence. But the conclusion deduced by counsel, although ingenious, is altogether unsound. It is negated by *Casey v. Typographical Union*, by *U. S. v. Kane*, by *Pettibone v. U. S.*, by *Thomas v. Railway Co.*, and by the *Debs Case*. That the defendants might, as counsel put it, peaceably and quietly persuade complainant's employés to quit work, is not, and cannot be, successfully denied. But persuasion, with the hootings of a mob and deeds of violence as auxiliaries, is not peaceable persuasion. As to the proposition that defendants were only exercising their constitutional rights, the court commends to their perusal the recent case of *Garrett v. T. H. Garrett & Co.*, 24 C. C. A. 173, 78 Fed. 472, decided December 8, 1896. The appellants were manufacturers of snuff, known to the trade as "Gar-

rett's Snuff," and sued to restrain defendant company from using the name "Garrett" on packages and cans of snuff manufactured by it and placed upon the market for sale. It was contended for the defendant that every man has the right to the use of his own name in business, and, as to the order of injunction below restraining defendant from using white paper for its labels, that every person has a constitutional right to use white paper. The court said:

"These propositions, in the abstract, are undeniably true; but counsel for the time overlooked the fact that, wherever there is an organic law, wherever a constitution is to be found as the basis of the rights of the people, and as the foundation and limit of the legislation and jurisprudence of a government, there the mutual rights of individuals are held in highest regard, and are most jealously protected. Always, in law, a greater right is closely related to a greater obligation. While it is true that every man has a right to use his own name in his own business, it is also true that he has no right to use it for the purpose of stealing the good will of his neighbor's business, nor to commit a fraud upon his neighbor, nor a trespass upon his neighbor's rights or property; and, while it is true that every man has a right to use white paper, it is also true that he has no right to use it for making counterfeit money nor to commit a forgery. It might as well be set up, in defense of a highwayman, that, because the constitution secures to every man the right to bear arms, he has a constitutional right to rob his victim at the muzzle of a rifle or revolver."

Counsel for defendants closed his argument with a somewhat impassioned appeal to the court, coupled with the expression of his hope and confidence that the decision would not be calculated to drive his clients to become anarchists. So long as labor organizations keep themselves within the limits of law, they will not be interfered with by courts, and they will have the sympathy and good will of a vast majority of well-disposed citizens. When they exceed those limits, they will be restrained by the courts, and dealt with, whatever the consequences may be, and they will lose the sympathy and good will of the public. The extraordinary character of the appeal made to the court justifies me in adding that the courts will be ready for the emergency whenever and wherever the spirit of anarchy may manifest itself, whether within or without the lodges, and the American people, if need be, will rise in their majesty and their might, and crush it as a trip-hammer would crush an eggshell.

Upon the facts of this case, and upon the law as stated in the authorities cited, the complainant's motion for a temporary injunction will be granted. A bond of \$2,000 will be required.

STATE OF TENNESSEE et al. v. QUINTARD et al.

(Circuit Court of Appeals, Sixth Circuit. May 4, 1897.)

No. 468.

1. RAILROAD FORECLOSURES—MASTERS' SALES—RIGHTS OF PURCHASER.

A bid for property at a special master's sale is only an offer to take it at that price, and the acceptance or rejection of the offer is within the sound legal discretion of the court, to be exercised with due regard to the special circumstance of the case. The acceptance of the offer is only manifested by an order confirming the sale, and, until this is done, the purchaser does not stand in the position of an innocent purchaser.

2. **SAME—PURCHASER AS PARTY.**

A purchaser at a master's sale becomes a quasi party to the suit, and is affected with notice of every step subsequently taken in the case relating to the purchase and the title acquired thereby.

3. **SAME—RIGHTS AND LIABILITIES OF PURCHASERS.**

Where, after a master's sale of a railroad, but before confirmation thereof, a third party intervened, asserting a right to have the railroad in the hands of the purchasers bound by a traffic agreement made with the receivers before the sale, and the purchaser did not then ask to be relieved from his bid, but submitted to a decree confirming the sale, and reserving the rights of the intervener for future determination, *held*, that this amounted to an election by the purchaser to take the property burdened with the contract, if the same should be upheld by the court.

4. **SAME—INTERVENTIONS.**

A land company incorporated for the building of towns, etc., and the "establishment and encouragement of industries," purchased large tracts of coal lands in Tennessee, and, to make them accessible, organized the H. Railroad Company to build a road connecting them with the Cincinnati Southern Railroad. Afterwards the land company contracted to sell to the state a portion of the coal lands for mining by convict labor, but with a proviso that the sale was not to take effect until the state had arranged with the Cincinnati road and the H. Company as to rates of transportation from these coal fields. Before the sale was completed, the land company, the Cincinnati road, and the H. road were all placed in the hands of receivers in foreclosure proceedings. Thereafter the receiver of the Cincinnati road made a contract with the H. Company giving the former the exclusive right to fix through rates on traffic originating on the H. road, with provisos, however, that the contract was not to take effect until the state should complete its purchase of the coal lands, and that the state should be entitled to any benefits accruing to it from the contract. The state, however, was not a party to this contract. The state subsequently made a contract with the company controlling the Cincinnati road, fixing rates of transportation for the products of the state mines on the purchased lands. The H. road having not yet been completed, the court authorized the issuance of receiver's certificates to finish the road, and at the same time empowered the receiver to execute the contract giving the Cincinnati road (or the company controlling it) a right to fix rates. This was done, and thereupon both contracts became effective, and the state proceeded to make large expenditures in developing the purchased lands. In this condition of affairs, the H. road was sold by a master in the foreclosure proceedings, and bought in for a reorganization committee. The foreclosure decree contained no provision protecting the rights of the state under these contracts, but, before confirmation of the sale, the state intervened, asking that such rights be defined and secured by the court. The purchasers did not then withdraw their bid, but merely filed an answer denying the state's right to relief, and, without invoking any action of the court upon the state's petition, suffered the entry of a decree confirming the sale, and reserving the question of the state's rights for future determination. *Held*, that in view of all the circumstances, and especially of the fact that all parties, including the purchasers, knew that these contracts were made to induce the state to complete its purchase of the coal lands, the state was entitled to intervene in its own name for the protection of its rights thereunder, though it was not a formal party to the contract between the H. Company and the receiver of the Cincinnati road; and that the purchasers of the H. road took it subject to the obligation of these traffic contracts.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

Geo. W. Pickle, for appellants.

W. P. Washburn, for appellees.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

CLARK, District Judge. This particular litigation had its inception in a petition filed by the state of Tennessee in the consolidated causes of the Central Trust Company of New York against the Harriman Coal & Iron Railroad Company, and J. H. Whitmore et al. against the Harriman Coal & Iron Railroad Company. Prior to August, 1893, the East Tennessee Land Company, a real-estate association, had been organized as a corporation under the general incorporation law of the state of Tennessee, with power and for the purpose of "locating, establishing, and building of towns and cities, the purchase, improvement, development, and sale of property, and the establishment and encouragement of industries." It was a chief aim and ambition with the original promoters and shareholders in this great company to establish in Roane county, Tenn., a prohibition city, and thereby furnish to the country an object lesson in prohibition and the good which would result therefrom. This was an undertaking which at once secured the interest and co-operation of a class of people of great intelligence and culture. Accordingly, large bodies of mineral lands were purchased and conveyed to the great company, and the city of Harriman founded at the junction of the Harriman Coal & Iron Railroad with the C. S. Railroad, a line extending from Cincinnati to Chattanooga, Tenn., and then under lease for a term of years to the C., N. O. & T. P. Railroad Co. The development of these large bodies of mineral lands, as well as the establishment of the city of Harriman, required the use and exercise of corporate franchises and powers beyond such as could, under the statutes of the state of Tennessee, be vested in one corporation. Accordingly, subsidiary corporations were organized, with powers suitable to carry forward to successful results the large scheme of the principal corporation. Most important among such subsidiary corporations was the Harriman Coal & Iron Railroad Company, organized for the purpose of building a railroad to connect the coal fields of the Big Brushy Mountain with the East Tennessee, Virginia & Georgia, and the Cincinnati Southern Railroads and with the city of Harriman, in order thereby to furnish means of transportation for "coal, coke, stone, timber, tan bark, and other mineral and substances found in abundance in the said Big Brushy Mountain district." This contemplated railroad was to extend from its junction with the Cincinnati Southern, at the city of Harriman, to the junction of Stogdills Creek with Crooked Fork, in Morgan county, Tenn., near which last point the state of Tennessee finally purchased about 9,000 acres of mineral lands, for the purpose of erecting thereon its mining penitentiary, in order that the state convicts might be employed in developing and operating coal mines; the state of Tennessee having abandoned the previously existing lease system of dealing with its convicts, and determined, by proper legislation, to work the penitentiary convicts through a penitentiary commission in opening up and operating some of the undeveloped coal fields in the state. The penitentiary commission, under legislative authority,

and in execution of the new scheme, advertised for mineral lands, being authorized to expend a sum not exceeding \$80,000 for the purchase of lands of this character on which to establish its mining penitentiary. Among other properties offered to the commission, the East Tennessee Land Company proposed to sell the Big Brushy Mountain coal fields, before referred to, and the negotiations which followed resulted in the execution of a memorandum contract between the state of Tennessee, acting through its committee, and the East Tennessee Land Company. This contract is dated August 1, 1893. The quantity of land to be conveyed was 9,000 acres, at the price of \$80,000. The contract provided expressly that it was not to go into effect or be binding upon the state of Tennessee until certain conditions were performed. The conditions which more immediately affect the matter now under consideration are as follows:

First. "Nor is the same to go into effect unless, within twenty (20) days from this date, a bond is executed to the state in the penal sum of one hundred and sixty thousand dollars, conditioned that the Harriman Coal & Iron Railroad shall be completed from its present terminus to a point to be selected, at or near the junction of Stogdills creek with the Crooked Fork, by the committee or any engineer selected by it, as the place where the sidings for coal mines to be opened by the state are to be located; said road to be completed to that point within six (6) months from this date, and satisfactory arrangements made as to equipping said road for operation."

Second. "This contract is not to go into effect until the committee on behalf of the state have arranged and agreed with the companies owning and controlling the Cincinnati Southern Railroad and the Harriman Coal & Iron Railroad, as to rates for transporting coal, coke, and the other products of said mines to be located on said lands, as well as the charges for carriage of persons and property to and from said mines over their said lines of railway."

In this condition of affairs, and before the sale from the East Tennessee Land Company to the state of Tennessee was consummated, the East Tennessee Land Company, the Cincinnati Southern Railroad, under lease as before stated, and the Harriman Coal & Iron Railroad Company, were placed in the hands of receivers under foreclosure bills filed in the United States courts against these companies respectively. In June, 1894, a contract was executed between the Cincinnati, New Orleans & Texas Pacific Railway Company, through Mr. Felton, its president and receiver, and the Harriman Coal & Iron Railroad Company, being a traffic contract in regard to shipments to come over the Harriman Coal & Iron Railroad. Among other provisions in the contract were the following:

"Now, therefore, it is agreed, between the parties hereto that, in case the said state of Tennessee shall purchase the said lands hereinbefore referred to, then and in such event the contract herein contained shall be binding upon both parties hereto upon the terms and conditions hereinafter mentioned, and which are as follows: (1) This agreement covers and applies to all freight or passenger traffic having its point of origin or point of ultimate destination on the line of the Harriman Coal & Iron Railroad Company, northwardly from and beyond De Armond Junction, Tennessee, which passes through Harriman, Tennessee, having also its destination or origin beyond Harriman." "(3) It is agreed by and between the parties hereto that the party of the first part shall have the sole and exclusive right to fix all rates upon the traffic hereby provided for, provided, however, that such party shall assume and pay all expense incident to preparing and publishing such rates." "This contract shall remain in force until the expiration or other determination of the present lease from the city of Cincinnati to the Cincinnati, New Orleans & Texas Pacific Railway Com-

pany, of the railway operated by said company. The state of Tennessee shall be entitled to any benefit or advantage that may accrue to it from the operation of this contract, but shall not be liable thereon."

And in August, 1894, a contract was executed between the Cincinnati, New Orleans & Texas Pacific Railway Company and the state of Tennessee, by which freight rates on the product of the state mines to be opened and operated were fixed. Among other provisions materially affecting the matter now under consideration, the following may be set out:

"It being recognized that the primary and principal object and purpose of this contract is to provide that the party of the second part shall at no time be under any unjust disadvantage, as compared with any other mine located on the lines of the party of the first part, in regard to reaching competitive markets, and disposing of its coal in such markets, the party of the first part hereby contracts that, during the tenure of this contract, it will at all times, so far as it may have the right to do, or so far as it may be within the scope of its influence with connecting and other carriers and transportation lines, to provide and maintain such lawful tariffs and rates on coal, and other products of said mines, distances and other conditions considered, as will enable the party of the second part to meet all fair and legitimate competition in the sale of such products, at all points that can be reached by the lines of the party of the first part and its connections, so far as the rates of transportation bear an influence on the meeting of such competition; it being the purpose of this agreement that the party of the first part shall, in all legitimate ways, in the fixing and maintenance of rates for transportation, aid and assist the party of the second part in marketing the product of its mines."

It will be observed that the previous contract between these two railroad companies expressly conferred upon the Cincinnati, New Orleans & Texas Pacific Railway Company the power to fix a through freight rate for shipments coming over the line of the Harriman Coal & Iron Railroad Company, and it was pursuant to the authority given that company in said contract that it entered into this contract with the state of Tennessee. It will also be noticed that the reason why the state officials were anxious to secure a contract for freight rates which would continue during the lease of the Cincinnati Southern Railroad was to avoid being put at a disadvantage by unfavorable rates in reaching competitive markets, for otherwise the state would have been left completely at the mercy of the Harriman Coal & Iron Railroad Company as to local rates over its line, there being no competitive line or other means of transportation for the products of the Big Brushy Mountain coal fields.

November 21, 1893, Whitmore's bill was filed against the Harriman Coal & Iron Railroad Company, being a general creditor, and insolvent bill to wind up the affairs of the company. Thereafter, May 7, 1894, the Central Trust Company of New York, trustee, in a mortgage executed by that company to secure certain outstanding bonds, filed its foreclosure bill in the Northern division of the Eastern district of Tennessee; and the two causes, being in the same court, were subsequently consolidated, and such steps were had that a foreclosure decree was pronounced, the property put up at a special master's sale, and bid off by E. A. Quintard, as trustee. This bid was subsequently assigned by Quintard to William Neisel, and by Neisel to Isaac K. Funk and others, they being members of a reorganiza-

tion committee, which will be noticed further on. At the time the Harriman Coal & Iron Railroad Company went into the hands of a receiver, its line of railroad was in process of construction, but not yet completed. It became evident that, unless it could be in some way fully constructed, the amount that had already been invested would become a total loss, and without means of transportation it was certain the state could not go forward with its mining enterprise. It was also manifest that the principal transportation business which would be furnished to this line of railway, and by which it could be made successful, would be the product of the state mines. In this situation of affairs, and while the suits against the company were pending, the receivers appointed under those suits made application to the court by petition filed June 12, 1894, for authority to issue receivers' certificates necessary to complete the line of railway, and also for authority, as receivers, to execute the traffic contract which had previously been entered into between the company of which they were receivers and the Cincinnati, New Orleans & Texas Pacific Railway Company, before referred to. In that petition the receivers state:

"Your orators further show that the said contract between the state of Tennessee and the East Tennessee Land Company has been so far perfected that the same is in full force and effect, to be carried out, however, only upon condition that the said railroad shall be completed to the said coal fields from its present terminus. Your orators further show that it is the purpose of the state of Tennessee to erect its penitentiary mines upon said tract of land near the junction of Stogdills and Crooked Fork creeks, in said Morgan county, and to mine therefrom coal, quarry stone, and make coke, and sell said coal, stone, and coke upon the general market, and that all the product of said mines and quarries will be transported over the line of the Harriman Coal & Iron Railroad to its junction either with the East Tennessee, Virginia & Georgia Railroad, or the Cincinnati Southern at Harriman, Tennessee, if destined to points beyond Harriman, and that said traffic will be large, and will afford good earnings upon all the investments that have been made or will be required to be made to complete said road, and to put the same in operation, for the purpose of carrying the traffic to and from the said state mines so to be erected as aforesaid."

A copy of the contract between the two railroad companies executed in June, 1894, was made an exhibit to this petition, containing, as we have seen, a provision that the state of Tennessee should be entitled to any "benefit or advantage that may accrue to it from the operation of this contract." The question whether it was advisable and desirable, in the interest of the Harriman Coal & Iron Railroad Company and others, that the authority asked by the petition should be granted, was referred to a special master in chancery, and, upon his favorable report, full authority was granted to the receivers to issue the construction certificates desired, and to execute the traffic agreement. It is to be borne in mind that this contract had been previously executed between the two corporations, and nothing further was necessary or desirable to make it binding and effective on those companies. The receivers, pursuant to the authority thus conferred, duly executed the contract as receivers; and the state of Tennessee proceeded with the prosecution of its work, and has expended large sums of money in improvements

and developments on the lands purchased, and is now engaged in coal mining as originally contemplated. In the decree directing a sale of the railroad, no provision or reservation was made in regard to the rights of the state of Tennessee under the two contracts before referred to. After the property was bid off by Quintard at the special master's sale, but before confirmation of the sale or any action by the court, the state of Tennessee intervened by this petition in the consolidated causes, and sought to have the rights of the state under said contract defined and set up by proper decree, and to have such rights declared obligatory upon the purchasers of the railroad. The purchaser, Quintard, waived process, entered his appearance, and answered, denying the state's right to any relief, and denying in a somewhat general and evasive way the charges of the petition. The opinion of the circuit judge shows that he entertained the view that the state intervened too late, because its petition was not filed before the decree directing the sale of the property, and that upon this ground, without going into the merits of the question, the petition was dismissed, with costs. From that decree the state has prosecuted this appeal, and assigned errors. No other method has been suggested by which the state could have asserted or secured an adjudication of its rights. It is certain that if the state had rested until a confirmation of the sale, and payment of the purchase price, and certainly after the property might have passed into the hands of innocent holders, great difficulty would have been found in maintaining its rights, if any, under these contracts. We are clear that the petition was properly and seasonably filed. The cases, both federal and state, fully establish the rule that Quintard's bid for the property at the special master's sale was only an offer to take the property at that price, and that acceptance or rejection of that offer was within the sound legal discretion of the court, to be exercised with due regard to the special circumstances of the case. The acceptance of his offer could only have been manifested by an order confirming the sale, and, until that was done, he acquired no title, and there was in his position at the time this petition was filed no element of an innocent purchaser. *Camden v. Mayhew*, 129 U. S. 73, 9 Sup. Ct. 246; *Blossom v. Railroad Co.*, 3 Wall. 196; *Mayhew v. Land Co.*, 24 Fed. 205; *Reese v. Copeland*, 6 Lea, 190.

It is also settled that the purchaser, by his bid, becomes a quasi party to the suit, and is affected with notice of every step subsequently taken in the case relating to the purchase and the title acquired thereby. *Davis v. Trust Co.*, 152 U. S. 594, 14 Sup. Ct. 693; *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950; *Stuart v. Gay*, 127 U. S. 518, 8 Sup. Ct. 1279; *Blossom v. Railroad Co.*, 1 Wall. 655; *Muse v. Donelson*, 2 Humph. 169; *Allen v. East*, 4 Baxt. 308; *Reese v. Copeland*, 6 Lea, 193. And this rule holds good even as to the sureties of the purchaser, executing with him notes for deferred payments on the purchase price. *Deaderick v. Smith*, 6 Humph. 139; *Munson v. Payne*, 9 Heisk. 672. Such part of the purchase price as may have been paid in cash at the time of sale was still in the registry of the court, and, like the purchaser's bid, completely under the control of the court. In this state of affairs, the state's petition,

as we have seen, was filed, and the purchaser, Quintard, given full and distinct notice of the rights asserted by the state. The sale not yet having been confirmed, it was competent for him, upon said petition being filed, to have sought to be relieved from his purchase, if unwilling to take the property subject to the state's rights, if any. He did nothing of this kind. On the contrary, pending this litigation with the state, the sale was confirmed by order of the court, the decree of confirmation reciting that such action was had after due notice to all parties to the cause of the application to confirm. The decree contained the following express reservation:

"But this decree of confirmation is made subject to whatever rights the state of Tennessee or the penitentiary commissioners may have upon the hearing of their petition herein already filed."

The purchaser, without invoking any action of the court whatever in view of the state's petition, has gone forward, and completed the sale, by the payment of the purchase price; and the purchase price, except a comparatively small balance, has been disbursed in the payment of the construction certificates and other claims having priority. In view of this situation, we have no hesitation in holding that the purchaser, with full knowledge, has elected to take the property bid off, subject to the obligations of these traffic agreements, provided there exists any obligation in favor of the state. And we are thus brought to the question of whether or not these contracts confer, and were intended to confer, upon the state, a right to their enforcement against this railroad, and whether the property passed to the purchaser by the sale subject to such right; and upon this point we entertain no doubt. It will conduce to a better understanding of the case and the question if we keep in view the main facts hereinbefore recited, which led up to making these contracts, and the relation of all parties to the same, and their interest therein. It would be entirely without the support of reason to suppose that the state's officials would have manifested the precaution which they did to secure a contract for reasonable freight rates extending over a period of some years, binding only on companies which had become insolvent, and were being wound up, or that these officials would have been content with the execution of such contract by the receivers of the court, with the understanding that it might at any time, however short, be ended with the termination of the receivership. The proposition that the parties interested in the state prosecuting its plan to a successful result understood that the obligations of the contract entered into by the receivers under authority of the court should last no longer than the receivership is equally unwarranted. The only just interpretation which can be placed upon the procedure which was had is that it was intended to subject this railroad, in the hands of a receiver, to the obligations of the traffic agreement in which the state was interested. Nothing short of this would have been an adequate inducement to the state to carry into effect its mining plan, and to make the large expenditures which would be necessary for that purpose. And the large freight traffic that would be thereby supplied to this line of railway, perhaps far exceeding all other sources of business combined, was fully sufficient

to justify those interested in the railroad property in desiring the state to have the full benefit of the long time contract which it demanded. We have not the slightest doubt that it was so understood on all hands. That this view is a just one is made manifest when we consider another aspect of this case. It is disclosed by this record that the East Tennessee Land Company, the vendor of the state, owned a large majority of the stock in the railroad company, and controlled and directed it. It further appears from the record that there has been put on foot a plan of reorganization, by which it is intended to bid in at foreclosure sales the large properties of the East Tennessee Land Company, as well as the line of railway in question, and in that way save all or a part of the original investment in the capital stock of these companies, by the shareholders and security holders. We have no doubt that the interests which were represented in the sale of the coal lands to the state, and in making the traffic agreement between the two railroads, and causing its execution by the receivers under authority of the court, are substantially the same interests now represented by this reorganization committee, in taking and holding title to the railroad. Among other parts of the record from which this appears, we may mention a circular announcement of this fact, made exhibit to the deposition of H. L. Corey. It is insisted by counsel for the defendants that this exhibit, with its contents, is incompetent; but no ruling upon the objection was had in the court below, and we cannot do otherwise than treat it as part of the record. Dr. I. K. Funk, a gentleman of high character and large influence, is chairman of this reorganization committee, and, as such, he officially issued and sent abroad the circular referred to. Among other parts of this announcement are the following:

"Important News.

"To Investors of the East Tennessee Land Company:

"The Railroad Purchased—Money Wholly Subscribed.

"A most important part of the work of reorganization has now been accomplished. The railroad has been purchased, the money fully subscribed, and all of the stock (amounting to \$600,000) now belongs absolutely to the reorganization committee. This is settled in the ownership of this stock. The reorganization committee has assets of solid value amounting to some hundreds of thousands of dollars. No candid person fully acquainted with the facts will question this statement.

"A Monopoly.

"The railroad has the absolute monopoly for railroad transportation for the enormous coal fields of the Brushy Mountain region. These deposits of coal are of extraordinary proportions and value. As the purchase of the railroad is now an accomplished fact, the money to pay for it being arranged for, we trust that we run no risk of being accused of 'booming' if we tell you of the great value of this railroad. Now, no harm can come to you even though we should overjudge the value of this unique railroad property."

The document then goes on to state that a foreclosure sale of the land company (meaning thereby the East Tennessee Land Company) properties has been ordered, and warning the original investors of the East Tennessee Land Company of the importance of being ready to bid in that property also. The following statement is found:

"If we are not prepared to buy the lands at the foreclosure sale, they will be sacrificed, and the investors in the old company will lose practically all of the million dollars that have been invested in these lands. A creditors' syndicate is being talked of to buy in these lands for its own benefit, it being assumed that the reorganization committee will not be ready to purchase. If the syndicate buys or outsiders buy, all the money invested by the stock and security holders of the old company in lands will be practically lost. It will be a most shortsighted thing for the stockholders and security holders to permit this tremendous loss, for, by a united effort, it can be prevented in a large part, and possibly wholly."

Attention is then directed to the rich and promising oil and gas discoveries which have been made upon this great body of land called the "Cumberland Plateau." This circular, of course, was designed mainly to secure subscriptions to the proposed plan of reorganization. After setting out in detail many other substantial grounds on which the reorganization should be supported, the document concludes with a touching and eloquent appeal to that sentiment which was expected to establish and make successful the city of Harriman, in language as follows:

"In all the bitter disappointments, in the many troubles that have come upon us, we must not forget the original aim in this whole investment,—prohibition an object lesson to the country. It is chiefly because of this that your chairman has wrought as he has during the past eighteen months. Whatever our losses may be, prohibition still remains an issue of overwhelming importance. During one of his great battles, Napoleon, riding up to his chief of staff, asked how the battle was going. The officer replied, 'Sire, this battle is lost, but [pointing to the sun, still an hour high] there is time enough to win another.' The ranks were formed, and a decisive victory was won. We have lost a battle at Harriman, but there is time enough yet to win, on that same battle field, a victory that will help the entire nation, and one that will go into history. With a heart within and God o'erhead, let us go forward."

Keeping in view the surrounding circumstances, we do not doubt that the state's officials accepted the court's action in authorizing the receivers to execute the contract previously made between the railroad companies, as assurance that the court, in its subsequent dealing with this property, would make good to the state its right to the freight rates secured to it by such contracts. We think these officials were well warranted in the belief that the court would do this, and that they have acted all along upon that assumption. The receivers were the officers, "the mere arm" and agents, of the court in the administration of the trust then in hand, and any obligation assumed by them might justly be regarded as an obligation of the court. And, certainly, a court is under the highest possible obligation to require full performance of every obligation incurred with the court's sanction. And parties and officers in a case before the court should be allowed to create no just expectations which the court does not fully satisfy. *Felton v. Ackerman*, 22 U. S. App. 154, 9 C. C. A. 457, and 61 Fed. 225; *Wabash, St. L. & P. Ry. Co. v. Central Trust Co. of New York*, 22 Fed. 269; High, Rec. §§ 1, 2, 175; *Railroad Co. v. Hoechner*, 31 U. S. App. 644, 14 C. C. A. 469, and 67 Fed. 456.

In view of what has been said, and without pursuing the discussion further, we conclude that the two contracts now under consideration are to be construed together, both of them having been ex-

executed in part, for the purpose of giving the state such a rate of freights as would induce it to proceed with the purchase of the property and development of the coal mine, with the benefits resulting therefrom to the railroad company, and that so construed, in the light of all the surrounding circumstances, these contracts conferred upon the state the right to the traffic rate stipulated for, and that to this extent the state may in its own name, in a court of equity, enforce the obligations of these contracts, the first as well as the second, although not a formal party to that contract. Undoubtedly, the primary object in the execution of these contracts by the railroad company, and subsequently the execution of the one by the receivers under authority of the court, was to confer upon the state a contract right in respect to freights such as would induce the state to act as it then contemplated doing; and the Harriman Coal & Iron Railroad will manifestly receive the benefits arising, and hereafter to arise, from the plan of operations thus entered upon by the state. So, too, the interests which were benefited by the sale of the coal fields to the state, being, as we have seen, the same interests now represented in the purchase of the road, we are clear that the railroad should be burdened with the obligation of the contracts so far as they operate in favor of the state. Upon the facts, no question is or could be seriously made upon the power of the court to sanction a contract of this character by the receivers. Nor is there room for doubt that the court's discretionary power was in this case properly exercised. *Kennedy v. Railroad Co.*, 5 Dill. 519, Fed. Cas. No. 7,707; *Mercantile Trust Co. v. Missouri, K. & T. Ry. Co.*, 41 Fed. 8. It results from this view that the circuit court should have pronounced a decree declaring the state's rights accordingly, and further adjudging that the purchase of Quintard was subject to the terms and obligations of these contracts, so far as they operated in favor of the state; and as the purchasers denied such right, and resisted the relief sought, the decree should have been with costs against the defendants. Reversed, and case remanded, with directions to enter decree in favor of the state, and for such further proceedings as may be necessary not inconsistent with this opinion.

HYER v. RICHMOND TRACTION CO. et al.

(Circuit Court of Appeals, Fourth Circuit. May 14, 1897.)

No. 198.

CONTRACTS—ILLEGALITY—PUBLIC POLICY.

An agreement between rival applicants for a street-railway franchise to combine in order to prevent competition between themselves or by others in procuring the franchise, and to avoid the imposition of conditions by the municipal authorities, is void as against public policy; and equity will not interfere to compel one of the parties to share with the others the fruits of their combination.

Brawley, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

This case comes up on appeal from the circuit court of the United States for the Eastern district of Virginia. The cause was heard below upon demurrer to the bill. The bill states, in substance, the following facts: The complainant is a civil engineer, who has been engaged in promoting and constructing street railways in various cities of the United States. His attention was attracted to the city of Richmond as a promising field for his enterprise, and, having secured the assurance of assistance from capitalists, he made application to the city council of that city for the franchise of a street railway through Broad street. He succeeded in obtaining an ordinance granting him this franchise for a company to be called the Richmond Conduit Railway Company. But the ordinance as it finally passed did not contain certain terms which he had asked for, and had deemed essential. He therefore asked amendments and modifications of the ordinance, and received assurances from prominent officials that the desired amendments would be made, provided that a deposit of \$10,000, as a guaranty of good faith, should be made in one of the banks of Richmond. This deposit was, in fact, made by him on 17th July, 1895, and shortly thereafter he went to New York to obtain from the capitalists who were at his back the financial assistance he required. While he was engaged in these efforts to secure his franchise and to amend the ordinance, he was aware that he had active competition from other parties, who sought the same franchise for the Richmond Traction Company. This competition was led by one P. B. Shield, a lawyer in Richmond. These competitors, however, had no communication with each other prior to the departure of complainant for New York, and, indeed, there was no personal acquaintance between them. The complainant regarded himself as having altogether the inside track, and appeared to himself to be master of the situation. Stewart & Co., of New York, were the capitalists on whose assistance complainant relied. When he left Richmond and went to New York, as above stated, he called at the office of Stewart & Co., to complete his negotiations with them, and found that P. B. Shield was at that moment in private conference with the head of the firm, S. H. G. Stewart. During the day Shield and the complainant separately had interviews with Mr. S. H. G. Stewart, and finally Mr. Stewart, after telling the complainant that Shield's purpose was to get some recognition for the promoters of the Richmond Traction Company at the hands of the promoters of the Richmond Conduit Company, advised complainant to do so. He urged that the rivalry between the conduit company and your orator and his associates, on the one hand, and the traction people and the said P. B. Shield and his associates, on the other hand, and antagonism of this character, would probably result in the defeat of both their schemes, or the passage of the franchise in favor of one of the two competitors loaded with such onerous and exacting conditions that no capitalist could be induced to put money in the enterprise; and he therefore urged complainant to shake hands with said Shield, to unite forces with him upon one of the two ordinances,—the conduit ordinance or the traction ordinance,—and thus to secure and share the fruits of victory, instead of the disappointment and bitterness of defeat. The advice of Mr. Stewart was accepted. The late rivals became allies. They met in conference in New York, came to a full understanding, and, as its result, embodied their agreement in a letter to Mr. S. H. G. Stewart:

"New York, August 9th, 1895.

"S. H. G. Stewart, Esq., 40 Wall Street, City—Dear Sir: We, the undersigned, L. H. Hyer, of Washington, D. C., and Phil. B. Shield, of Richmond, Va., have this day entered into the following agreement: That both of us, being interested in the procuring of a franchise for and the construction of a street railway on Broad street, in the city of Richmond, Virginia, with collateral lines, have made the following agreement: That we hereby bind ourselves, in our own behalf and for our associates, mutually to co-operate one with the other in securing a franchise for said railway, and to divide equally between us and our associates whatever may be realized from the enterprise, first deducting from said amount whatever actual expenses may have been incurred by either side, such expenses to be paid out of the first money realized from said enterprise. It is further agreed between us that the deposit already made with the State Bank of Richmond, in Richmond, Virginia, by Mr. L. H. Hyer or his associates, is to stand and remain intact as it now is for the pur-

pose of securing the franchise aforesaid, subject to any conditions for the withdrawal thereof made by Mr. Hyer with the depositor after the seventeenth day of August, 1895; and, further, it is agreed that the application and franchise to be presented to the common council of the city of Richmond shall be that of the Richmond Traction Company, for the building of an overhead trolley railway or cable system. Among ourselves we will decide what names are proper to be used in the franchise, and the policy we will use in procuring the same.

"Yours, very respectfully,

[Signed] L. H. Hyer.

"[Signed] Phil. B. Shield."

The bill alleges that Shield was the agent of and acted for all the promoters of the Richmond Traction Company who were such at the date of this complaint; and that all persons who have come into the enterprise since that date, having received the benefit of the contract, are also bound by it. This contract having been made, all efforts to perfect the ordinance granting franchises to the Richmond Conduit Company ceased, the ordinance was withdrawn, and an ordinance was passed authorizing the construction and operation of a street railway within the limits of the city of Richmond by the Richmond Traction Company. Shield broke off all relations with the complainant after he had obtained this contract, and sold his interest in the enterprise to certain financiers in Richmond. The ordinance granted the franchise to the Richmond Traction Company, composed of John W. Middendorf, John L. Williams, John S. Williams, Everett Waddey, Reuben Shereffs, Philip B. Shield, Charles T. Child, and W. F. Jenkins. The ordinance was passed on 26th August, 1895. The complainant, on the afternoon of that day, caused to be published a notice in the Richmond State newspaper of the nature and character of his claim on the franchise of the traction company; that is to say, that he was entitled to one-half thereof when it was granted, in consideration of the fact that he had caused the withdrawal of the Richmond Conduit Company's application for franchises in favor of the traction company. This notice, either because it was too late, or for some other reason, did not affect or stop the action of the Richmond council. He also gave notice to each of the persons named in the ordinance of his contract with Shield and his claim thereunder. Upon taking this franchise for the Richmond Traction Company, the persons named in the ordinance undertook to form a corporation and issue shares of stock with a capital of \$300,000, with full notice or means of notice of complainant's rights in the premises. That said corporation was not formed in accordance with the laws of Virginia in such case made and provided. That notwithstanding they selected a board of directors, all of whom but one—A. B. Addison—had notice of complainant's rights and claims. And that the directors determined to execute, and did in fact execute, a mortgage to the Maryland Trust Company of all the franchise and property of said traction company to secure 500 bonds of \$1,000 each, but that said mortgage itself is void as not executed by lawful authority, or in accord with the laws of Virginia in such case made and provided.

The complainant, after filing his original bill, craved and obtained leave to file amended and supplemental bills. The prayer of the original bill is as follows: "That each and all of said parties defendant, their agents and servants, be enjoined and restrained from transferring or incumbering the franchise or property of the said Richmond Traction Company, or any part thereof, or any interest therein, or from issuing any stock or bonds of said company, or in any other way borrowing money for the use of said company upon its franchise or property; that your orator may be decreed by this honorable court to have valid right and claim to a full one-half interest in and under said contract of August 9th, and, upon the basis of said contract, to have such right and claim to a full one-half interest in the said Richmond Traction Company's franchise, enterprise, property, and stock; that specific execution of said contract be decreed your orator, and enforced under the power and process of the court; that all parties defendant be required and compelled by the process of the court to do and perform every act which may be requisite and necessary to the vesting of your orator's full rights in the premises." The amended bill prays that this prayer of the original bill may be read, treated, and granted as if again fully repeated, and further prays that the so-called subscription to the capital stock of the Richmond Traction Company be declared illegal, null, and

void; that the scrip issued be called in and canceled; that the organization of the company based thereon be declared illegal, null and void, and vacated; that all transactions at any meetings of the so-called stockholders and directors be declared null and void, especially the authorization, execution, and issue of the bonds and the mortgage to the Maryland Trust Company of Baltimore, and that all the bonds be called in and canceled; that all the stockholders and directors who participated in these matters, except Addison, be declared wrongdoers, conspiring to hinder, delay, and defraud complainant, and liable in damages to him for all losses he may suffer in the premises; that they be required to do whatever may be necessary to discharge the Richmond Traction Company and franchise from the consequences of the organization of the said company, and from all contracts, debts, and liabilities contracted in the name of said company; that the Maryland Trust Company be enjoined from acting as trustee under the mortgage, and from authenticating any of the bonds, or issuing, delivering, or selling the same to any one, and from paying over to any one proceeds of sale of any bonds heretofore sold. And "that the said Richmond Traction Company, its officers, directors, and all others acting, or purporting to act, in its name, may be enjoined and restrained from entering into any contract or incurring any debt or liability in the name of the said Richmond Traction Company, or exercising any of the rights, powers, functions, or privileges of the Richmond Traction Company; that a receiver may be appointed, pending the determination of this cause, to take charge of all of the aforesaid bonds, of all the proceeds from the sale of such of them as may have been sold or otherwise disposed of, and of all the property and assets of the said Richmond Traction Company of every character and wherever situated; and that all proper inquiries may be made, accounts taken, and decrees entered. And your orator further prays that he may have and be granted such other, further, general, and complete relief as may be agreeable to equity and the nature of his case." The defendants demurred to the bill, setting forth nine grounds of demurrer. The first and third go to the jurisdiction of a court of equity, in that complainant has a plain, adequate, and complete remedy at law. The second denies the jurisdiction, because of the citizenship of the parties. These three grounds the court below overruled. The fourth ground is as follows: "(4) That the contract and agreement set forth in said bill as the sole cause of action of said complainant is against public policy, and null and void, and no court of equity will enforce the same." This ground of demurrer the court below sustained, and thereupon dismissed the bill, the remaining six grounds of demurrer assigned by the defendants not being considered or determined by the court. Leave was granted to complainant to appeal, and the cause is here on assignments of error. The first assignment of error goes to the ruling of the court below that the contract sued upon is void as contrary to public policy. The second assignment of error asserts error in the court in not overruling all the grounds of demurrer filed by defendants, and in not granting the relief prayed. The third and fourth are too general and vague, and will not be regarded.

Robert Stiles and A. L. Holladay, for appellant.

W. Wirt Henry and George Whitelock, for appellees.

Before FULLER, Circuit Justice, SIMONTON, Circuit Judge, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge (after stating the case as above). The question in this case is: Is the contract set forth in the bill as the sole cause of action such a contract as a court of equity will enforce? There were two competitors before the municipal authorities of Richmond, each seeking for himself, upon the best terms he could, the grant of a street-railway franchise. Apparently both of them were promoters,—that is to say, were without sufficient capital themselves, depending upon securing the aid, co-operation, or purchase of capitalists. The competition evidently was bitter and hostile, for

the competitors had no communication whatever with each other. The complainant was satisfied that he had "the inside track," and was "master of the situation." With this high hope and encouragement, he sought his capitalist in New York, to obtain the fruition of his efforts. There he unexpectedly meets his rival in close conference with the capitalist. Under the advice of this capitalist, he lays aside his rivalry, and the competitors become allies, and all competition between them ceases. The reasons which induced him were that the antagonism would probably result in the defeat of both, or that, before the franchise was obtained, it would be loaded with such onerous and exacting conditions that no capitalist could be induced to put money in the enterprise. The result of the advice was the contract in question. By this contract complainant and his rival joined hands, withdrew all competition, agreed to co-operate in securing a franchise for a street railway from the municipal authorities of Richmond, and to divide whatever was realized from the enterprise, first deducting expenses incurred by either side. They agreed to use, so far as it went, the advantage of complainant's deposit in a Richmond bank, and the franchise to be asked for was that of the Richmond Traction Company for the building of an overhead trolley railway or cable system. Adding these words: "Among ourselves, we will decide what names are proper to be used in the franchise, and the policy we will use in procuring the same." The effect of this reconciliation of interests was to prevent all competition between the rival promoters; to shut off, as far as they could, all possible competition from others, which might result in the defeat of both; and to avoid the imposition of conditions by the municipal authorities, which the promoters, and especially capitalists, might consider onerous and exacting. The circuit court which tried the case was of the opinion that the contract was against public policy.

A text writer (Greenhood) states the rule to be this:

"Any agreement which, in its object or nature, is calculated to diminish competition for the obtainment of a public or quasi public contract to the detriment of the public or those awarding the contract is void." Greenh. Pub. Pol. p. 178, Rule 172.

In *Pingry v. Washburn*, 1 Aiken, 264, the court held that an agreement on the part of a corporation to grant to individuals certain privileges in consideration that they will withdraw their opposition to the passage of a legislative act touching the interests of the corporation is void as against public policy, and prejudicial to correct and just legislation.

In *Hunter v. Nolf*, 71 Pa. St. 282, a contract between two candidates for the office of United States assessor that one should withdraw, and, if the other were appointed, they should divide profits, was recognized and treated as against public policy, and void. To the same effect is *Meguire v. Corwine*, 101 U. S. 108.

In *Smith v. Applegate*, 23 N. J. Law, 352, a note given to a person in consideration that he withdrew all opposition to the opening of a road was held void for the same reason.

The supreme court of Massachusetts in *Gibbs v. Smith*, 115 Mass. 592, clearly marks the line in an analogous case:

"An agreement between two or more persons that one shall bid for all upon property about to be sold at public auction, which they desire to purchase together, either because they intend to hold it together or afterwards to divide it into such parts as they individually wish to hold, neither desiring the whole, or for any similar honest or reasonable purpose, is legal in its character, and will be enforced. But such an agreement, if made for the purpose of preventing competition, and reducing the price of the property to be sold below its fair price, is against public policy, and void."

A citation and examination of the very many cases on this fruitful subject would run this opinion, already too long, into an unreasonable length. Any effort which stifles competition, or prevents a fair and reasonable price for property, is against public policy. Especially is this the case when the property is a public or quasi public franchise. In the case at bar there were two bidders before the municipal authorities of Richmond for the franchise of a street railway. Naturally and normally that competitor would receive the franchise who made the greatest concession for the public welfare. The competition was active. Its tendency was to promote the public interest. It was withdrawn by the coming together of the parties, who agreed to abandon it for fear that they would neutralize each other, and also for fear that the passage of the franchise in favor of one of the two competitors would be loaded with such onerous and exacting conditions that no capitalist could be induced to put his money in it. In other words, the competition would induce great and extraordinary concessions for the public good. To prevent this, it was abandoned. Among themselves they would decide what names to be used in procuring the franchise, and the policy to be used in procuring it; that is to say, there being but one contractor in the field, the promoters themselves could, in the absence of competition, decide to whom the contract should be awarded, and could, in some measure, dictate the terms and concessions to be used in procuring the franchise. "The true inquiry is, is it the natural tendency of such an agreement to injuriously influence the public interests? The rule is that agreements which, in their necessary operation upon the action of the parties to them, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or third parties, are against the principles of sound public policy, and are void." *Atcheson v. Mallon*, 43 N. Y. 147. The conclusion is not unreasonable that the contract was against public policy and void.

But it is contended that, if this be admitted, the complainant is still protected by the doctrine laid down in *Brooks v. Martin*, 2 Wall. 80, recognized in *Farley v. Hill*, 150 U. S. 576, 14 Sup. Ct. 186, and in the dissenting opinion in *Burck v. Taylor*, 152 U. S. 668, 14 Sup. Ct. 696; *Armstrong v. Bank*, 133 U. S. 467, 10 Sup. Ct. 450. The principle decided in these cases is:

"When several persons enter into an illegal contract for their own benefit, and the illegal transaction has been consummated, and the proceeds of the enterprise have been actually received, and carried to the credit of one of such parties, so that he can maintain an action therefor without requiring the aid of the illegal transaction to establish his case, he may be entitled to relief." *McCrary, J., in Cook v. Sherman*, 20 Fed. 170.

See, also, *Jackson v. McLean*, 36 Fed. 217.

This construction by Judge McCrary is sustained upon examining the case of *McBlair v. Gibbes*, 17 How. 233, which is the leading case on which this principle depends. In that case, and in all the quotations cited to support it, the cause of action was not the illegal transaction,—the void act,—but a subsequent independent contract which the law raised. The difference is between enforcing illegal contracts and asserting title to money derived from them. *Tenant v. Elliott*, 1 Bos. & P. 3; *Farmer v. Russell*, Id. 296; *Thomson v. Thomson*, 7 Ves. 473,—all cited and approved in *McBlair v. Gibbes*, *supra*. Sir William Grant, in the case in 7 Ves. 473, clearly states the principle. In that case there had been a sale of the command of an East India ship to the defendant. This was an illegal transaction. In consideration of the sale, he had agreed to pay an annuity of £200 to the previous commander, from whom he purchased, so long as he remained in command. Defendant, after remaining in command for some time, retired, and secured the retiring allowance of £3,540. The bill was filed to get a decree enforcing the contract, and investing so much of this as would produce £200 per annum. The objection was made that the contract providing for the annuity was illegal, and a court of equity would not enforce it. The distinguished master of the rolls held the contract illegal. He recognized the equity in the fund, if it could be reached by a legal agreement, but there was no claim on the money, except through the medium of an illegal agreement, which, according to the determinations, cannot be supported. "How, then," says he, "are you to get at it except through this agreement? There is nothing collateral, in respect of which, the agreement being out of the question, a collateral demand arises." In the case at bar the entire cause of action is on the agreement, which is void through public policy. The complainant depends altogether upon that agreement, and seeks to set aside everything that has been done, and to enforce the specific performance of that agreement. He asks the court "to enforce this illegal contract, and requires the aid of the illegal transaction to establish his case." It follows that the contract under consideration can neither be enforced nor made the basis of any relief in a court of equity. The maxim *in pari delicto* applies. The court will leave the parties to such a contract precisely where it finds them. "Courts cannot be made the handmaids of iniquity." *Bank v. Owens*, 2 Pet. 539.

It is urged, however, that the complainant, on the very afternoon of the day on which the city council gave the franchise, exposed his agreement with Shield in a public print. Assuming that this was seen by the members of the council, it cannot avail him. The wrong complained of is not that he concealed his contract, but that he made the contract; not that he pretended still to seek a franchise, but that he sold himself out, and, doing so, defeated competition, shut the city council in to but one bidder, deprived the public of that contention among bidders which would protect the public from loss, and secure the highest price for the sale of the franchise. This is not a case in which a court of equity should interfere, and the decree of the circuit court should be affirmed, without prejudice, however, to

any right which complainant may have to seek relief, if any he be entitled to, in a court of law.

The CIRCUIT JUSTICE concurred in the result, on the ground that the remedy of the complainant, if any, was at law.

In this conclusion, also, SIMONTON, Circuit Judge, concurred.

BRAWLEY, District Judge. I dissent. Hyer and Shield were rival promoters, each seeking from the city council of Richmond a franchise for a street railway on Broad street, and both looked to Stewart, a banker in New York, for the money to carry out the enterprise. Hyer had already obtained a franchise from the council, and was asking for some amendments thereto. Stewart, fearing that the continued rivalry might result in the defeat of both, or in the obtaining of a franchise of such nature that capital would not embark in it, advised the parties to come together, and they united in an agreement for mutual co-operation, and for an equal division of whatever profits were realized. The agreement does not, on its face, bear any of the indicia which mark a dishonest purpose. It does not show, nor can it be reasonably inferred, that any sinister, extraneous, or corrupting influences were to be brought to bear upon the city council of Richmond to superinduce the granting of the franchise, nor is it alleged that any improper means were to be used to accomplish it, and thus it is clearly distinguished from all that class of cases where the courts have held contracts void as reeking with corruption, such as using official influence for private gain, securing public office for pay, retiring from competitive candidacy under agreements to divide fees, securing public contracts upon like terms, or bargains for lobbying services to influence legislation. None of those elements enter here, and the sole ground upon which the decision rests is that the agreement was calculated to diminish competition for the obtaining of the franchise. It is not contended, nor can it be assumed, that Hyer or Shield, either or both, had such control or monopoly of the building of street railways that they could, by combination, put up the price, or demand an unusual or unreasonable franchise, or embarrass the city of Richmond, and thus injure or jeopardize the public interest, either by their action or nonaction. A rule that might be justly applicable to a kind of business which could not be restrained to any extent whatever without prejudice to the public interest ought not to be arbitrarily extended so as to interfere with that freedom of contract which is a fundamental right. The franchise in question was not a thing that was put up at public auction, and bound to go to the lowest bidder, where a combination to chill the bidding might be held to be in contravention of the public interest. The city council of Richmond, faithful, as it must be assumed, to its obligations to the public, was not bound to give the franchise to this or any other combination except upon such terms as it chose to annex, and there was no agreement for any corrupting influences to affect its action. An honest co-operation between two parties to effect an

object which neither could accomplish by itself is not forbidden, although, in a sense, that might tend to lessen competition. There is a competition that kills, as there is a combination that saves. Competition in itself is not invariably a public benefit, and, to hold a contract void because its tendency may be to defeat competition, it must appear that the benefit to be derived from it is certain and substantial, and not theoretical and problematical. The rivalry of impecunious promoters in the obtaining of a franchise for an important public work requiring large capital for its fulfillment is not of such certain advantage to the public that the law should be invoked to prevent its suppression. When such men discover a field where capital can be profitably employed, and, seeking its aid at the same source, are informed that the money necessary to develop it can only be obtained upon the condition of their joint co-operation, and they voluntarily combine in furtherance of the enterprise, there can be no objection to it if it is done honestly and in good faith. Unless such a contract, either on its face or viewed in the light of the circumstances surrounding it, clearly discloses the fact that improper means and influences are to be used to accomplish the desired end, it should be sustained. "If there is one thing," says Sir George Jessel in a recent case, "which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice." All presumptions are in favor of the legality of contracts; all reasonable intendments are indulged to support them; if capable of a construction that will uphold and make them valid, they are not to be held illegal unless the circumstances are so strong and pregnant that no other reasonable conclusion can be drawn from them, for intention to violate the law is not to be presumed.

The extent to which the doctrine of invalidating contracts of this nature may be safely carried is not clearly defined, and there is no immutable standard by which this rule is to be tested. Within it are clearly embraced all cases of fraudulent acts, and all combinations having for their object the stifling of fair competition at bid-dings with the design to become purchasers at a price less than the fair value of the property, but combinations for mutual convenience, with a view to enable parties to do in common what neither could do individually and which do not disclose a dishonest purpose, are as clearly not within the rule. Courts must determine each case according to its peculiar facts and circumstances, and can only determine rightly when those circumstances are considered in their relation to the reason and grounds of the rule. In *Atcheson v. Mallon*, 43 N. Y. 147, the case cited in support of the adverse view, Justice Folger says:

"But a joint proposal, the result of honest co-operation, though it might prevent the rivalry of the parties, and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and avowed, and not secret. The risk, as well as the profit, is joint, and openly assumed. The public may obtain at least the benefit of the joint responsibility and of the joint ability to do the service. The public agents know then all that

there is in the transaction, and can more justly estimate the motives of the bidders, and weigh the merits of the bid."

That Hyer and Shield had made this agreement was no secret. The fact was published in the newspapers in Richmond on the afternoon before the city council passed the ordinance granting the franchise, and we have no complaint from that city—from the party supposed to be injuriously affected—that the suppression of competition has induced the granting of a franchise not duly regardful of the public interests. The bill states that it was Hyer's intention to lay the whole matter of this agreement before the city council, and there is no ground for the suspicion that there was any concealment. I have not thought it necessary to consider carefully the effect upon this contract of the rule stated by Lord Cottenham in *Sharp v. Taylor*, 2 Phil. Ch. 801, and approved in *McBlair v. Gibbes* and *Brooks v. Martin* and other cases in this country, although I am inclined to the opinion that the doctrine there announced is directly applicable. Here the contract to obtain the franchise which is held to be illegal has been consummated, the franchise has been obtained, the aid of the court is not sought to enforce it, nor can the franchise be in any manner affected by what it may do; the transaction alleged to be illegal is completed and closed; one of the parties is in possession of all the fruits, and the other seems to me to be entitled to recover in an appropriate action his share of the realized profits. Public policy requires that men should perform their contracts, and they ought not to be allowed to evade their obligation upon vague and shadowy grounds. If this were a proceeding on the part of the city of Richmond to vacate the charter on the ground that it was obtained by any corrupt practices, or by the suppression of fair competition, the court should lend attentive ear to every suggestion of improper conduct on the part of the promoters; but the judicial conscience should not be awakened for the protection of one who seeks to avoid a contract of his own seeking on the ground that it was immoral, and therefore that he has the right to make off with the swag. Those who have legitimately invested their brains and capital in this enterprise of public utility should not be harassed by the injunctions and other processes which would impede its successful consummation, but the plaintiff is, in my opinion, entitled to an accounting and to a share of the profits realized by his co-promoter, and the bill, limited in its scope to that object, should be retained.

UNITED STATES v. UTZ et al.

(Circuit Court of Appeals, Third Circuit. April 30, 1897.)

1 CONTRACT WITH GOVERNMENT—CARTAGE OF IMPORTED GOODS.

Petitioners contracted with the United States to do all the cartage of merchandise in custody of the government, imported at New York, from the vessel, and from the general order store and warehouse to the public store, for two years, at 18 cents per package, excepting "sample packages," which were to be carted at 1 cent each. *Held*, that "sample packages" was not limited to sample packages containing nondutiable goods,

but included all sample packages, whether dutiable or not. 75 Fed. 648, reversed.

2. LIMITATION OF ACTIONS—SUITS AGAINST UNITED STATES.

A right of action against the government, under a contract for cartage of imported goods in its custody, accrues as soon as the money becomes due, without a prior presentation of the claim to the executive department for allowance; and hence the six-years limitation in the act of March 3, 1887, begins to run from that time, and is not interrupted by such presentation of the claim, or while it is under investigation or in course of auditing by executive officers. 75 Fed. 648, reversed.

In Error to the Circuit Court of the United States for the District of New Jersey.

This was a suit against the United States by William Utz, Thomas M. Garrett, and William H. Kirby, to recover a sum of money alleged to be due for cartage of imported goods while in custody of the customs officers at the port of New York. The circuit court entered a judgment for the petitioners (75 Fed. 648), and the United States bring error.

J. Kearney Rice, for the United States.

Chas. A. Hess, and Henry S. White, for defendants in error.

Before ACHESON and DALLAS, Circuit Judges, and BUFFINGTON, District Judge.

ACHESON, Circuit Judge. This cause is a proceeding under the act of congress of March 3, 1887, entitled "An act to provide for the bringing of suits against the government of the United States," whereby jurisdiction is conferred upon the circuit courts of the United States, concurrently with the court of claims, to hear and determine certain claims against the government of the United States. 24 Stat. 505. The suit was commenced in the court below on the 23d day of February, 1895. The claimants, William Utz, Thomas M. Garrett, and William H. Kirby, in their petition, set up as the foundation of their claim a written contract, dated January 15, 1886, entered into by and between the petitioners, as parties of the first part, and the United States, as party of the second part, whereby it was agreed that the petitioners would do all the cartage of merchandise in the custody of the government at the port of New York "from the sixteenth day of January, 1886, up to and including the fifteenth day of January, 1888, at the rate of eighteen (18) cents per package for all packages from the importing vessel, and from general order store and warehouse to public store, with the exception of sample packages; and that said parties of the first part will cart all sample packages from all points at the rate of one (1) cent per package, the said parties of the first part paying all ferriage incurred in carrying out this agreement." The suit was brought for the recovery of a balance alleged by the petitioners to be due to them from the United States under this contract, the petitioners averring that they had carted a large number of packages, upon which they were entitled, under the contract, to receive payment at the rate of 18 cents per package, but upon which packages they had received payment at the rate of only 1 cent per package. The court below sustained the claim of the petitioners to the extent of

\$4,501.77, and gave judgment in their favor against the United States for that sum. The case is here upon a writ of error sued out by the government.

Two principal questions are here involved: First, whether the term "sample packages," as used in the contract, covered only such packages as consisted of nondutiable samples, or whether it also embraced packages consisting of dutiable samples; second, whether the claim of the petitioners was barred by the statutory limitation.

The defendant below submitted to the court the following proposition:

"That as the plaintiffs and petitioners made a binding agreement with the defendant to cart all sample packages of merchandise for the sum of one (1) cent per package, that no other or greater amount than the said sum of one (1) cent per package could be recovered, it being immaterial whether the sample packages so carted contained dutiable goods as samples, or samples of goods which were free from paying duty to the United States."

This proposition the court denied; and, in stating its conclusion of law, the court, upon the mere assumption that the rate of cartage for "sample packages" was fixed so low, because of the lack of revenue to the government from such packages, said:

"It seems quite clear that the true test of a 'sample' lay in the fact that it was undutiable. The mere marking of packages as 'samples' by the shipper or others could in no wise affect the rights of these plaintiffs under this contract. The criterion by which packages were to be classified is to be found in the character of goods which they contained, whether they were dutiable or nondutiable. For, all packages carted the plaintiffs were to receive eighteen cents per package, excepting those which were samples, i. e. nondutiable. For these but one cent was allowed."

We are not able, however, so to read this contract. We search its provisions in vain to find any warrant for holding that the cartage of "sample packages," if they contained duty-paying merchandise, was to be at the rate of eighteen cents per package, and that only "sample packages" consisting of nondutiable merchandise were to be carted at the rate of one cent per package. No such distinction is expressed or hinted at in the contract. By their agreement the parties fixed the cartage rate of eighteen cents per package for all packages, "with the exception of sample packages"; and then followed the explicit stipulation "that said parties of the first part will cart all sample packages from all points at the rate of one (1) cent per package." The contract having thus clearly provided that "all sample packages" should be carted at the rate of one cent per package, how can the court, proceeding upon the basis of the contract itself, declare that that rate of compensation was applicable only to one particular class of sample packages? To do this would be not to construe doubtful language in order to reach the imperfectly expressed intention of the parties, but to make a material alteration in their plain stipulation. The court is not at liberty, upon a mere conjecture as to the supposed actuating motive of the parties, to introduce into their stipulation a qualifying term, and thus restrict the stipulation to dutiable sample packages, when the parties have said "all sample packages." We are of the opinion that the court below erred in holding that, under this contract, the petitioners

were entitled to recover more than one cent per package for the cartage of sample packages which contained dutiable merchandise.

The first section of the said act of March 3, 1887, contains a proviso in the words following:

"Provided, that no suit against the government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made."

This provision, it will be perceived, is jurisdictional. To maintain a suit under the act, it must be commenced within six years after the alleged right accrued. Here the petitioners' right of action fully matured in February, 1888. This suit was not brought until more than seven years after the rights accrued for which the claim is made. In the face of the above-quoted proviso, how could this suit be entertained when it was brought?

In sustaining the action, the court below relied upon *U. S. v. Lippitt*, 100 U. S. 663, 669. That case, however, ruled merely that the limitation prescribed by the act of March 3, 1863, amendatory of the act establishing the court of claims, does not bar in that court a claim referred to it for determination by the head of an executive department under statutory authority, provided it was presented for settlement at the proper department within six years after it accrued. The supreme court there said:

"The cases thus transmitted for judicial determination are, in the sense of the act, commenced against the government when the claim is originally presented at the department for examination and settlement. Upon their transfer to the court of claims, they are to be 'proceeded in as other cases pending in said court.'"

There was a like ruling in the case of *U. S. v. New York*, 160 U. S. 598, 16 Sup. Ct. 402. The case in hand, however, is not governed by these decisions, which relate exclusively to claims transmitted by the head of an executive department to the court of claims for final adjudication. Here the bringing of suit within six years after right accrued was a condition not to be avoided by the claimants. Undoubtedly, the right of action accrued to these petitioners as soon as the money claimed by them became payable by the terms of the contract sued on. To sustain a suit therefor against the government, it was not necessary for the claimants to present their claim to an executive department before suing. *Clyde v. U. S.*, 13 Wall. 38.

Now, the petitioners' right having fully accrued in February, 1888, the six-years limitation began to run then. The presentation of the claim to the treasury department in the year 1893 did not stop the running of the statute, nor was the petitioners' right of action suspended during the investigation of the claim by the executive officers. The forbearance of the claimants to sue was altogether voluntary on their part, and it is not within the power of the court to relieve them from the consequence of their failure to comply with the condition of the statute. *Finn v. U. S.*, 123 U. S. 227, 233, 8 Sup. Ct. 82. We are of opinion that this suit was brought too late, and that the court below erred in overruling the defense on that ground, set up by the government. This conclusion accords with

the decision of the court of claims in the well-considered case of *Carlisle v. U. S.*, 29 Ct. Cl. 414.

We have not overlooked the finding of the court below that in the year 1893, "under and by directions of the secretary of the treasury, the said claim of the petitioners was audited by the collector of customs at the said port of New York at the sum of \$4,501⁷⁷/₁₀₀, and that sum was then and there found to be due said petitioners from the defendant." It is, however, very certain that the so-called "audit" by the collector did not partake of the nature of a judicial determination. It was a mere reference of the claim by the treasury department to the collector for examination and report. The action of the collector was merely advisory. His report bound nobody. Had it been unfavorable to the petitioners, it would not have concluded them. *U. S. v. Harmon*, 147 U. S. 268, 13 Sup. Ct. 327. It is authoritatively settled that "the action of executive officers in matters of account and payment cannot be regarded as a conclusive determination when brought in question in a court of justice." *Wisconsin Cent. R. Co. v. U. S.*, 164 U. S. 190, 205, 17 Sup. Ct. 45.

Nor can we accept the suggestion that the action of the collector relieved these claimants from the operation of the statutory limitation. Here we may appropriately quote the language of the supreme court in *Finn v. U. S.*, *supra*:

"An individual may waive such a defense either expressly or by failing to plead the statute; but the government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the courts of claims."

The judgment of the circuit court is reversed, and the cause is remanded to that court, with direction to dismiss the petition.

UNITED STATES v. CARLOVITZ et al.

(Circuit Court of Appeals, Fifth Circuit. April 20, 1897.)

No. 557.

EVIDENCE—TRANSCRIPT FROM TREASURY DEPARTMENT BOOKS.

In a suit by the government on the bond of a postmaster to recover a balance due from him, a duly-certified transcript of the books of the treasury department, showing the account between such postmaster and the United States, is competent evidence, and is sufficient to establish a *prima facie* case, though open to rebuttal.

Error to the Circuit Court of the United States for the Northern District of Florida.

J. Emmet Wolfe, for the United States.

W. A. Blount and A. C. Blount, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

McCORMICK, Circuit Judge. It appears from the record that John Carlovitz was postmaster at Milton, Santa Rosa county, Fla., from October 1, 1885, to June 30, 1888, and had given bond as such

postmaster, with approved securities. On January 6, 1888, the postmaster general made the following order:

"Order No. 4.

"Being satisfied that John Carlovitz, P. M., Milton, Santa Rosa county, Florida, has made false returns of business at the post office at said place during the period from January 1, 1881, to March 31, 1887, in order to increase his compensation beyond the amount he would justly have been entitled to have by law: Now, in the exercise of the discretion conferred by the act of congress entitled 'An act making appropriations for the service of the post-office department for the fiscal year ending June 30, 1879, and for other purposes,' approved June 17, 1878 (section 1, chapter 259, Supplement to Revised Statutes), I hereby withhold commissions on the returns aforesaid, and allow as compensation (in place of such commissions and in addition to box rents and commissions on sales of waste paper, twine, etc.), deemed by me under the circumstances to be reasonable, during the period aforesaid, as follows: From January 1st, 1881, to March 31, 1883, the rate of \$127.50 per quarter, and from April 1, 1883, to March 31, 1887, the rate of \$152.50 per quarter, and the auditor is requested to adjust his accounts accordingly.

"[Signed]

Wm. F. Vilas, Postmaster General."

In accordance with the request in the foregoing order, the auditor for the post-office department made up the account of the postmaster from October 1, 1885, to the end of the second quarter, June 30, 1888, showing a balance due the government by the postmaster of \$339.29, which balance was thereafter duly demanded of the postmaster, and of the several sureties on his bond. The demand not being complied with either by the postmaster or his sureties, the government instituted this suit to recover the balance due.

Issue was joined on the defendants' plea of payment. The government offered in evidence a duly-certified copy of Order No. 4, given above, a statement of account between the government and the postmaster from the office of the auditor for the post-office department showing the balance claimed, and made the proper proof of notice to and demand on the postmaster and the sureties on his bond. To the reading of the duly-certified transcript of the books of the United States treasury department showing the post-office account between the United States and the said John Carlovitz, postmaster, upon which account the suit was based, the defendants, by their attorneys, objected, because said transcript showed on the face thereof that the balance therein stated as due by said Carlovitz to the United States was the result of an arbitrary readjustment of the account of the said Carlovitz as postmaster by the auditor for the post-office department in pursuance of an order issued by the postmaster general, and that said transcript, in connection with the foregoing order of the postmaster general, could not make out a prima facie showing of the indebtedness of the said postmaster, Carlovitz, to the United States; which objection was sustained by the trial judge, and the transcript of the said statement of account showing the balance sued for was excluded from the jury. The plaintiff rested its case, and the court directed the jury to find a verdict in favor of the defendants, which was done, and judgment rendered thereon. The action of the court in excluding the evidence offered is assigned as error, and we are of opinion that the assignment is well taken. Substantially the identical question involved

in this assignment was presented to the supreme court in the case of *U. S. v. Dumas*, 149 U. S. 278, 13 Sup. Ct. 872, in which that court say:

"As to the competency, merely, of this evidence, there can be no question, for it is provided by section 889, Rev. St., that 'in any civil suit in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits.'"

It is unnecessary for us to review the authorities, which are fully cited and sufficiently reviewed by the supreme court in the case just cited. As said by Mr. Justice Jackson in the opinion in that case, there can be no question as to the competency merely of this evidence. There is just as little room to question that this evidence, standing alone, constitutes a *prima facie* case that would sustain and require a judgment in favor of the government. It is equally clear, however, that it constitutes only a *prima facie* case, and is subject to be met by other competent proof. It follows that the judgment of the court below should be reversed, and the cause remanded for further proceedings therein according to law, and it is so ordered.

RICHARDSON v. McLEAN et al.

(Circuit Court of Appeals, Fifth Circuit. May 4, 1897.)

No. 551

JOINT ADVENTURES—CONVEYANCE TO SECURE ADVANCES—REDEMPTION.

Where one party has advanced money to another to be used in the purchase of property for their joint benefit, and the latter has taken title to such property in his own name, and conveyed it to strangers, as security for further advances for his own use, the original lender is entitled to redeem such property from the persons to whom it has been conveyed, and to obtain a reconveyance from them on payment of their advances.

Appeal from the Circuit Court of the United States for the Southern District of Florida.

George W. Radford and J. C. Cooper, for appellant.

J. N. Stripling, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

McCORMICK, Circuit Judge. In 1890, Albert L. Rice was president of a projected railroad in Florida, called the "Gainesville, Tallahassee & Western Railroad." He and others interested with him saw in the *New York World* a notice stating that Christopher W. McLean, of Toledo, Ohio, had just met with great success, and made a large amount of money, in building the first electric railroad in that city. Mr. Rice thereupon opened correspondence with Mr. McLean, which resulted in the latter visiting Florida in the month of March, 1890, and entering into business arrangements with the projectors of the above-named railroad. Soon thereafter Mr. McLean had

negotiations with Mrs. E. J. H. Richardson, of Detroit, Mich., which ripened into an agreement evidenced by this memorandum in writing, duly executed by them, respectively:

"This memorandum of agreement, made and entered into between Mrs. E. J. H. Richardson, of Detroit, Michigan, and C. W. McLean, of Toledo, Ohio, this 30th day of April, 1890, viz.: Whereas, C. W. McLean is about to enter into a contract to build a land-grant railroad in the state of Florida, from Gainesville to Tallahassee, and to such other points as he may think best, or to purchase any railroad now constructed or under construction, and one hundred thousand dollars is needed for such purchases, survey, and construction before the railroad can be bonded to continue construction, the said Mrs. E. J. H. Richardson has this day paid C. W. McLean the sum of thirty thousand dollars on account of this agreement, and hereby authorizes C. W. McLean to use this first thirty thousand dollars to buy phosphate, timber, and other lands, lots, town sites, or to obtain option on same, and to use this money, using his own discretion in investing this money as he may desire, hoping thereby to receive some portion of the hundred thousand dollars needed to prepare railroad for bonding. C. W. McLean does hereby agree to obtain life insurance on his life for the benefit of Mrs. E. J. H. Richardson, to cover whatever amount is paid by her to him, in order that, in case of his death, she will be able promptly to secure amount of money or moneys so advanced by her, as much depends on the life of C. W. McLean to bring this matter to its fullness. It is further understood and agreed that the net profits made in all and each transaction mentioned in this agreement are to be divided equally, share and share alike, between Mrs. E. J. H. Richardson and C. W. McLean, Mrs. Richardson furnishing the money mentioned in this agreement, C. W. McLean being responsible for one-half the amount advanced by Mrs. E. J. H. Richardson."

Some difficulty arose with the minority stockholders in the Florida railroad project, attended with litigation and delay, pending which McLean directed his attention to dealing in phosphate lands, of which then and later he acquired considerable quantities, taking title in his own name, generally without alluding to any other beneficial ownership, but in a few instances taking the title to himself as trustee, without any further declaration of the trust. When matters had progressed for something more than a year, further negotiations between McLean and Richardson ripened into a second agreement, evidenced by a written memorandum duly executed by them, as follows:

"Whereas, in the month of April, 1890, C. W. McLean, of Toledo, Ohio, and Mrs. E. J. H. Richardson, of Detroit, Michigan, entered into an agreement or partnership, wherein Mrs. E. J. H. Richardson was to furnish money for buying phosphate, timber, and other lands, town and city lots; buy, sell, or lease railroads, or build them in or out of the state of Florida; sell or operate railroads, or mine phosphate, or to form phosphate companies, one or more; buy and sell real estate and other properties in Ohio, Florida, or other states: It is understood and agreed that both are to share, and share alike, in all profits, whether in money, stocks, or bonds, land, city and town lots (whether they may prove to be phosphate or mineral lands or not), railroad lands or terminals, or interests in harbors or seaports; also the Red Sulphur Spring near Old Town, on the Suwannee river, in the county of Lafayette, state of Florida; in fact, to share, and share alike, in the net proceeds of all business by C. W. McLean for five years from the date of this instrument. The said Mrs. E. J. H. Richardson having contributed fifty thousand dollars in cash at various times, for which C. W. McLean has given his receipts, and has loaned to the company or co-partnership, at various times, stock in the Diamond Match Company, of Chicago, which stock is to be returned to the said Mrs. Richardson as soon as it can be safely done, and will not cripple the operations of said McLean, said C. W. McLean has placed in the hands

of Lobdell, Farwell & Co., of Chicago, Illinois, sixty thousand dollars, par value, for which receipts have been given, on which he has borrowed sixty thousand dollars, and has also received fifty-four thousand dollars, par value, and this day, 8th of July, forty-two thousand more of said stock, viz.:

\$60,000 in Lobdell, Farwell & Co., Chicago, Ill.

54,000

42,000

\$156,000, par value,

—C. W. McLean still having fifty-four thousand on hand, and forty-two this day delivered to him; C. W. McLean having obtained a temporary loan on eighteen thousand dollars of said fifty-four thousand, of ten thousand five hundred dollars, which said Mrs. Richardson received this 8th day of July, 1891, the receipt of which is hereby acknowledged. The said C. W. McLean is to obtain a loan as soon as possible for twelve thousand dollars, which, when done, Mrs. Richardson is to deliver said C. W. McLean the further sum of fifty-six thousand (par value) of Diamond Match stock, and said McLean to remit said Mrs. Richardson the further sum of thirty thousand dollars. The remainder of the stock to be used by said McLean as he thinks best, for the mutual advantage of both parties, and to be returned when it can be done without injury to the enterprises on hand by C. W. McLean. It is further agreed by C. W. McLean that, as soon as the certificate of stock is issued in the Gulf Stream Phosphate Company, of Florida, the company will send or deliver to said Mrs. Richardson four hundred thousand dollars of said stock, and also same out of Construction Company stock; also eight hundred thousand dollars of the stock of the Florida, Georgia & Western Railroad. All the above stocks are full paid and nonassessable. The above stocks all to be delivered to said Mrs. Richardson as soon as engraved, signed, and sealed. It is further agreed by C. W. McLean that in case of the death of said C. W. McLean, and any loss should be sustained by Mrs. Richardson in consequence of death or otherwise, that the interest of said C. W. McLean in the above properties and stocks shall be sold as soon as possible, without sacrifice, to pay said E. J. H. Richardson in full, with interest. It is further agreed that, when Mrs. E. J. H. Richardson desires to sell the Diamond Match stock pledged for our mutual interests, she is empowered to take up said stock at any time she thinks best to do so. It is further agreed that, in case of death of either party, the business is to be carried on for the benefit of whom it may concern for the full term of five years.

C. W. McLean.

"Detroit, Mich., July 8th, '91.

E. J. H. Richardson."

About December 1, 1891, the enterprises as conducted by McLean began to need urgently further funds than he had in hand. Mrs. Richardson had advanced all the capital she conveniently could, or, at least, was willing to put into the enterprises, and McLean had to look to other sources for raising money to save from forfeiture and from seizure of creditors the property already acquired. About December 12, 1891, he began getting money from Nathan C. Pond. Mrs. Richardson began to be restless under her disappointment in not getting the promised and expected returns from her investments with McLean, and still further negotiations were had between the partners, the result of which is expressed in a third written memorandum, in the following terms:

"It is understood by and between Mrs. E. J. H. Richardson and C. W. McLean that Mrs. Richardson redeed to him property purchased of him in November last, he returning the mortgages canceled, in what is known as the 'Glassboro Addition,' in Toledo, Ohio, and to free her in the purchase of the Windsor Hotel of Mary Wolf Van Hamm, provided she (Mrs. Richardson) sign release herself. C. W. McLean is to go on with the construction of the Florida, Georgia & Western Railroad, laying ten miles of track, grading and tying forty miles, in order to secure the first land grant, and to do this as

soon as possible on or before four months. Said McLean to renew notes with Lobdell, Farwell & Co., on Diamond Match stock, par value of stock being \$212,000, until it is returned to her. It is further understood and agreed that Mrs. Richardson is to have one-half of the stock in the Florida, Georgia & Western Railroad, half the stock in the Interstate Land Construction Company, and one-half the stock in the Gulf Stream Phosphate Company,—all of the state of Florida. She already having two-fifths of the stock of the railroad and two-fifths of the stock of the Interstate Land Construction Company, she therefore is to receive one-tenth more in each of these companies. In the Gulf Stream Phosphate Company she has not received any, but is to receive one-half. These stocks are to be issued to her just as soon as the companies can be reorganized, and no delay beyond the necessary delay of doing this. It is further understood and agreed that said Mrs. Richardson is in no way to interfere with my operations, or this contract is null and void. It is further agreed that I, C. W. McLean, agree to deed the phosphate lands that stand in my name at this date to the Gulf Stream Phosphate Company as soon as organized, without any unnecessary delay."

McLean continued from time to time to get money from Nathan C. Pond, to whom he transferred, December 14, 1891, two policies of insurance on McLean's life; and on April 2, 1892, he deeded to Louis K. Pond, the son of Nathan C. Pond, a considerable amount of the Florida lands theretofore acquired. The policies of insurance and the lands deeded to Louis K. Pond were subsequently conveyed to Sarah E. Pond, who was the wife of Nathan C. Pond, and the mother of Louis K. Pond. In connection with the Florida enterprises, McLean had dealings with James M. Mayo, Sidney I. Wailes, and John C. Daves.

On March 27, 1893, the complainant, E. Jennie H. Richardson, exhibited her bill against Christopher W. McLean, Nathan C. Pond, Louis K. Pond, Sarah E. Pond, James M. Mayo, Sidney I. Wailes, and John C. Daves. To this bill, only Nathan C. Pond, Sarah E. Pond, and Louis K. Pond answered. They filed a joint and several answer. The issues as to all the other defendants were found in favor of the complainant by the decree of the circuit court, and there is no complaint of so much of that decree. In reference to the defendants who answered, the bill charges as follows:

"That the said defendant McLean, in violation of said agreements with your said oratrix, and in violation of his said trust, has purported to convey or mortgage to the defendants Louis K. Pond or Sarah E. Pond certain portions of said trust lands above mentioned, purchased as aforesaid with the funds of your oratrix, or with funds procured by said McLean upon her stocks as collateral, as aforesaid. Said portions of said lands so conveyed or mortgaged to said defendants Louis K. Pond or Sarah E. Pond, or one of them, are described as follows, to wit: * * *. That your oratrix charges and alleges that the said transaction between the said McLean and the said Ponds was a loan from the said Ponds, or one of them, or from one Nathan C. Pond to the said McLean, the exact amount of which your oratrix cannot state without discovery from the said defendants; but she charges and alleges that the same was not more than the sum of twenty thousand dollars, and the defendants should be required to make discovery of the true amount so paid by the said Ponds, or either of them, to said McLean. Your oratrix further charges and alleges that any deed or deeds executed by the said defendant McLean to the said Louis K. Pond, or to the said Sarah E. Pond, were intended to secure the repayment of a loan of money made by the said Ponds, or one of them, or Nathan C. Pond, to the said McLean; and any such deed or deeds are, in law and equity, mortgages subject to redemption, and do not convey to the said Ponds, or either of them, the complete title in fee in and to said lands described in said deed or deeds. That at the same time that

the said mortgages, deed, or deeds were executed by said defendant McLean to said defendants Ponds, and at the same time that the said money, if any, was paid by the said defendants Ponds to the said defendant McLean, they or Nathan C. Pond obtained from him, and he assigned to them, or one of them, certain policies of insurance upon his life, as additional security to secure the repayment to them, or one of them, of the money so advanced by them, the said Ponds, to him; thus evidencing that the true nature of the transaction between the said Ponds and the said McLean was a loan of money by them to him, for which he was giving them security upon said lands and upon said life insurance."

The prayer of the bill, as against the defendants Pond, is as follows:

"That an accounting be had of what amount, if any, was paid or advanced by defendants Louis K. Pond or Sarah E. Pond or Nathan C. Pond to the defendant McLean, and that the deed or deeds from the said McLean to said defendants Ponds or either of them, be decreed to be mortgages, and they be decreed to hold the title to said property in trust for your oratrix, in place and stead of said McLean, as trustee, or on payment to them by your oratrix of the amounts found paid by them to the defendant McLean; that they be decreed to convey and transfer to your oratrix the title to said lands so conveyed to them by defendant McLean, and to assign and transfer to your oratrix any and all insurance policies upon the life of said McLean, or other securities transferred to them by said defendant McLean."

On the issues joined between the complainant and the defendants Pond, the circuit court decreed as follows:

"It is further ordered, adjudged, and decreed that the deeds from the said defendant McLean to defendant Louis K. Pond * * * were, in effect, mortgages only upon said lands, given to secure the defendant Nathan C. Pond for moneys advanced to said defendant McLean by said defendant Nathan C. Pond, prior to the 24th day of May, 1892, for the purpose of carrying on the enterprises mentioned in the contracts (Exhibits A, B, and C) between said complainant and said defendant McLean; and that said Louis K. Pond held said mortgages for and on account of moneys loaned and obligations incurred by said defendant Nathan C. Pond and Louis K. Pond, without any personal interest, right, or title thereto in said Louis K. Pond, except as aforesaid. * * * It is further ordered, adjudged, and decreed that this cause be referred to Francis P. Fleming as a special master in chancery, for the purpose of taking proofs, and stating the account, of the amount of such advances and loans and obligations made by said Nathan C. Pond and Louis K. Pond to the defendant Christopher W. McLean, prior to the 24th day of May, 1892, for the purpose of carrying on the enterprises embraced in the contracts (Exhibits A, B, and C) between complainant and said defendant McLean above mentioned, and taxes on said lands; and that, in taking said account, the said master shall deduct from the amount of any such advances the sum of \$10,000, received by the said defendants Ponds, or either of them, from the surrender of two certain life insurance policies held by them upon the life of said Christopher W. McLean, as security for said advances [with directions as to allowing interest]."

The master took testimony, and stated the account, as required by the reference, and, by his report, showed a balance due Nathan C. Pond, or his assigns, on February 3, 1896, of \$35,877.83, which, with interest up to the date of the decree, July 28, 1896, amounted to \$36,924.27, in addition to which an amount of \$657.43, for taxes paid by Sarah E. Pond, and interest thereon to date of the final decree, were found by the final decree to be a charge on the lands in question, which lands, it was adjudged, should be reconveyed by said Nathan C. Pond, Louis K. Pond, and Sarah E. Pond to the complainant upon her payment of the charges above fixed, or, in the event of such pay-

ment being made, and the failure to convey, the decree was to operate with the same force and effect as such conveyance; "and, upon the failure to make such payment within six months, said right of redemption shall be considered forfeited."

As we construe the record in this case, the interlocutory decree entered April 15, 1895, found every issue made by the complainant's bill in favor of the complainant, and a careful examination of the testimony satisfies us that the directions given by the judge of the circuit court to the special master for stating the account were such as the case required, and appear to have been satisfactory at the time to all the parties, or at least were acquiesced in by all. Thereafter a large amount of proof was taken before the master. Much of it received by the master, subject to objections made at the time by counsel for the defendants, was impertinent to the investigation the master was charged to make, and was doubtless disregarded, as it should have been, by the judge of the circuit court when he came to act upon the complainant's exceptions to the master's reports. After a laborious and careful examination of the record in this case, we find nothing that would justify us in coming to a different conclusion than that expressed in the decree appealed from. It appears to us to be a case presenting only questions of fact. There seems to be no dispute between the parties (and there could hardly be) as to the law applicable to the case made by the bill and answer and proof. The decree of the circuit court, therefore, is affirmed.

CITY NAT. BANK OF QUANAHA, TEX., v. CHEMICAL NAT. BANK OF ST. LOUIS, MO.

(Circuit Court of Appeals, Fifth Circuit. May 11, 1897.)

No. 522.

BANKS AND BANKING—BORROWING BY CASHIER—LIABILITY OF BANK.

The cashier of the Q. Bank, who, in addition to his usual powers as such, was allowed by the officers to have full control of its business, applied to a bank in another city for accommodation, sending to the latter bank what purported to be the signatures of the officers of the Q. Bank and a resolution of its directors authorizing him to borrow money and rediscout paper. Thereafter loans were made to the Q. Bank on its notes, signed by the cashier in its name. It was customary for banks in the region where the Q. Bank was located to borrow at certain seasons, and everything connected with the transaction was apparently done in the usual and regular course of business. *Held*, that the Q. Bank was liable on the notes signed by the cashier, though it afterwards appeared that the signatures of the officers and the resolutions sent by him to the lending bank were forgeries, and the proceeds of the loans were used by him for his own benefit.

Error to the Circuit Court of the United States for the Northern District of Texas.

Duncan G. Smith, for plaintiff in error.

J. E. Gilbert, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

NEWMAN, District Judge. In this suit by the Chemical National Bank of St. Louis, Mo., against the City National Bank of Quanah, Tex., the plaintiff by its petition sought to recover against defendant on certain promissory notes executed by the defendant bank through its cashier, William F. Brice. There was also an account in the petition for money loaned, covering the same transaction as that embodied in the notes. The City National Bank defended on the ground that the action of Brice was not its action, and that it never made the loans or executed the notes, and that the transaction by Brice was for his personal benefit, and did not inure to the benefit of the bank in any way. The record discloses the fact, which is undisputed, that Brice was the cashier of the City National Bank, and that in 1894 he applied to the cashier of the Chemical Bank for accommodations, proposing to keep a balance in the Chemical Bank, and to send it the collections in St. Louis of the City National Bank. Brice also sent to the Chemical National Bank, to be used for comparison, what he represented to be, and what purported to be, the signatures of the officers of the City Bank; also what purported to be a resolution of the directors of the City Bank, authorizing him as cashier to borrow from time to time, and to rediscount with the Chemical Bank, the whole or any part of \$10,000, and to deposit as collateral paper made by the customers of the City National Bank. The correspondence resulted in an agreement between the cashiers of the two banks, and on August 27, 1894, a note for \$5,000 was sent by Brice to the Chemical Bank. This note was signed "City National Bank, by William F. Brice, Cashier," with the seal of the bank affixed. Certain collateral, amounting to \$7,640, consisting of what purported to be notes payable to the City Bank, was forwarded with this note. Subsequently a note similarly signed was made on September 27, 1894, for a like amount, with which collateral, or what purported to be collateral, amounting to over \$8,000, was placed. The proceeds of these notes, when discounted by the Chemical Bank, were placed to the credit of the City Bank, but unquestionably a large proportion of the amount was used by Brice for his individual benefit. Soon after these transactions 3,000 silver dollars were sent by the Chemical Bank, on a telegram requesting the same, signed "City National Bank," and this silver, according to the evidence, went into the vaults of the City Bank. There was considerable evidence in the case, but it need not be set out in detail, as the above statement embraces the material facts necessary to an understanding of the issues involved. The court directed a verdict, under all the evidence in the case, for the plaintiff, and the question presented is, was this action of the court right?

Not only did Brice, the cashier of the City Bank, have the usual powers of a cashier,—of general management of the bank's business as to loans, rediscounts, etc.,—but the testimony of the president shows that the actual management of the City Bank was left almost entirely to Brice after April 2, 1894. Brice seems to have been left by the president and directors of the bank, in connection with his son, as assistant cashier, in full control of the bank's business. The letters written by Brice in reference to loans from the Chemical

Bank, and all the correspondence, were on the regular letter paper, and so was what purported to be a copy of a resolution of the directors authorizing the loan. There was printed on all the paper so used this heading:

The City National Bank. Capital \$100,000.

G. S. White, President.
Wm. F. Brice, Cashier.

J. W. Golston, Vice President.
E. H. Brice, Asst. Cashier.
Quanah, Texas.

While it appears to be true that the signature of the president, though a good imitation of his genuine signature, was a forgery, and while what purported to be a resolution of the board of directors was also a forgery, there was nothing whatever to excite the suspicion of the officials of the Chemical Bank as to their genuineness. The action of Brice was within the general scope of his duties as cashier of the bank, and there was nothing whatever in it calculated even to arouse inquiry as to Brice's honesty, and as to the transaction being made in good faith on behalf of the City Bank.

Any authority that may be found to the effect that rediscounting the bank's paper does not come within the scope of the powers of the cashier of a bank would not be applicable to the facts here. There is evidence in this case to show that it was customary for similar banks in Texas, during certain seasons, to borrow money in this way. Considering the amount and character of these loans, and the whole nature of the transaction with the Chemical Bank, there was nothing done, as it appeared to the Chemical Bank, that Brice could not legally and properly do. The cases of *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 14 Sup. Ct. 572, and *Chemical Nat. Bank v. Armstrong*, 13 C. C. A. 47, 65 Fed. 573, are not applicable, on their facts, to this case. The character and amount of the loans, and the manner in which they were made in both of these cases, were such as might well have raised suspicion as to the regularity and bona fide character of the transaction. In this case the negotiations and all the correspondence were such as might well lead the officers of the Chemical Bank to believe that Brice was acting on full authority, with perfect good faith and honest intention. The transaction with the Chemical Bank being, as we have stated, within the general scope of the duties of a bank cashier, and Brice having been placed by the authorities of the City Bank in a position and afforded facilities to enable him to make these loans as its representative, we do not see how the court could have done otherwise than direct a verdict, as it did, in favor of the plaintiff on these notes. A sentence or two from leading authorities will indicate, without multiplying citations, the law we think applicable to this case: "The cashier is the executive officer through whom the whole financial operations of the bank are conducted." *Merchants' Bank v. State Bank*, 10 Wall. 604. "The cashier has inherent power to borrow money in the regular course of the business of the bank, and may secure the loan by note or pledge of the bank's property." *Morse, Banks*, § 160. See, also, *Mor. Priv. Corp.* §§ 539, 597.

The first specification of error is that the court erred in admitting in evidence the notes executed by Brice as cashier of the City Bank

to the Chemical Bank, without proof of execution, notwithstanding the plea of non est factum. They were admitted on an admission by defendant that Brice, who signed them, was the cashier of the defendant bank, that the same were in his handwriting, and that the seal affixed was the genuine seal of the bank. There was no error in this.

The second specification of error is that the court erred in admitting in evidence what purported to be a copy of the resolution of the board of directors authorizing Brice to make these loans. There seems to have been no question but that Brice placed this paper, containing what purported to be the action of the board of directors, with the Chemical Bank, in connection with the loan transaction; and we think the paper was properly admitted, its weight and value as evidence to be afterwards determined.

The third specification of error is that the court erred in refusing to instruct the jury to return a verdict for the defendant. In this the court was clearly right.

The fourth assignment of error is that the court erred in instructing the jury to return a verdict for the plaintiff. We think, on the whole case before the court, for the reasons we have heretofore given, that this instruction to return a verdict for the plaintiff was right.

The court having correctly directed a verdict for the plaintiff, the judgment based thereon should be affirmed; and it is so ordered.

BRADLEY FERTILIZER OO. v. PACE et al.

(Circuit Court of Appeals, Fifth Circuit. May 4, 1897.)

No. 553.

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—FORM OF CONVEYANCE—PARTNERSHIP INTEREST.

A conveyance of "all goods, chattels, stock, promissory notes, debts, claims, judgments, property, and effects of every description," is sufficient to convey the grantor's interest in a partnership of which he is a member, so as to conform to the law of Florida, requiring an assignment for the benefit of creditors to convey all the assignor's property of every description.

2. SAME—ASSIGNEE'S BOND.

A bond, executed by the principal, who becomes liable for the full amount, and by several sureties, who become liable in smaller sums aggregating the whole amount of the bond, is a good and sufficient bond for an assignee for the benefit of creditors under the statute of Florida.

3. SAME—RECORDING OF DEED—PARTNERSHIP LANDS.

An assignment for the benefit of the creditors of an individual need not be recorded in the county where land owned by a firm of which he is a member is situated, though such assignment carries his interest in the firm.

4. SAME—GRANTEES IN DEED.

A conveyance to an assignee for the benefit of creditors is properly made to him and his successors and assigns, and not to him and his heirs.

5. DEEDS—DELIVERY.

A deed properly delivered is not invalid because the attestation clause recites that it was signed and sealed only, without reciting that it was delivered.

In Error to the Circuit Court of the United States for the Southern District of Florida.

J. C. Cooper, for plaintiffs in error.

E. K. Foster and Geo. M. Robbins, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

NEWMAN, District Judge. As these two cases involve the same subject-matter, they were, by consent of parties, submitted on one record. The Bradley Fertilizer Company, having a judgment against John E. Pace, procured summonses of garnishment to be issued, one directed to Thomas E. Wilson, and the other to William M. Brown. The purpose of the garnishment was to test the validity of assignments made by Pace to Wilson on January 1, 1895, and by John E. Pace and Arthur J. Doyle, partners under the firm name of Pace & Doyle, to William M. Brown on January 3, 1895. Both garnishees answered, denying indebtedness in any way to Pace, or that they had in possession any goods, chattels, credits, or effects of said Pace. These answers were traversed by the plaintiff, and the issue raised thereon was, by stipulation of the parties, submitted to the court for trial and determination without a jury; the court to make special findings of law and fact in the case. The court made various findings of fact, several findings of mixed questions of law and fact, and also findings of law; and, as a final conclusion of law and fact in both cases, the court found for the defendant and garnishees, and judgment was rendered accordingly.

These assignments were attacked in several particulars as being invalid under the Florida law. We shall notice those grounds only upon which the greater stress was laid for the plaintiffs below (plaintiffs in error here). It is urged that the assignment from Pace to Wilson did not convey to the assignee the interest of Pace in the firm of Pace & Doyle; that is, any interest after payment of partnership debts. By the statute of Florida (Rev. St. §§ 2307, 2308), all the assignee's property, of every description, must be embraced in the assignment. The language of the assignment from Pace to Wilson, so far as material here, after describing specifically certain property, is as follows:

"Also, all goods, chattels, stock, promissory notes, debts, claims, judgments, property, and effects of every description, belonging to the party of the first part, wherever the same may be, except such property as is exempt by law from levy and sale under an execution under the law of Florida."

This is broad enough and sufficient to convey to Wilson, as assignee, Pace's individual property, and also his interest in the partnership property of every kind.

It is further urged that the bond executed by Wilson was not a good and sufficient bond, and was not properly approved. The principal reason urged against the sufficiency of the bond is that the sureties thereto did not each become liable for the full amount of the bond. The bond was in the sum of \$50,000; Wilson, as principal, obligating himself for the full amount of the bond, and 10 sureties for

\$5,000 each, one for \$1,500, and one for \$1,000, making the total amount for which the sureties became liable \$52,500. The court found, as matter of law, that this bond, although made up as above stated, was sufficient under the law of Florida requiring assignees to give bond. The Florida law on the subject (Rev. St. § 2310) requires that the "assignee shall give bond approved by the clerk of the county where the assignor lives * * * and payable to the governor of Florida, in double the value of the property assigned." We agree with the court below that this was a good bond, and that it complied with the law.

Some question is made under the language of the statute requiring the bond to be filed "immediately." The assignment was dated January 1st, and the bond January 4th. The assignment was not filed in the clerk's office until January 4th, and the oath of Pace required by the statute was made on the 4th of January. So it seems that the assignment was really being made during three or four days, and all of the papers necessary seem to have been made during that period.

We are satisfied, also, with the finding of the court that the assignment from Pace to Wilson was properly recorded. We see no necessity for the record of Pace's individual deed in Brevard county. While we hold that the effect of the deed was to convey Pace's interest in the partnership property, after paying the partnership debts, it was such a contingent interest as would not require the record of the deed in the county where the partnership assets were situated. The title to the real estate was in the firm, and Pace's individual right was in what Pace & Doyle's assignee might have left after paying partnership debts.

The deed from Pace to Wilson is made to Wilson, "his successors and assigns"; and it is claimed that the word "heirs" should have been used, and, as it does not appear, that the entire estate in Pace's real estate was not conveyed. On the contrary, we think it uses the proper language. A conveyance to an assignee for the benefit of creditors, "his successors and assigns," is in the proper form.

It is also claimed that because the deed from Pace to Wilson, according to its language, was "signed and sealed," but was not "delivered," in the presence of the attesting witnesses, that the same is invalid. No question is raised but that, as a matter of fact, the deed was delivered. The assignee accepted the trust, and went into possession of the property. We think this objection equally untenable.

These are the only objections we care to notice. The other questions raised are such that, in view of the findings of fact and law by the court below, need not be especially mentioned. These two deeds, the one from Pace to Wilson, and from Pace & Doyle to Brown, seem to have been, in effect, one transaction. At least, they aim at a common purpose. It is not seriously contended that together they do not convey all the property of the parties. They convey the individual property of Pace, and the partnership property, to all the creditors alike, containing no preferences. For this reason the assignments should be favored and upheld, if possible.

Counsel for plaintiffs in error urged that the case of *Williams v.*

Crocker, decided by the supreme court of Florida in 1895, and reported in 18 South. 52, is favorable to them on some of the questions first mentioned. We do not see that it affects the precise questions involved here. It does hold, however, that the purpose of the assignment law of Florida was to prohibit partial assignments for the benefit of creditors, and prohibit therein the preferment of one creditor over another. Such we will also consider the purpose of this assignment law, and we think that purpose was carried into effect by the assignments before us in this case. Considering the grounds of objection to these assignments, therefore, either separately, or taking the whole transaction together, we think that the court below was right in finding in favor of the garnishees on the issues made, and the judgment of the court below is accordingly affirmed.

PEIROE v. KILE.

(Circuit Court of Appeals, Seventh Circuit. May 31, 1897.)

No. 348.

1. MASTER AND SERVANT—NEGLIGENCE—PRESUMPTIONS.

As between master and servant, proof of the occurrence of an accident raises no presumption of negligence. If the circumstances speak the negligence of the master, and that can be deduced therefrom as a natural and reasonable inference, the duty of explanation is cast upon him, but proof to warrant such inference must be brought forward by him who charges the negligence, and it cannot be established by conjecture or speculation, or drawn from a presumption.

2. SAME—SAFE APPLIANCES—DIRECTING VERDICT.

Where the only evidence of negligence as the cause of an accident is the fact that a rope broke, and it is clearly shown that the rope was of a size and quality sufficient for the work in which it was used, that there was no sign of wear or defect in it, and that the break was a fresh one, it is error to refuse to direct a verdict for the defendant, who is charged with negligence in furnishing an improper or inadequate rope.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

This action was brought by Robert Kile, administrator of the estate of Eli M. Davis, deceased, defendant in error, against the appellant, Robert B. F. Peirce, receiver of the Toledo, St. Louis & Kansas City Railroad Company, to recover damages for negligently causing the death of Eli M. Davis. The only count of the declaration upon which reliance is placed is predicated upon the negligence of the plaintiff in error in failing to furnish proper and adequate machinery and appliances, and in furnishing improper and inadequate appliances, for use by the intestate of the defendant in error in the course of his work. The plea was the general issue. The trial resulted in a verdict for the plaintiff below, and to reverse the judgment rendered upon the verdict this writ of error was sued out from this court. The evidence established the following facts: Eli M. Davis was a bridge laborer, and one of the bridge gang in the service of the receiver of the railroad. At the time of the accident he was employed, under the supervision of a foreman, in loading piles on flat cars. The piles were to be used in the repairing and rebuilding of bridges and were being loaded for transportation over the road. They were from 58 to 60 feet in length, tapering from 23 to 24 inches in diameter at the butt to about 10 inches at the smaller end. The bridge gang consisted of six men, who were aided in this work by a track gang, and the work proceeded in the presence of a number of the citizens of the locality, who were standing by, watching

the progress of the work. The flat cars upon which the piles were loaded were provided with iron sockets, known as "pockets," placed at stated intervals around the lower edge of the car. Stakes or standards were placed in the sockets of the car on the further side from the stack of piles. Some of these were split saplings, and were placed in the sockets with the round side towards the outside of the car. Others were round saplings. Two switch ties, 16 feet long and 10 inches wide, were placed, one end resting on the car and the other upon the ground on that side of the car nearest the piles, and were used as skids or slides up which the piles were hauled upon the car by means of two tackles consisting of two double blocks with lines reeved through them. These tackles were attached to the two outer stakes on the outer side of the car by slings of rope passed around the stakes into the ends of which the blocks were hooked. The ropes used in the slings were 1¼-inch Manilla ropes. In one tackle a 1-inch fall line was used, and in the other a line of 1¼-inch. The pile was rolled to the foot of the skids, and the tackle attached to both ends of the pile; the smaller rope to the smaller end. The men engaged pulled first on the one tackle, hauling that end of the pile upon the skid some two feet, and the fall rope being then fastened to prevent the pile slipping down, the opposite end of the pile was raised in like manner, and so the pile was hauled up upon the car. Occasionally the piles would stick upon the skids or become jammed. To overcome this obstruction, a pinch bar was used to raise the pile upon the skid when the men hauled upon the tackle. At the time of the accident two layers of piles had been loaded upon the car, occupying a space of three feet in height above the floor of the car. The accident occurred during the hauling of the last pile, which was somewhat heavier than the others, and when the pile had been hauled upon both skids nearly to the top. Some of the bridge gang and section men were hauling on the fall rope at the west end of the pile, assisted by some bystanders. Davis, standing at the west side of the skid, was prying up the pile with a pinch bar to overcome some obstruction. The men engaged in hauling on the fall rope tugged several times with the rope, but could not move the pile, and while thus hauling upon the rope the sling holding the tackle to the post on the west end broke, allowing the pile to slide down the skids, striking Davis upon the chest, and throwing him against the bank of a ditch at the side of the track, and instantly killing him. After the accident the rope was examined, and showed a clean, new break, presenting no sign of wear or defect. This rope was a Manilla rope 1¼ inches in diameter, and was of the best grade on the American market. In size it was somewhat heavier than was ordinarily used for work of this character. Its breaking strength was about 4,000 pounds. It had been supplied, through the master of bridges, to the foreman, about a year before the accident, and had been used occasionally when heavy work was done, about four or five times a month. There was no evidence given by the plaintiff below, other than the fact of the accident itself, to show that the rope was defective or insufficient. The evidence upon the part of the defendant below was to the effect that the rope was of the best quality, of sufficient strength for the work in which it was employed, was in good condition and was not defective. At the conclusion of the evidence the court was moved to direct the jury to return a verdict for the defendant. This motion was overruled by the court, to which ruling a proper exception was reserved, and such ruling is assigned for error.

Clarence Brown and Charles A. Schmettau, for plaintiff in error.
F. W. Dundas, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). The declaration charges a failure by the master to furnish adequate machinery and appliances, and negligence upon his part in furnishing appliances which were improper, inadequate, and of insufficient strength for the required service, and that the death of the defendant in error resulted from such negligent discharge by him of

his duty. It was, therefore, incumbent upon the defendant in error to prove the negligence asserted in one or other of the particulars charged, and that such failure in duty was the proximate cause of the death. The duty of the master is to use ordinary care to furnish appliances reasonably safe and suitable for the use of the servant, such as, with reasonable care upon the part of the servant, can be used without danger except such as is incident to the business in which such instrumentalities are employed. *Reed v. Stockmeyer*, 34 U. S. App. 727, 20 C. C. A. 381, and 74 Fed. 186. But the master is not responsible for the negligent or unskillful use by the servant or by the foreman of his gang of laborers of the necessary and safe tools and appliances furnished. *Railway Co. v. Brown*, 34 U. S. App. 759, 20 C. C. A. 147, and 73 Fed. 970. The undisputed evidence at the trial was to the effect that the rope furnished was sufficient for the performance of the work; that it was a Manilla rope,—the best quality of rope in the market; that after the accident the rope exhibited a clean, new break, the strands throughout being bright, and without sign of wear or defect. There was no evidence, other than the fact that the rope broke, to suggest insufficiency or defect. The general rule is not disputed that, as between master and servant, the proof of the occurrence of an accident raises no presumption of negligence. If the circumstances surrounding the transaction speak the negligence of the master, and that can be deduced therefrom as a natural and reasonable inference, the duty of explanation is cast upon the master. *Bahr v. Lombard*, 53 N. J. Law, 233, 21 Atl. 190, and 23 Atl. 167; *McKinnon v. Norcross*, 148 Mass. 533, 20 N. E. 183; *Redmond v. Lumber Co.*, 96 Mich. 545, 55 N. W. 1004. The proof to warrant such inference must be brought forward by him who charges the negligence, and upon whom is the burden of proof. The inference of negligence cannot be established by conjecture or speculation, or drawn from a presumption, but must be founded upon some established fact. The law of the case was correctly apprehended and stated by the court in its charge to the jury, but the court erred in not directing a verdict for the defendant below. There was absolutely no evidence, other than the fact of the breaking of the rope, from which negligence of the master could justly be inferred. The accident may have occurred from (1) the insufficiency of the rope, (2) a latent defect in the rope, (3) its improper use and overstraining, (4) the manner of its adjustment to the standard, (5) the character of the standard used. It is urged that it was proper to submit the case to the jury upon the ground that they had the right to infer that the rope was insufficient, for the reason that the other possible causes of the accident were excluded by the evidence. This reasoning is fallacious in its premises. The evidence did not exclude all other probable causes of the breaking of the rope. To the contrary, it suggests as strongly probable that the accident was due to a great and inconsiderate strain upon the rope during the obstruction of the pile, and while Davis was endeavoring with the pinch bar to overcome the obstruction, and before it could be surmounted, and through the great lateral strain upon the rope caused by the pulling on it by 15 or 20 men while the pile was thus obstructed. Whether that be the

correct solution of the cause of the accident or not, it is certain that not only were all other probable causes of the insufficiency of the rope not excluded by the evidence, but the testimony clearly established its sufficiency. The plaintiff below, therefore, had failed to establish any neglect of duty upon the part of the defendant below causing this injury, and it was error not to direct a verdict as requested. The judgment will be reversed, and the cause remanded, with directions to the court below to grant a new trial.

SICKLES et al. v. CITY OF NEW ORLEANS.

(Circuit Court of Appeals, Fifth Circuit. April 12, 1897.)

No. 526.

1. CONSTRUCTION OF WILL—CHARITABLE BEQUESTS—RIGHTS OF HEIRS.

When a will makes several bequests to charities, including a bequest of the residue of the testator's estate, and also provides that, in the event of the failure of any such bequest, the executors shall pay over the amount bequeathed to such uses as they think most in consonance with the testator's wishes, the heirs of the testator can take nothing on the failure of any charitable bequest.

2. CONFLICT OF LAWS—CONSTRUCTION OF WILL.

The law of a testator's domicile controls as to the formal requisites of the validity of a will as a means of transmitting property, the capacity of the testator, and the construction of the instrument; but, if a will contains a particular bequest of funds to be transmitted to and administered for particular purposes in another state, the validity of such bequest must be tested by the law of the latter state.

3. CHARITABLE BEQUESTS—PERFORMANCE OF CONDITIONS.

Under the law of New York and of common-law states generally, a valid bequest for charitable uses is not revocable, on account of failure of the trustees to comply with conditions attached thereto, unless such revocation is expressly reserved in the will.

4. GIFTS—DONATIO CAUSA MORTIS—CHARITABLE USES.

Under the law of Louisiana, there is a distinction between a mode or charge and a condition, as affecting a donation; and the expression of a purpose in the making of a donation is not equivalent to the imposition of a condition, within the meaning of articles 1559 and 1710 of the Civil Code relating to the revocation of donations. Accordingly, *held*, that a donation mortis causa for charitable or pious uses is not revocable in favor of the heirs, because of the failure of the donee to administer the charity.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

In 1856, Simon Van Antwerp Sickles, formerly a resident of the city of New Orleans, state of Louisiana, but then a resident of the state of New York, departed this life, leaving an olographic will, executed on the 30th day of July, 1855, as follows: "I, Simon V. Sickles, late of the city of New Orleans, now residing in the village of Nyack, county of Rockland and state of New York, considering the uncertainty of this mortal life, but being of sound and disposing mind and memory, do make, publish, and declare the following to be my last will and testament: I hereby enjoin it upon my executors, hereinafter named, to dispose of all my real and personal estate, excepting that specifically devised by me, and to apply the proceeds thereof to the purposes of this will, first paying all my just debts. I give and bequeath unto my

brother James ten thousand dollars, for his own sole use forever; and I also give and bequeath to my said brother James the sum of six thousand dollars, to be held by him in trust, and invested in bond and mortgage in his name, as trustee, and the income thereof applied to the use of my brother William during his natural life, half-yearly, and upon his death, whether before or after me, said sum of six thousand dollars shall be paid over to such of his children as shall survive him, in equal shares (excepting Margaret, who is otherwise provided for), when they respectively become of age, with the accumulated interest. I give and devise unto my niece Mary Ann Sickles the farm on which she now resides, situated in the county of Adams, or Hancock, or both, and state of Illinois, purchased by me of Mr. Tucker, containing 110 acres, and also the eighty acres of land adjoining said farm, and subsequently bought by me of Mr. Ellison. I give and bequeath unto my nieces Jane and Elizabeth, and to my nephew James, children of my brother Nicholas, the sum of three thousand dollars each. I give and devise unto my brother William the forty acres of land lying on the northeast corner of the farm he now occupies and owns, situate in Adams county, and state of Illinois. I give and bequeath unto my cousin Mary V. A. Ostrom and James E. Van Antwerp the sum of one thousand dollars each; unto my aunts Sarah King and Mary Salsbury the sum of five hundred dollars each; unto my cousins Mary Van Wagener, Catharine Blanvelt, Francis Heath, Mary Green, Sarah Herring, John L. Salsbury, and my friends William Demarest, of New York, and Margaret, wife of William S. Dunham, of Brooklyn, the sum of five hundred dollars each. I give and bequeath unto Abraham Springstein, late in the employ of my brother William, five hundred dollars. I give and bequeath unto William C. Trimmis, now one of the firm of Sickles & Co., one thousand dollars. I give and bequeath unto my executors in trust, to pay over to the societies or institutions hereinafter named, or to the treasurers thereof for the time being, for the use of such institutions respectively, the following sums, namely: To the Protestant Boys' Orphan Asylum of the city of New Orleans five thousand dollars, and to the Protestant Girls' Orphan Asylum of the same city five thousand dollars. My executors will select those asylums most in need of this bequest, and bestow it accordingly. To the Catholic Female Orphan Asylum on Camp street, in the city of New Orleans, where my friend Margaret is worthily engaged, five thousand dollars. To the New York Magdalen Female Benevolent Society of the city of New York ten thousand dollars. To the Association for the Relief of Respectable Aged Indigent Females in the city of New York the sum of five thousand dollars. To the New York Institution for the Instruction of the Deaf and Dumb five thousand dollars. To the New York Institution for the Blind in the city of New York five thousand dollars. I also give and bequeath unto my executors in trust the sum of ten thousand dollars, to be paid to the treasurer for the time being of the Protestant Orphan Asylum situated on the banks of the Hudson river, in the city of New York, on the east side of the river, the same to be applied to the use of said asylum. I give and bequeath unto my esteemed friend, the Revd. Lewis M. Pease, superintendent of the Five Points House of Industry in the city of New York, in consideration of his self-devotion to the cause of humanity, the sum of five thousand dollars. In his truly noble efforts to rescue from crime, and elevate the character of, the sons and daughters of misfortune, he merits the gratitude of mankind. In the event that my brother-in-law Richard D. Cantillon survives my sister Mary, I give and bequeath unto him, to have and to hold during his natural life, the use of the farm, buildings, and appurtenances, situated near the village of Nyack, on which he now resides, and containing about seventeen acres; and, upon his death, I give and devise said farm, buildings, and appurtenances unto the New York Magdalen Female Benevolent Society in fee simple; and if, for any legal difficulty, such society cannot take title thereto, then I direct my executors to sell and dispose of the same, and to apply the proceeds thereof to the use of said society. I give and bequeath unto the trustees of the Rockland County Female Institute the amount of my present subscription of eight thousand dollars, and, in addition, I give and bequeath ten thousand dollars more. It is my will that the income of these sums should be applied in the education and support in this institution of orphan girls, to be selected from among the most promising in point of character and intellect from the orphan

asylums in the city of New York, provided, however, that there shall be reserved from the income of said fund for the board and education in said institution of my niece Margaret Sickles, or, in the event of her death before majority, any other of my nieces, not exceeding two, whom my sister may choose to send, a sum sufficient for this purpose. It is my expectation that said institution will be lawfully incorporated, and, when this shall happen, said sum of ten thousand dollars shall be paid over to the trustees or managers thereof upon trust to invest the same, and to apply the income thereof as hereinbefore set forth. I give and bequeath unto my executors in trust, to pay over to the trustees of the Five Points House of Industry, or its treasurer for the time being, twenty thousand dollars, to be applied to the uses thereof. Said institution is in the city of New York. All the rest and residue of my estate, both real and personal and wheresoever situate, I give, devise, and bequeath to the municipal authorities of the city of New Orleans, to be appropriated to the establishment of a city dispensary for the gratuitous dispensing of medicine, and medical advice to the poor of said city. It is my will that none of the foregoing charitable bequests shall fail by reason of my not having described correctly the beneficiaries intended by me. If, in consequence of any lack of authority on the part of any of such beneficiaries to receive the sums given them, or in case any of said bequests cannot take effect in consequence of any legal objection, it is my will, and I direct, that my executors shall in such event pay over the amount of the bequest or bequests so failing to such charitable and educational uses as they shall think most in consonance with my wishes and intention expressed in this will. Finally, I nominate and appoint my friends James S. Aspinwall, of the city of New York, and John G. Gaines, of the city of New Orleans, and my brother James B. Sickles, of the city of St. Louis, or such of them as shall qualify, the executors of this, my last olographic will and testament. I give to them full power to sell either at public or private sale, and convey by proper deed of conveyance, all my real estate not specifically devised, to compromise and submit to arbitration all claims in favor of or against my estate, also without the interference of judicial or extrajudicial authority, to make inventory and dispose of all my estate, and to settle and liquidate the same in as ample a manner as I might myself do were I living and acting in my own behalf. I have signed and sealed this, my olographic will, entirely written in my own hand, this thirtieth day of July, in the year of our Lord one thousand eight hundred and fifty-five (1855).

"[Signed]

Simon V. Sickles."

The succession of said Sickles was opened in the state of New York, and thereafter ancillary proceedings were had in the Second district court of the parish of Orleans, state of Louisiana, wherein the last will and testament of the deceased was duly proved, and John G. Gaines duly qualified as testamentary executor. Such proceedings were then had that the real estate situated in Louisiana and other property belonging to the estate of the said Sickles were duly inventoried, sold, and accounted for. After the payment of special legacies and other obligations and expenses, on May 6, 1864, \$14,000 were paid over to the city of New Orleans as the residuary legatee; and afterwards, on August 26, 1871, the further sum of \$2,884.93, being the balance in the hands of the executor as the assets of said succession, was likewise paid over. February 16, 1893, Mary A. Sickles and numerous other persons, alleging themselves to be the heirs at law of Simon Van Antwerp Sickles, brought this action against the city of New Orleans to recover the aforesaid sums, amounting to \$16,884.93, with legal interest on \$14,000, and on \$2,884.93, from the respective dates on which said sums were received by the city, on the ground that the city of New Orleans has wholly failed to fulfill the conditions of the bequest made by Simon Van Antwerp Sickles, and it has never made any attempt or shown any disposition to fulfill said conditions, said city having not only never established the city dispensary required, but, on the contrary, has actually applied and appropriated said money to other purposes, in gross violation of the trust and the conditions imposed. On February 27, 1893, the city of New Orleans filed exceptions to the demand of the plaintiffs, on the following grounds, to wit: First, that the said plaintiffs are not the proper parties to institute the proceeding on the last will and testament of Simon Van Antwerp

Sickles, having no interest in the same; second, no cause of action. These exceptions, on being heard by the court, were ordered referred to the merits, and thereafter, on April 29, 1893, the city of New Orleans filed an answer, as follows: "This defendant now, and at all times hereafter, saving and reserving to itself all and all manner and benefit and advantage of exception or otherwise herein filed, or which may be hereinafter filed, denies each and every allegation contained in plaintiffs' petition, saving and excepting what may be hereinafter admitted. Your respondent admits that, by his last will and testament, the said Simon Van, Anjwerp Sickles bequeathed to the city of New Orleans, for the establishment of a free dispensary, wherein drugs and medical advice would be furnished free to the indigent, the residue of his estate, after payment of debts and legacies, and that the executor of the said will, J. B. Gaines, did turn over to the city of New Orleans, for the purpose designed by the testator, on the 12th day of May, 1864, the sum of fourteen thousand dollars; and subsequently, on the 19th day of April, 1865, the additional sum of 2,884 ²³/₁₀₀ dollars, making a total of 16,884 ²³/₁₀₀ dollars. Your respondent denies that the defendant city has at any time or in any way squandered or misapplied the funds so bequeathed, but, on the contrary, has fostered the same with the care and the full intention and purpose of carrying out to the very letter the beneficent object of the testator. That the defendant, on the 31st of August, 1871, by Ordinance No. 1,011, A. S., authorized the selection of a drug store to furnish medicines to the poor; and, by and in virtue of the said ordinance, Dr. Shelly was appointed druggist, and dispensed drugs, etc., to the poor, up to the month of December, 1872. He was succeeded by Dr. Kelly. On the 24th of January, 1872, by Ordinance No. 1,325, A. S., it was ordered that the Sickles fund be placed in charge of the administrator of finance; that said fund be specially kept apart and separate from any funds belonging to the city of New Orleans; that said funds be invested in city securities, and the interest collected therefrom be applied to supplying the indigent sick with medicines; that by Ordinance No. 2,139, A. S., May 21, 1873, the administrator of public accounts was authorized and directed to issue to the custodian of the Sickles fund a warrant for consolidated bonds at par, for the sum of 20,124 ⁵⁵/₁₀₀ dollars, being the amount due by the city to the said fund on the 1st day of May, 1873. From this time, up to October 1, 1877, drugs, medicines, and advice were furnished to the poor to the extent of the means derived from said fund in the hands of the administrator of finance, at which date, however, by Ordinance No. 4,189, A. S., all further expenditure on said fund was stopped, and the mayor was authorized to select a committee of three physicians to devise some means of carrying out the object of the bequest; and the mayor appointed Drs. J. D. Bruns, Charles C. Turpin, and F. L. Taney to act on said committee. This action on the part of the council was no doubt provoked by the report of the administrator of finance, the Hon. J. C. Denis, of date of the 29th of October, 1877, which informs the committee that 'now the utmost amount of the revenue that can be expected will be about \$1,200 per annum, which would have nearly sufficed to carry on the previous rate of monthly expenditure, but that for the past four months, by what seems to be a preconceived arrangement, a raid has been made on this fund by prescriptions, at the rate of over \$325 per month, which the fund is entirely inadequate to furnish. * * *' In January, 1878, the committee of physicians appointed by the mayor made their report, containing various suggestions as to how the dispensing of drugs gratis would be more advantageously made, which, though received with due courtesy, were not put into execution; and from that time to this day the effort of the city of New Orleans has been to increase the fund by judicious and successful investments, until such time when the revenues derived from it will be such that the grand purpose of the benevolent testator will be a permanent memorial of his love for the poor. As will be seen by the annexed report of A. P. Harrison, to whom, for a number of years, this sacred fund has been intrusted, and to whom is due chiefly the credit for the grand condition in which the fund now is, it will be seen that the fund, which originally, as above set forth, amounted to the sum of 16,884 ²³/₁₀₀ dollars, is of date of February 20, 1893, of face value 37,267 ⁸⁸/₁₀₀ dollars, actual market value 58,795 ⁸⁸/₁₀₀ dollars, showing an increase of over threefold of the original amount bequeathed. Respondent denies

the right of plaintiffs to demand a money judgment against the city of New Orleans. Respondent further denies the right of said plaintiffs to stand in judgment; that the plaintiffs, being special legatees, have received from the testator all that he desired that they should receive; and that, under the construction of the will, should any eleemosynary institution fail to receive the amount which he designed it to receive, that it should go to some other institution of charity. Respondent further denies the right of the poor of the city of New Orleans to be deprived by any act of the city administration of the charitable provisions made for their benefit. Respondent specially denies the right of the said plaintiffs to demand a rescission of the bequest, for the reasons that, in the provisions of said will for the institution of a free dispensary, no time was designated by testator wherein the establishment of a free dispensary should be made. Respondent, by way of answer, specially pleads prescription of ten years to plaintiffs' action. Annexed hereto, and making part hereof, are certified copies of ordinances, resolutions, and reports herein referred to. Respondent prays that judgment be rendered in favor of the defendant, the city of New Orleans, and for all and general relief."

Other proceedings were had, not necessary to recite, and finally a jury was impaneled, and the action tried. The evidence submitted substantially established the facts averred in the answer, and thereupon, on motion of the defendant, the court directed the jury to find a verdict for the defendant. Due exceptions were made to this action of the court, as well as to the refusal of the court to give the following charges requested by the plaintiffs, to wit: "(1) To establish a dispensary for the gratuitous dispensing of medicine to the poor of this city does not necessarily mean to establish and maintain for all time a dispensary containing a stock sufficient to dispense medicine daily to all the poor. (2) No time having been specified by the testator within which the dispensary was to be established, the law implies that he intended that it should be established within a reasonable time; that is to say, as soon as it was practicable to establish such a dispensary as was contemplated by the testator. (3) The jury must look at the intention of the testator, and, if they find that such a dispensary as he had in mind could have been established with the said Sickles fund at any time prior to the suit, then the city has failed to perform the conditions imposed upon it as donee, and a verdict should be rendered for the plaintiffs. (4) If the jury find that the city at any time used said money received from the Sickles estate for any purpose other than that for which it was bequeathed, then a verdict should be rendered for the plaintiffs. (5) If the jury find that said money was at any time indistinguishably mixed with the general or any other fund of the city, and that thereafter the city paid back the amount, with interest, and then for the first time separated said money from the other funds of the city, that is presumptive evidence that the city used the money for its own account, and for other purposes than that for which it was bequeathed; and, if the city has failed to show the contrary, then this presumptive evidence becomes conclusive evidence of that fact. (6) That 'all the rest and residue of my estate, both real and personal, and wheresoever situate,' is, in law, 'a universal legacy,' the action to recover which is prescribed by the prescription of thirty years; and, twenty-nine years having run when this action was instituted, the donee has had more than a reasonable time to comply with the bequest. (7) That the city of New Orleans is the donee of the bequest in this case, and is subject to the same obligations and governed by the same rules as other donees, under articles 1559 and 1710 of the Revised Civil Code." The plaintiffs below, having failed to obtain a new trial, prosecute this writ of error, assigning 13 specific errors, the first 8 of which relate to the general charge given to the jury, and the charges requested by the plaintiffs, but refused, and the last five assignments relate to rulings of the court not appearing in the record, or else not reviewable on error.

J. Ward Gurley and D. C. Mellen, for plaintiffs in error.

Saml. L. Gilmore and W. B. Sommerville, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge, after making the above statement of the case, delivered the opinion of the court.

Under the will of Simon Van Antwerp Sickles, there is no estate to vest in his heirs at law on the failure of any charitable bequest therein named. The intention of the testator in this respect is clear. Aside from bequeathing to the municipal authorities of the city of New Orleans all the rest and residue of his estate, both real and personal, wherever situated, to be appropriated to the establishment of a city dispensary for the gratuitous dispensing of medicines and medical advice to the poor of said city, the will provides that, in the event that any of the specific charitable bequests therein made should fail, the executors should pay over the amount of the bequest or bequests so failing to such charitable and educational uses as they should think most in consonance with the testator's wishes and intention expressed in the will; thus apparently following the doctrine of cy-pres. Under such testamentary disposition, the heirs at law can take nothing on the failure of any charitable bequest. *Vidal v. Girard's Ex'rs*, 2 How. 126, 191; *McDonogh's Ex'rs v. Murdoch*, 15 How. 367; *Prevost v. Martel*, 10 Rob. (La.) 512; *McDonogh's Will Case*, 8 La. Ann. 171, 220, 253. All the charitable bequests, except the one to the municipal authorities of the city of New Orleans, are of specific amounts of money; and it would seem that the bequest to the municipal authorities of New Orleans is a bequest of money, because the will provides that the executors shall dispose of the real estate not specifically devised, collect all claims, dispose of all the estate, and settle and liquidate the same; and it is apparent from the face of the will that the testator's intention was that the said municipal authorities should receive nothing but money. In equity (where, perhaps, this case should have been brought), there is no question on this point. See Macn. p. 29; Pom. Eq. Jur. § 1159. The court of appeals of New York, in *Chamberlain v. Chamberlain*, 43 N. Y. 431, in dealing with a will containing provisions similar to those in the Sickles will, says:

"If the residuary bequests are valid, there was an equitable conversion of the whole estate into personalty for all the purposes of the will. The gifts were of money, the avails of the real and personal estate, and the conversion of the realty into personalty, under the authority conferred upon the executors, is regarded as having been accomplished at the death of the testator. *Leigh & D. Conv.* 5, 109; *Phelps v. Pond*, 23 N. Y. 69; *Thornton v. Hawley*, 10 Ves. 129; *Stagg v. Jackson*, 1 N. Y. 206. If, therefore, the disposition of the residue of the estate in favor of the two corporations named as legatees is valid as a bequest of personal property, and to the extent that the two corporations can take under the will, regarding the gift as of personalty, and not of realty, the will must stand. The Centenary Fund Society is a foreign corporation, having its existence under the laws of Pennsylvania, and located within that state. The existence, however, of corporations organized under the laws of a sister state, is recognized by the courts of this state; and they may take property here under wills executed by citizens of the state if, by the law of their creation, they have authority to acquire property by devise or bequest."

The law of the testator's domicile controls as to the formal requisites essential to the validity of the will as a means of transmitting property, the capacity of the testator, and the construction of the instrument. *Story, Conf. Laws* (8th Ed.) § 479ab; *Crusoe v. Butler*, 36

Miss. 150; *Chamberlain v. Chamberlain*, supra. Movable property has no locality, and therefore the law of the domicile of the owner governs its transmission, either by last will and testament or by succession in case of intestacy. Story, *Conf. Laws* (8th Ed.) § 481; *Jones v. Habersham*, 107 U. S. 179, 2 Sup. Ct. 336; *Holmes v. Remsen*, 4 Johns. Ch. 460. Although, within the law of the domicile, a will has all the forms and requisites to pass the title to movable property, nevertheless, if the will contains a particular bequest of funds to be transmitted to and administered for particular purposes in another state, the validity of such particular bequest must be tested by the law of the state to which the fund is, by the terms of the will, to be transmitted and administered. *Chamberlain v. Chamberlain*, supra. Under the laws of the state of New York, as in common-law states generally, a valid bequest for charitable uses is not revocable on account of failure by the trustees to comply with any conditions attached thereto, unless such revocation is expressly reserved in the will. Perry, *Trusts*, § 744; *Reformed Church v. Mott*, 7 Paige, 77. A donation to the municipal authorities of the city of New Orleans for charitable purposes is substantially a donation to the city for the purposes named, and may be accepted and administered. Rev. Civ. Code, arts. 433, 1549; *Succession of Mary*, 2 Rob. (La.) 438; *Fink v. Fink*, 12 La. Ann. 301. Donations to charitable uses are not only permitted in Louisiana, but are highly favored. *Succession of Mary*, supra; *McDonogh's Will Case*, supra; *Succession of Vance*, 39 La. Ann. 371, 2 South. 54.

Interpreting the will of Simon Van Antwerp Sickles according to the laws of the state of New York, in which state said Sickles resided, and where his said will was made, we find that the bequest to the municipal authorities of the city of New Orleans, for the purposes named, was not revocable for any failure of said authorities to comply with any of the conditions attached thereto; and, testing the validity of said bequest by the law of Louisiana as to the right and power of the municipal authorities of the city of New Orleans to accept and administer said trust, the same is valid in all respects. It would seem that what has been said should dispose of this case, because, if the heirs at law have no interest, or if the bequest to the municipal authorities of the city of New Orleans is not revocable, the plaintiffs in error cannot complain of the instruction given to the jury to find a verdict for the defendant. The majority of the court, however, are not willing to rest their decision upon either of these points, because the case was tried in the court below, and has been presented by both sides here, as a case arising wholly under the law of Louisiana; and therefore I proceed to consider whether, under the law of Louisiana, a donation mortis causa to municipal authorities for charitable or pious uses, having once vested, is revocable in favor of the heirs at law, whenever the said authorities shall fail to administer the charity, although no revocatory right is reserved by the donor.

Articles 1559 and 1710, Rev. Civ. Code, provide as follows:

"Art. 1559. Donations inter vivos are liable to be revoked or dissolved on account of the following causes: (1) The ingratitude of the donee; (2) the non-

fulfillment of the eventual conditions, which suspend their consummation; (3) the nonperformance of the conditions imposed on the donee; (4) the legal or conventional return."

"Art. 1710. The same causes which, according to the foregoing provisions of the present title, authorize an action for the revocation of a donation *inter vivos*, are sufficient to ground an action of revocation of testamentary dispositions: provided, however, that no charges or conditions can be imposed by the testator on the legitimate portion of forced heirs, nor can they lose their inheritance for any act of ingratitude to the testator, prior to his decease. That he has not disinherited them shall be sufficient evidence of his having forgiven the offense."

The learned counsel for the plaintiffs in error, in their very lucid brief, contend that the bequest or donation in this case was made on a condition within the meaning of articles 1559 and 1710,—i. e. that a free dispensary should be established by the city; that the city is the donee, and, as such, is subject to the same obligations and governed by the same rules as other donees under said articles, there being no exception made in the case of donations for pious uses; and that the word "conditions," in article 1559, is used in the sense of "charges,"—i. e. "a donation may be revoked for failure on the part of the donee to execute the charges on him imposed." It is conceded that, under the civil law prevailing in Louisiana before the adoption of the Civil Code, a donation *mortis causa* to charitable uses was not revocable for the failure of the authorities to administer the charity, unless the revocation was expressly reserved by the testator in his will.

Under the same law, there was a well-recognized distinction between the mode (or charge) and the condition as affecting donations, and this distinction is clearly stated in *De Pontalba v. New Orleans*, 3 La. Ann. 660, which was a suit to annul a donation *inter vivos* made in 1785 to the city of New Orleans for a leper hospital. The donation was qualified as follows: "Which he gives wholly and gratuitously to you, in order that the lepers, of whom there is a large number at present, may be harbored, and in order that the public may perpetually enjoy this endowment,"—and was accepted and applied for some time to the use contemplated by the donor, but was afterwards abandoned as a hospital, the building having been burned. The court says:

"We take this donation to be a donation *sub modo*. The laws cited by the plaintiff's counsel from the *Fuero Real* and the *Partidas* were undoubtedly the general rules on the revocation of donations; but those rules were liable to many exceptions, and, in applying them, regard must be had to the distinction made by the civil and the Spanish laws between the mode or charge and the condition. The inobservance of the condition often avoided the donation, when the inexecution of the charge did not. Thus says Pothier: 'If the charge on which the bequest is made is not in itself impossible, but fails before the legatee has been put in mora, his obligation to execute it ceases, and the legacy is due. For instance, a testator has given me a legacy, and charges me to be tutor of his children. If the judge, on the advice of the family, has appointed another tutor, as I can no longer be appointed, I am liberated from the charge, and entitled to the legacy. In such a case, the legacy made *sub modo* differs from that made under the condition, if he is tutor of my children.' Pothier des Testaments, Donations, etc., No. 114. Merlin, deriving the doctrine on the subject from the Roman law, says that a material difference must be made between the motives which the donor mentions as being the cause of the liberality, and the conditions he imposes, because, although the failure of a condi-

tion annuls the donation, it remains valid, although the motives therein expressed be untrue. Merlin, Répert. verbo 'Donations,' § 6, No. 5. See, also, (39. 4.) D., 5 De Donationibus. The same distinction, also drawn from the civil law, is recognized by the English courts. The rule there is that, where a legacy is bequeathed for a particular purpose, it is not conditional, so as to fall with the purpose for which it is given. Thus, a legacy made to a woman for the maintenance of her children has been held valid, notwithstanding she has no children, or they all die. So, also, where lands were given to a mother for the education and maintenance of her daughter till eighteen years old, and the daughter died under eighteen, it was adjudged a good term to the mother till the daughter would have obtained eighteen years had she lived. Ward, Legacies, No. 142, and cases there cited. 8 Law Lib. Delvincourt and Duranton, upon whose authority the opinion of the court below rests, were misunderstood by the learned judge. We perceive no material difference between the opinion of Delvincourt and those of Merlin and Pothier. Duranton, if his authority was so decided as the judge supposes it to be, ought not to prevail against those three commentators. But he does not greatly differ from them. He merely says that, when a donation is made ob rem futuram, it is a mode affixed to the liberality; and, when the motive fails, the validity of the donation depends upon the intention of the donor to be deduced from the act. 8 Duranton, No. 548."

The Civil Code, when adopted, contained this article:

"Art. 3521. From and after the promulgation of this Code, the Spanish, Roman and French laws, which were in force in this state, when Louisiana was ceded to the United States, and the acts of the legislative council, of the legislature of the territory of Orleans, and of the legislature of the state of Louisiana, be and are hereby repealed in every case, for which it has been especially provided in this Code, and that they shall not be invoked as laws, even under the pretense that their provisions are not contrary or repugnant to those of this Code." Fuqua's Civ. Code La. art. 3521.

This article, retained in the Code up to 1870, was omitted in the revision of that date. Construing this article, the supreme court of Louisiana, in *Reynolds v. Swain*, 13 La. 193, said:

"The repeal spoken of in the Code and the act of 1828 cannot extend beyond the laws which the legislature itself had enacted, for it is this alone which it may repeal. 'Eodem modo quilibet constituitur, eodem modo dissolvitur.' The civil or municipal law, that is, the rule by which particular districts, communities, or nations are governed, being thus defined by Justinian,—'Jus civile est quod quisque sibi populus constituit.' 1 Bl. Comm. 44. This is necessarily confined to positive or written law. It cannot be extended to those unwritten laws which do not derive their authority from the positive institution of any people, as the revealed law, the natural law, the law of nations, the laws of peace and war, and those laws which are founded in those relations of justice that existed in the nature of things, antecedent to any positive precept. We therefore conclude that the Spanish, Roman, and French civil laws, which the legislature repealed, are the positive, written, or statute laws of those nations and of this state, and only such as were introductory of a new rule, and not those which were merely declaratory; that the legislature did not intend to abrogate those principles of law which had been established or settled by the decisions of courts of justice. * * * We know not any Roman or French statute which was in force in this country at the period of the cession, and to which the repeal in the Code and the act of 1828 could extend. Nevertheless, it is the daily practice in our courts to resort to the laws of Rome and France, and the commentaries on those laws, for the elucidation of principles applicable to analogous cases."

According to this, the Code did not repeal principles of construction and interpretation, nor the legal meaning of words and terms, but, following the well-recognized rule, used words and terms according to the meaning and interpretation of the same as previously de-

clared by judicial authority. We find no decision of the supreme court of Louisiana conflicting with *De Pontalba v. New Orleans* and *Reynolds v. Swain*, but we find recently, in *Succession of Vance*, 39 La. Ann. 371, 2 South. 54, in a suit by the city of New Orleans for a legacy construed to mean and be for the benefit of the indigent insane, and where the defense was that the particular insane asylum mentioned in the will had been closed and abandoned by the city before the city accepted or made demand for the legacy, the court held:

"The executor puts himself out of court by the very attitude which he assumes when he charges that the legacy has returned to the succession, by reason of the discontinuance of the asylum. He thereby impliedly admits that the legacy has passed from the succession to the legatee, but insists that it has returned. This cannot be under our system of law, which forbids giving and not giving. Had the testatrix thus stipulated, however, that condition, being prohibited, would have been illegal, and, as such, dealt with or reputed as not written. If the legacy has passed, as it surely has, then the succession has been divested absolutely, and the legatee has acquired. An unconditional legatee cannot, after vesting, be divested under any contingency. * * * Here the question is not one of identity. It is simply one of existence or not,—one which is practically whether a municipal corporation has a right to claim a legacy made to an institution at a time under its direct management, and which has been discontinued as a distinct organization after the death of the testator. There is no dispute that, if the insane asylum which was in being at that date existed to-day in the same conditions, the city would have a right to recover. But we have said that the place, mode, or manner in which the insane of the city are maintained is insignificant, the intention or object of the testatrix being the relief of those persons of whom the city takes charge and for whom she provides. We therefore conclude that the legacy made by the deceased for such relief, having once vested, cannot be, and has not been, divested, and that consequently the city is entitled to recover it, the same to be used exclusively in furtherance of the benevolence of the testatrix."

If this language is to be given any force, we must conclude that it means that a donation to a municipality for charitable uses is unconditional, although the special charity to be aided is named, and that such donation is irrevocable for any reason, which is the same as holding that the charge to apply a charitable donation to the uses of a particular charity is not imposing on the donation a condition; within the meaning of the word in article 1559.

Counsel for plaintiffs in error rely upon the case of *Girod v. Crossman*, 11 La. Ann. 497, which was a suit to revoke and annul a legacy for the neglect and refusal of the devisee to comply with the conditions on which it was claimed the legacy was made. Reliance is placed upon this passage in the opinion of the court:

"On the third ground, it may be admitted, so far as this case is concerned, that the modus or charge upon the legacy is in the nature of a condition, and subject to the rules which govern other conditional legacies. 2 Moreau & O. 739, Law 6; 3 Savigny, 230, bk. 2, c. 3, § 128. We concur also with plaintiff's counsel that, in order to ascertain how the condition conceding it to be one should be performed, we should look at the intention of the testator." Page 500.

This is the mere admission of a contention not necessary to determine (*obiter dictum*), and falls far short of deciding that modes or charges expressed in a donation to pious uses are conditions, within the meaning of article 1559, Rev. Civ. Code. The real beneficiaries to charitable donations are generally the unorganized poor, and the administration of the charity is necessarily confided to agents. If

such charities are not properly administered, or by neglect are allowed to lapse, the fault is not attributable to the beneficiaries, nor always to the public, but generally to the bad judgment or neglect of administrators. The state, as *parens patriæ*, can and should protect all such charities by legislation and through the courts, as is the universal rule in civilized states. Where a municipal corporation is the instituted donee, and its mayor and council misapprehend the limitations and charges of the trust, and thereby delay or wholly fail to carry the charity into effect, it would be contrary to equity, as well as contrary to the donor's intention, to decree a revocation (really, a forfeiture) on that account. Besides, such donations are generally intended to and really constitute perpetuities, and, unless the same expressly appears in the act of donation, it cannot be said that the donor intended that the thing or amount donated should ever return to himself or his estate, much less to his heirs at law.

Enough has been cited and said to show why we find that article 1559, Rev. Civ. Code, was not intended to, and does not, include, among donations liable to be revoked, those donations to pious uses which, otherwise absolute and unconditional, merely specify or direct the particular charity favored by the donee, and why we conclude that, under the recognized jurisprudence of Louisiana, such donations are not revocable. In our opinion, the plaintiffs in error (plaintiffs below) are not entitled to recover in any aspect of the case as presented by the record, and therefore the general charge in favor of the defendant was correct and proper. Judgment affirmed.

CUNNINGHAM IRON CO. v. WARREN MANUF'G CO.

(Circuit Court, D. Rhode Island. May 8, 1897.)

No. 2,548.

1. SALES—EXECUTORY AGREEMENT—PASSAGE OF TITLE.

An agreement for the sale of steam boilers then in place in a factory, which provides that they shall be taken out and delivered before a certain time, is an executory contract, and is not rendered operative to pass title by a statement in the memorandum of sale that the vendee "purchased the * * * boilers."

2. SAME—INJURIES TO PROPERTY IN HANDS OF VENDOR—FAILURE TO DELIVER.

Slight damages occurring to the subject-matter of an executory contract of sale prior to the time of delivery, not being such as to render performance impossible, will not excuse the vendor for refusing to deliver on the vendee's offer to accept the property with a deduction for the damages.

3. SAME—DAMAGES.

It is the duty of one injured by breach of contract to make reasonable exertions to save himself from loss. He can charge the delinquent with such damage only as with reasonable endeavors and expenses he could not prevent. A. agreed to sell to B. certain boilers, which were to be taken out of A.'s factory, and delivered before a day named. Prior to that time the boilers were slightly injured by fire. A. offered to cancel the contract, or to deliver the boilers in their injured condition at the original price. B. insisted upon his rights under the contract. A. resold the boilers to D., who sold them to C., the agent and manager of the corporation (B.), C. purchasing in his individual name. The boilers were delivered at B.'s place of business. In an action by B. against A. for breach of contract, held,

that as B., through its agent, C., had an opportunity to purchase the boilers, as a part of B.'s business was repairing boilers, and as the injuries in question might have been repaired with trifling trouble and expense, it was B.'s duty to use the available means to place itself in the same condition as if the contract had been fulfilled; and that, in consequence, B. could recover only such damages as B. could not have prevented by the use of such available means, namely, an amount equal to the expense of making the repairs. *Warren v. Stoddart*, 105 U. S. 230, followed.

J. C. Pegram, for plaintiff.

B. M. Bosworth, for defendant.

BROWN, District Judge. This is an action on the case for breach of contract relating to the sale and delivery of certain second-hand boilers contained at the time of contract in the defendant's factory, and by the terms of the contract to be taken out and delivered in defendant's yard before November 1, 1895. The case was heard upon oral testimony, a jury trial being waived. From the fact that the boilers were in use and bricked in at the defendant's factory, to be taken out by the defendant at such time prior to November 1, 1895, as the defendant chose, I am of the opinion that the contract was an executory contract, which did not pass title to the plaintiff, since something was to be done to make delivery possible, and to be done by November 1st, which made time essential, and gave a right to the plaintiff to rescind for failure to perform the agreement within the stipulated time. The fact that the memorandum of sale states, "Cunningham Iron Co. purchased * * * the thirteen 72" boilers," etc., does not, in my opinion, render the transfer of title complete, in view of the foregoing facts. *Hatch v. Oil Co.*, 100 U. S. 124; *Jones v. U. S.*, 96 U. S. 24, 28. On October 3, 1895, defendant's factory was destroyed by fire. There remained eight boilers to be delivered. These boilers were not damaged, except by loss of doors, flue doors, water gauges, and other appliances. After the fire the plaintiff wrote, requesting the delivery of the remaining boilers. On October 26th the defendant wrote, "The remaining boilers having been through the fire, we cannot deliver the same as if they had not been through the fire, and we do not think you can expect it," and offering to cancel the agreement as to the rest of the boilers, and afterwards wrote inquiring whether the plaintiff would take the boilers in their then condition at the original price. The plaintiff replied, insisting upon performance of the original contract, saying, "We see no occasion to make any additional contract, or change the provisions of the old one;" and subsequently, without waiving its rights, offered, by way of compromise, to take the boilers at the original price, "less the amount of actual damage done, to be ascertained by inspection." On November 23d the defendant wrote, "I understood that legally the fire canceled the contract or agreement had between us," but again offering the boilers at the original price. The proposal not having been accepted, and the plaintiff still insisting on its original rights, the defendant, after notice of its intention to do so, sold the boilers on January 31, 1896, to George B. Doane for \$230 per boiler. On the same day Doane billed the same to Cunningham, the plaintiff's agent and largest stockholder, and

on the following day was paid \$1,900 for the same by Cunningham's individual check. Some time afterwards the boilers were removed to the yard of the Cunningham Manufacturing Company, where they remained at the time of trial; Cunningham claiming the same as his individual property, and testifying that he purchased the same on his own account, and not for the plaintiff. In view of the fact that the title remained in the Warren Manufacturing Company at the time of the fire, and of the testimony of Cunningham that the boilers "were not damaged a particle," save in loss of doors and other appliances, which could have been replaced at a comparatively insignificant cost, there was no impossibility of performance resulting from the fire, and the defendant was not relieved thereby from its obligation under the contract. *Jones v. U. S.*, 96 U. S. 24, 29. Failing therefore either to accept the reasonable offer of plaintiff for a compromise by a deduction of the amount of actual damage, or to perform the contract substantially according to its terms, and preventing performance by a resale, the defendant must be held liable in damages for breach of contract. The question of damages being necessarily before the court, the following facts become material: The boilers were sold by the defendant to Doane for \$230 each. Doane sold the same to Thomas Cunningham for a price amounting to \$237.50 each. Cunningham was the owner of 398 out of 400 shares of the Cunningham Iron Company, and the agent and manager of said company. The company was engaged in repairing and selling boilers as a part of its business. The boilers were brought to the company's yard, and save for loss of doors, etc., "not damaged a particle," as Cunningham testified. Upon these facts, I find that the Cunningham Iron Company had an opportunity, at a trifling expense, and with slight exertions on its part, to place itself in the same condition as if the contract had been fulfilled. The duty of the plaintiff on the breach of contract is well defined in the case of *Warren v. Stoddart*, 105 U. S. 224, 229:

"The rule is that where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense, or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damage only as with reasonable endeavors and expenses he could not prevent."

See, also, *Marsh v. McPherson*, 105 U. S. 709.

Considering the character of the business of the plaintiff, its facilities for putting the boilers in a condition equal to that called for by the contract at an expense which, upon the evidence, I find not to be in excess of \$30 each, for new doors, etc., and considering the willingness of the plaintiff to receive the boilers in their actual condition, I am of the opinion that by the reasonable endeavors and exertions required by the foregoing rule the corporation might have saved itself from all damages except the expense of making good the loss of doors, etc. If Cunningham, who was the agent of the corporation, did not see fit to avail himself of the opportunity to reduce the damages, and preferred to make the purchase in his own name, the corporation became responsible for a failure of its agent to take advantage of the opportunity, and cannot charge the de-

fendant for large damages based upon evidence uncertain and speculative in character. In the language of the supreme court in *Warren v. Stoddart*, 105 U. S. 230, "The law required him to take that course by which he could secure himself with the least damage to the defendant." Applying the rule above quoted from the case of *Warren v. Stoddart*, and assessing such damages only as with reasonable endeavors and expenses the plaintiff could not prevent, I find for the plaintiff in the sum of \$240.

In re LI FOON.

(Circuit Court, S. D. New York. February 23, 1897.)

1. CHINESE IMMIGRANTS—CERTIFICATE OF RIGHT TO ENTER.

An infant child of a Chinese merchant lawfully residing in the United States is not entitled to enter the country without the production of the certificate required by the act of July 5, 1884 (1 Supp. Rev. St. [2d Ed.] p. 458), which is the sole evidence of the right of a Chinese alien to enter.

2. SAME—COLLECTOR'S DECISION.

Under the act of August 18, 1894 (28 Stat. 390), the decision of a collector of customs in favor of the right of a Chinese alien to enter the country is not final, but the question of his right to enter is subject to re-examination by the courts.

Wm. C. Beecher, for petitioner.

Max J. Kohler, for the United States.

LACOMBE, Circuit Judge. Since the facts are all set forth tersely in stipulation, it will not be necessary to restate them. The proceedings under which the petitioner is temporarily held till he can be removed from the United States were instituted under section 12 of the Laws of 1882, as amended by the Laws of 1884, which provides that "any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came." He was brought before a United States commissioner, who found that he was a person not lawfully entitled to be or to remain in the United States, and ordered his removal. Section 6 of the same amended act provides in detail for a certain certificate evidencing, inter alia, the permission of the Chinese government to be obtained by every Chinese person other than a laborer, who seeks admission into the United States, and further provides that such certificate "shall be produced to the collector of customs of the port in the district of the United States at which the person therein shall arrive, and afterwards produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted, and the facts therein stated disproved, by the United States authorities." Petitioner concededly did not produce such certificate to the collector or to the commissioner, and apparently had never obtained one.

It is contended that the petitioner, being the infant son (he is

between 11 and 13 years old) of one who may, for the purposes of this proceeding, be considered a Chinese merchant lawfully residing here, is entitled to enter without the production of any such certificate. The only authority cited in support of this proposition is the *Chung Shee Case*, 71 Fed. 277, but apparently in that case the betrothed bride held a certificate. The clear weight of authority is against petitioner's contention (*In re Ah Quan*, 21 Fed. 182; *In re Chinese Wife*, Id. 786; *In re Wo Tai Li*, 48 Fed. 668), and there is nothing in the language of the statute warranting any such construction. As was held by the supreme court in *Wan Shing v. U. S.*, 140 U. S. 424, 11 Sup. Ct. 729:

"The result of the legislation respecting the Chinese would seem to be this: that no laborers of that race shall hereafter be permitted to enter the United States, or even to return after having departed from the country, though they may have previously resided therein, and have left with a view of returning; and that all other persons of that race, except those connected with the diplomatic service, must produce a certificate."

It is next contended that the decision of the deputy collector at Malone, N. Y. (acting as collector), permitting petitioner to enter the United States, although no certificate such as the statute required was produced to such officer, is a final adjudication upon petitioner's right to enter, and that, in view of such decision, the commissioner should have held that he was lawfully entitled to be and remain in the United States. There have been very many decisions under the various acts regulating immigration, Chinese or other, touching the conclusiveness of the decision of collectors or other officers to whom application is made for permission. It is not necessary to review them here at length. The propositions which they sustain are these: Where the decision of the executive officer, such as the collector, is not made final either by express language or by necessary implication, the courts will adjudicate upon the question of his being entitled to enter, when that question comes before them, unhampered by any decision of the executive officer. And the phraseology of sections 12 and 6 of the act above cited manifestly contemplates an investigation as to the right to enter by the judicial officers referred to therein. It is, however, within the power of congress to delegate to executive officers solely, without review by the courts, the determination of any or all questions as to the right of an alien to enter this country. It will be sufficient to refer to *U. S. v. Jung Ah Lung*, 124 U. S. 621, 8 Sup. Ct. 663; *Nishimura Ekiu v. U. S.*, 142 U. S. 651, 12 Sup. Ct. 336; *Lem Moon Sing v. U. S.*, 158 U. S. 538, 15 Sup. Ct. 967; *U. S. v. Loo Way*, 68 Fed. 475; *U. S. v. Chung Shee*, 71 Fed. 277, on appeal 22 C. C. A. 639, 76 Fed. 951. In 1888, by the act of September 13th (section 12), congress provided that "the collector shall in person decide all questions in dispute with regard to the right of any Chinese person to enter the United States, and his decision shall be subject to review by the secretary of the treasury, and not otherwise." Under this act, whichever way the collector decided his adjudication, under the authorities *supra*, would be final. It seems that section 12 of the act of 1888 never took effect, being contingent on the ratification of some treaty pending at

the time. Subsequently, in the act of August 18, 1894, c. 301 (28 Stat. 390), congress provided that "in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs' officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the secretary of the treasury." This makes the decision a final adjudication only when adverse to admission. If the immigration or customs officer decides to allow the immigrant to enter, such decision has no more force as a controlling adjudication, when the question of right to be or remain in the United States comes before court or commissioner, than it had under section 9 of the act of 1882, as amended in 1884, which was before the supreme court in *U. S. v. Jung Ah Lung*, supra.

It is further contended that the ruling of the commissioner that the sole proof of petitioner's right to enter was the certificate which he had never obtained was erroneous. Various constitutional objections are advanced, but they have all been raised before, and answered by the supreme court, as may be seen from the exhaustive review of its decisions in *Wong Wing v. U. S.*, 163 U. S. 228, 16 Sup. Ct. 977. There is no question here of any punishment; the order complained of directs petitioner's removal only. The writ of habeas corpus is dismissed, and the decision of the commissioner which was brought up on certiorari is affirmed.

STERNAMAN v. PECK.

(Circuit Court of Appeals, Second Circuit. May 26, 1897.)

1. EXTRADITION—HABEAS CORPUS.

A writ of habeas corpus cannot perform the office of a writ of error in reviewing the proceedings in extradition before an officer authorized to entertain such proceedings, but can only reach error which is fatal to the jurisdiction of the officer over the person of the accused, or over the subject-matter of the accusation.

2. SAME—CONCLUSIVENESS OF COMMISSIONER'S DECISION.

When an officer authorized to entertain proceedings for extradition has before him evidence which, though not satisfactory, and far from convincing, authorizes conflicting presumptions and probabilities as to the guilt of the accused, such evidence, being sufficient to call for the exercise of his judgment upon the facts, gives him jurisdiction of the subject-matter, and his determination cannot be reviewed.

Appeal from the Circuit Court of the United States for the Northern District of New York.

This was an application for a writ of habeas corpus to procure the release of Olive A. Sternaman, who had been committed by a commissioner for extradition to Canada on the charge of murder. The circuit court, after a hearing, discharged the writ (77 Fed. 595), and the petitioner appealed.

Wallace Thayer and Frank C. Ferguson, for appellant.
Wm. A. Poucher and Chas. J. Thomas, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. A writ of habeas corpus cannot perform the office of a writ of error in reviewing the proceedings in extradition before an officer authorized to entertain such proceedings. It is efficient only to reach error which is fatal to the jurisdiction of the officer over the person of the accused, or over the subject-matter of the accusation. In the present case the question as to the jurisdiction of the person of the accused is whether the complaint pursuant to which the warrant for her apprehension issued was sufficient. This question is fully discussed in the opinion of the district judge from whose order denying the writ of habeas corpus this appeal has been taken. We approve his conclusion that the complaint was sufficient, and the reasons assigned for that conclusion, and deem it unnecessary to add anything to his opinion. The question as to jurisdiction of the subject-matter is whether there was competent evidence before the commissioner tending to show that the accused had committed the crime with which she was charged, viz. the murder of George H. Sternaman. In considering this question, the rule is that, if the commissioner had before him competent evidence sufficient to call for the exercise of his judgment upon the facts, his determination cannot be reviewed. *Oteiza's Case*, 136 U. S. 330, 10 Sup. Ct. 1031. In the recent case decided by the supreme court May 10, 1897 (*Ex parte Bryant*, 17 Sup. Ct. 744), the court state the question to be "whether there was any legal evidence at all upon which the commissioner could decide that there was evidence sufficient to justify a commitment for extradition." The depositions taken in Canada were not authenticated by the certificate of the principal diplomatic or consular officer of that country, as required by section 5 of the act of congress of August 3, 1882 (22 Stat. 216). Disregarding these depositions altogether, there was evidence not only that Sternaman died from the effects of arsenical poisoning, and that the accused, his wife, who prepared his food, and administered his medicines, could have administered the poison, but also of a motive upon her part for the act. The evidence was not very satisfactory, and was far from being convincing. Nevertheless, the facts and circumstances proved authorized conflicting presumptions and probabilities as to her guilt or innocence, and it was the province of the commissioner to determine their import, and whether they were such as to justify him in exercising his power to commit her to custody pending the action of the department of state. No useful purpose would be subserved by an analysis or discussion of the evidence.

The order dismissing the writ is affirmed.

BUXBAUM et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 26, 1897.)

CUSTOMS DUTIES—GOODS IN BOND—ABANDONMENT—CHANGE OF DUTIES.

When imported goods have remained in bond beyond three years, and are thereupon deemed abandoned to the government by virtue of Rev. St. § 2971, the rights and liabilities of the parties become fixed at once, and the government is entitled to retain from the proceeds of their sale, or to collect upon the bond, the amount of duties according to the then existing law, though a different rate of duty goes into effect before a sale actually takes place.

In Error to the District Court of the United States for the Southern District of New York.

This is a writ of error to review a judgment of the district court, Southern district of New York, entered upon a verdict directed by the court in favor of defendants in error, who were plaintiffs below. The action was to recover damages for the breach of a warehouse bond given by plaintiffs in error (defendants below) to the United States on March 23, 1891.

Walter Carroll Low, for plaintiffs in error.

Henry D. Sedgwick, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Defendants, on March 23, 1891, imported 60 bales of hops into the port of New York, and duly entered the same at the customhouse. The duty at that time was 15 cents a pound, and the entry was liquidated April 2, 1891, at \$3,428.25. The entry being for warehouse, defendants executed the bond in suit, conditioned to be void in any one of these three events: (1) That the goods should be withdrawn within one year from date of importation, and duties paid; (2) or after one year, and within three, if so withdrawn, and duties paid, plus 10 per cent. added; (3) or if within three years they should be withdrawn for export. At various times down to and including February 23, 1893, parts of these hops were withdrawn, and duties paid thereon. A credit for decrease in weight was also allowed. Deducting these payments and credit from the liquidated amount of the duties, there remained still unpaid \$571.35. On March 23, 1894, the three years allowed by the bond expired, and the obligors became indebted to the United States to the extent of the damages sustained by the latter. Rev. St. U. S. § 2971, provides that "any goods remaining in public store or bonded warehouse beyond three years shall be regarded as abandoned to the government and sold under such regulations as the secretary of the treasury may prescribe, and the proceeds paid into the treasury." Section 2972 further provides that "the secretary of the treasury in case of any sale of merchandise remaining in public store or bonded warehouse beyond three years, may pay to the owner," etc., "the proceeds thereof, after deducting duties, charges, and expenses, in conformity with the provision relating to the sale of merchandise remaining in a warehouse for more than one year." This provision relating to goods remaining for more than one year—

i. e. "unclaimed" goods—will be found in section 2973. It provides for an appraisal and sale at public auction, and that "the proceeds of such sale, after deducting the usual rate of storage at the port in question, with all other charges and expenses, including duties, shall be paid over to the owner," etc. The bales of hops remaining after the three years were appraised, and thereafter sold in April, 1895. The net proceeds of the sale were credited on account of the bond, and for the balance due, with interest, verdict was directed. The Wilson act of 1894, which went into effect on the date of its passage, August 28, 1894 (U. S. v. Burr, 159 U. S. 78, 15 Sup. Ct. 1002), reduced the duty on hops to eight cents a pound. The main contention of plaintiffs in error is that the collector should have deducted from the proceeds of the sale duties on the goods sold only at the rate fixed by the act of 1894. The argument is as follows: Section 2972 provides that the secretary of the treasury may pay to the owner the proceeds of a sale of merchandise remaining in bonded warehouse beyond three years in conformity with the provisions relating to sale of unclaimed goods. Section 2973, which deals with unclaimed goods, provides for an appraisement of the goods to be sold. Article 816 of the treasury regulations provides that there shall be deducted from the proceeds of sale "duties at the same rate as if the merchandise had been regularly withdrawn for consumption," while article 817 provides that "duties will, in such cases, be assessed on the dutiable value found on appraisement at the rates chargeable at the time of such appraisement on ordinary entries for consumption, on importation." The difficulty with this argument is that duties are imposed upon imported merchandise, not by the secretary of the treasury, but by congress. When the three years limited in the statute and the bond expired, March 23, 1894, the rights and liabilities of the parties became fixed; the goods were "abandoned" beyond any further right to redeem; the United States were entitled to sell them, and thus secure reimbursement for the duties unpaid at the rate fixed by existing law, viz. 15 cents. The collector had no authority, under treasury regulations, to accept less or to exact more, and no statute conferring such authority is referred to. On the contrary, the tariff act of 1894 expressly provides (section 72) that "the repeal of existing laws or modifications thereof embraced in this act shall not affect any act done, or any right accruing or accrued, * * * but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modification had not been made." This certainly saved the right of the United States to the 15-cent duty, and also the liability of the bondsmen to pay at that rate.

It is further suggested that section 2971 was repealed by section 54 of the act of October 1, 1890. Nothing need be added to the opinion of the circuit court of appeals, Ninth circuit, on this point. *Anglo-California Bank v. Secretary of Treasury*, 22 C. C. A. 527, 76 Fed. 742.

The objection that it was not sufficiently proved that the entire merchandise remaining in the warehouse had been sold is without

merit. The several exceptions to admissions of testimony have not been argued, and need not be discussed; they, also, are unsound. The judgment of the district court is affirmed.

TALMAGE et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 26, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—BENGAL RICE.

Patna or Bengal rice, from which both the outer and inner cuticle have been removed, is dutiable, under paragraph 193 of the tariff act of 1894, as cleaned rice, though containing from 3 to 5 per cent. of "rice polish," and a small percentage of broken grains of rice, and commercially known, prior to August 28, 1894, as uncleaned rice. 77 Fed. 826, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

W. Wickham Smith, for appellants.

Henry C. Platt, Asst. U. S. Dist. Atty.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. In March, April, and May, 1895, the firm of Dan Talmage's Sons imported into the port of New York sundry invoices of Patna or Bengal rice, upon which the collector assessed a duty of $1\frac{1}{2}$ cents per pound, under the provisions contained in paragraph 193 of the tariff act of August 28, 1894. The paragraph is as follows:

"Rice cleaned, one and one half cents per pound, uncleaned rice, or rice free of the outer hull and still having the inner cuticle on, eight tenths of one cent per pound; rice flour and rice meal and rice broken which will pass through a sieve known commercially as No. 12 wire sieve, one fourth of one cent per pound; paddy, or rice having the outer hull on, three fourths of one cent per pound."

The importers protested against the assessment upon the ground that the merchandise was uncleaned rice, and therefore dutiable, under the foregoing paragraph, at eight-tenths of one cent per pound, or that, if it was an unenumerated article, it was dutiable at the same rate by virtue of the provisions of section 4 of the same act (commonly known as the "similitude clause"), because it most resembled uncleaned rice in all material respects. The board of general appraisers sustained the collector, and the statement of facts which is contained in their opinion is conceded to be correct. From the decision of the circuit court (77 Fed. 826), which sustained the board of general appraisers, this appeal was taken by the importers.

By the board's finding of facts, it appears that Bengal rice contains from 3 to 5 per cent. of "rice polish," otherwise known as "rice dust," "rice flour," or "rice meal," and a small percentage of broken grains of rice, and prior to August 28, 1894, was known commercially as "uncleaned rice." The outer and also the inner or yellow cuticle had been removed from the rice; the latter process being accomplished by pestling in mortars, which is the most expensive

of the various processes of milling rice. These milling processes are six in number:

"(1) The screening, or second threshing, given the rough rice, or 'paddy,' designed to remove trash, stalks, and foreign particles. (2) The removal of the outer husk by the milling stones. (3) The separation of the chaff and other substances by the screen blower and chaff fan. (4) The removal of the yellow cuticle of the grain by pestling in mortars, which is the most laborious and expensive of the several processes. (5) The separation of the rice bran from the rice grains by sifting, and the separation of the small and large grains of rice by the bush screen. (6) Polishing, which is accomplished by a horizontal, revolving drum, covered with leather, and surrounded by a cylinder of wire gauze."

The proper classification of Bengal rice for dutiable purposes was for some years prior to 1894 a subject of disagreement and litigation between the importers of rice and the government; the question in dispute being whether it was uncleaned, or was cleaned, rice. The tariff acts of March 3, 1883, and of October 1, 1890, had imposed duties upon rice as follows: Act March 3, 1883, par. 270: "Rice, cleaned, two and a quarter cents per pound; uncleaned, one and one-half cents per pound." Paragraph 271: "Paddy, one and a quarter cents per pound." Act Oct. 1, 1890, par. 261: "Rice, cleaned, two cents per pound; uncleaned rice, one and a quarter cents per pound; paddy, three-fourths of one cent per pound." It will be perceived that no statutory definition of uncleaned rice or of paddy was given in either of these paragraphs, and consequently the question at issue mainly depended upon the commercial signification of the various terms in the statutes. The juries in two cases under the act of 1883—one case before the circuit court for the district of Louisiana, and the other before the circuit court for the Southern district of New York—differed in opinion, and these conflicting verdicts were undoubtedly based upon the conflicting testimony of commercial experts in different parts of the country. To remove the uncertainties which grew out of the unwritten commercial meaning of these terms, and the continuing contest between the treasury officers and the importers, congress introduced into the act of 1894 statutory definitions of uncleaned rice and of paddy, and said that the former meant "rice free of the outer hull and still having the inner cuticle on," and that the latter article was "rice having the outer cuticle on." It follows from this historical statement of the motive for the rice clauses of the act of 1894, and the consequent construction to be placed upon them, that Bengal rice is not to be classified as uncleaned rice. The next question is as to its proper classification. The importer suggests that it is not cleaned rice, which is still further advanced by a removal of the inner cuticle, and that, therefore, it is unenumerated, but, having a similitude in its character and use to uncleaned rice, it should pay the same rate of duty. The government asserts that, having been excluded from uncleaned rice, it must be regarded, for tariff purposes, as cleaned rice, but that, if unenumerated, it should pay the corresponding duty which is imposed upon that article. There is strong ground for the conclusion that congress, having excluded it from the lower grade, intended to classify it in the higher grade; but, whether that is true or not, the

board of general appraisers have found as facts that the only lack of substantial resemblance in material and quality between the rice in question and cleaned rice is the presence of about 4 per cent. of rice polish or flour in the former article, and its absence from the latter. The use of each is for food, the one being more merchantable than the other. It follows that in materially important particulars it is cleaned rice, and should pay the same rate of duty. The decision of the circuit court is affirmed.

WALTER BAKER & CO., Limited, v. SANDERS et al.

(Circuit Court of Appeals, Second Circuit. May 26, 1897.)

No. 125.

1. TRADE-MARKS—INFRINGEMENT—UNFAIR COMPETITION—EFFECT OF DECREE IN ANOTHER CIRCUIT.

A decree of a circuit court in another circuit finding infringement and unfair competition, and enjoining the same, is not conclusive in a suit by the same parties against an agent of that principal, where such decree is merely interlocutory, and still subject to the control or modification of the court.

2. SAME—SUIT AGAINST AGENT—INJUNCTION.

The fact that defendant is selling alleged infringing packages as agent for a nonresident is no ground for refusing an injunction, though he may not be liable for profits.

3. SAME—USE OF ONE'S OWN NAME.

One entering into competition with another person of the same name, who has an old and established business, is bound to distinguish his goods from those of the latter so as to prevent confusion.

4. SAME.

Where by long use the words "Baker's Chocolate" had come to mean, in the minds of the public, complainant's goods, *held*, that a subsequent maker of chocolate with the same name was not entitled to use that name, whether with his given name or its initials, in such manner as to announce that the goods he sells are "Baker's Chocolate."

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal from a decree of the circuit court, Southern district of New York, rendered in a suit brought by the proprietors of the original "Baker's Chocolate" to restrain unfair competition by defendants in the sale of a rival chocolate manufactured and put up in the city of New York in the name of W. H. Baker, of Winchester, Va. When the case was presented to the circuit court it appeared that another suit had been brought against W. H. Baker himself in the Western district of Virginia, wherein, upon the same evidence, an interlocutory decree had been entered against Baker. 77 Fed. 181. The defendant Sanders is his chief salesman and manager of his business here. The other defendants, upon the employment either of W. H. Baker directly or of said Sanders, are concerned more or less with the manufacture and putting up of said chocolate. Some of the defendants submitted to a final decree in the form asked for by complainant, other defendants have obtained extensions of their time to plead, and this cause has been prosecuted to interlocutory decree only against the defendant Sanders. The judge who heard this case in the circuit made a decree in substantial conformity with the decree in the Western district of Virginia. It enjoins

the defendant Sanders: (1) From using on labels, wrappers, bill heads, advertisements, etc., the name "W. H. Baker & Co.," and from using the words "& Company," or any abbreviation thereof, following any form of the name of W. H. Baker, of Virginia. (2) From using in like manner the words, "Established in Mercantile Business, 1785," or any words calculated to lead dealers or consumers or the public to believe that such business (manufacturing and dealing in chocolate), carried on by said W. H. Baker, has been long established, or any words so nearly resembling the words "Established 1780," used by the complainant, as to be calculated to mislead. (3) From using in connection with the business of making or selling chocolate, on labels, wrappers, cans, boxes, cakes, molds, signs, letter heads, bill heads, or advertisements, or in any other manner whatsoever, the name "Baker's" alone, but is required to insert in lieu thereof the full name "W. H. Baker," or "W. H. Baker's," wherever the name "Baker's" now exists upon any such labels, cans, cakes, etc. (4) From using on or in connection with the sale of chocolate the label now used by respondent on plain chocolate, a sample of which is hereto annexed, marked "Exhibit Defendant's Label No. 1," and from using on or in connection with the sale of said Baker's plain chocolate any yellow label, or any label of a color resembling yellow, and from using on or in connection with the sale of said Baker's plain chocolate any label which in its lettering, arrangement, and design is not plainly distinguishable from that used by complainant. (5) But the court refuses to enjoin the respondent from using the name "W. H. Baker" in connection with the manufacture or sale of chocolate, and from using the blue wrapper upon said Baker's plain chocolate, or making and selling cakes of plain chocolate of the shape and size and with the marks and lines thereon as at present used by him, or from putting thereon the words "No. 1" and "Premium," as at present used by him, or from using molds of the shape, size, etc., in which the said chocolate is now made; and the court refuses to grant any injunction against the said defendant Sanders except as herein set forth, and refuses any other relief than that by this decree granted or reserved. The complainant appealed, and now contends that this decree allowing (or rather requiring) defendant to mark and advertise his chocolate as "W. H. Baker's Chocolate" does not give it the full measure of relief to which it is entitled, in that it allows the chocolate sold by defendant to be designated in such a way that, although W. H. Baker's own name is used, it is so used as to cause his goods to be mistaken for complainant's, and thus work a fraud upon the public. Defendant Sanders has not appealed.

Rowland Cox and William Lowell Putnam, for appellant.
Robert C. Barton and John Vincent, for appellee.

LACOMBE, Circuit Judge (after stating the facts as above). It is contended by respondent that both the circuit court and this court are concluded by the decree in the Virginia circuit, such decree being rendered in a suit between the same complainant and the principal or employer of defendant Sanders. The difficulty with this contention, however, is that the Virginia decree is interlocutory only. The whole matter is still open there, and when the case comes up on final hearing that court may enlarge or contract the measure of interlocutory injunctive relief as the record then before it may warrant, without being in any way embarrassed by its prior decision. Certainly, the defendant Sanders can be in no better position in some other circuit than his principal, W. H. Baker, will be in when his case comes before the Virginia court for further and final adjudication upon a record which contains evidence additional to that adduced in support of the interlocutory decree. Nor is the circumstance that Sanders is selling the alleged infringing pack-

ages as agent for a nonresident any ground for refusing injunction. He may not be liable for profits which his principal takes, but injunction operates upon the individual, and in a proper case the individual will be restrained from manufacture, preparation, and sale which infringe upon another's rights, whether he be principal or merely employé.

The law of unfair competition is well settled. It is only the application of that law to individual cases which requires discussion, and quite frequently it becomes necessary to recite the facts at great length in order to demonstrate that there has been such unfair competition, and to point out what precise measure of relief should, under well-settled principles, be accorded to the complainant. In the case at bar, however, it will not be necessary to rehearse all the salient points in the voluminous record now before the court. They have been most exhaustively presented, and their bearing most carefully and elaborately discussed, in the opinion of Judge Paul, rendered in the Virginia case above referred to, and which will be found reported in 77 Fed. 181. It would be a work of supererogation to undertake any restatement of them. Reference to that opinion will fully indicate the proofs upon which our conclusion is based. A brief synopsis, as near as may be in the language of Judge Paul, will be quite sufficient for the purposes of this opinion. The complainant is engaged in the business of manufacturing chocolate, having succeeded to the business originally established about the year 1780 by one James Baker at Dorchester, Mass. The business has been extensive and successful, and its preparations have a high reputation in the markets of the United States. A large amount of money has been spent in advertising it. It is put up in the ordinary size and shape of chocolate packages, wrapped in blue paper, with a yellow label thereon. Upon the top and bottom of this yellow label is a scroll of intertwined leaves, and at each end a coat of arms surmounted by a flag, also surrounded by a scroll of intertwined leaves, bearing in the upper center the words "Baker's Chocolate" in large type, and the words "W. Baker & Co., Dorchester, Mass.," in small capitals, with a list of some other articles manufactured by the complainant. This blue wrapper and yellow label have been used by complainant and its predecessors for more than 40 years. Complainant's goods had become well known as "Baker's Chocolate," and the evidence from the trade shows that when "Baker's Chocolate" was called for it was understood to be Walter Baker's chocolate that was intended. The W. H. Baker (or defendant's) package, which is of the standard shape and size, was (until a modification was made after entry of the interlocutory decree in Virginia) also wrapped in blue paper with a yellow label, having at its top and bottom a scroll of leaves, and at each end a coat of arms partially surrounded by a scroll of leaves. At the top were the words "Established in Mercantile Business 1785." Below these words, in large type, were the words, "W. H. Baker & Co.'s Chocolate," and under them, in smaller capitals, the words "Premium No. 1." Then, in smaller type, was given a description of the goods and directions for

using, and finally, at the foot, in small capitals, "W. H. Baker & Co., Winchester, Va."¹

The wrapper was the same shade of blue as complainant's. The yellow label was a shade lighter than complainant's, and of the same length and width. As is usual in such cases, the alleged infringer insists that he had no intention to dress up his goods to resemble complainant's; that, on the contrary, the very identity of the surnames, Baker, "made him all the more careful to avoid any confusion therefrom," and that in wrapping his goods he "has used every possible device to accentuate a difference by using a wholly different inscription,—a design of marked dissimilarity; figures that have no possible likeness, and a tout ensemble that strikes the eye of the most casual observer." His success in accentuating differences has certainly not been remarkable, and it is curious to note how frequently in cases of this kind the designer's efforts to produce wrappers, labels, and inscriptions which shall be distinctly characteristic of some new make of goods result only in producing confusion with some earlier and well-known brand. In the following excerpts from Judge Paul's opinion we fully concur:

"He has taken the testimony of a number of witnesses to prove his high character as a citizen and a business man. In the argument great stress is laid upon this testimony by respondent's counsel, as negating the idea of a fraudulent purpose on the part of the respondent in dressing up his goods in imitation of the complainant's. The court cannot give to this evidence the weight to which counsel insist it is entitled. It must in this case, as in every case where intent is the subject of investigation, deduce the intent from the acts of respondent. * * * It is clearly apparent from the testimony of the respondent, and from other evidence in the cause, that in the arrangement between the respondent and Sanders respondent's name of 'Baker' was to play a prominent part in the sale of his goods. When this testimony is taken in connection with the similarity in shape and size, * * * the identity in color of the blue wrappers, and the similarity of the yellow labels on each, it is impossible to escape the conclusion that it was the purpose of the respondent to put upon the market his goods in such con-

¹ The following is a copy of the label of W. H. Baker to which this court here refers:

ESTABLISHED IN MERCANTILE BUSINESS. 1786.

W.H. BAKER & CO'S CHOCOLATE.
PREMIUM No 1.

Customarily used by Bakers for all Baking purposes.
It is manufactured of the highest grades of Cocoa and guaranteed equal, if not better than any other Chocolate made in the World.

DIRECTIONS—For a beverage, grate fine one block or an ounce of this Chocolate; add about the same quantity of sugar; place them into a pint of boiling water or milk, prepare an equal portion of each. Thoroughly stir until dissolved. A few minutes boiling will show a great improvement.

W.H. BAKER & Co. Winchester, Va.
 Producers of Premium Chocolate, Breakfast Cocoa, Sweet & Vanilla Chocolate.
 PHILADELPHIA, PA. — NEW YORK.

dition and appearance that the same might be readily accepted as the goods of complainant. That such was the result, the evidence abundantly shows. * * * The testimony of grocers and consumers * * * abundantly shows that great confusion exists in the trade and with the public between the goods of the complainant and those of the respondent, and that both the trade and the public were deceived into purchasing the goods of respondent when they thought they were getting those of complainant. * * * A careful consideration of the evidence, and an inspection of the packages, wrappers, labels, inscriptions, etc., of the goods of complainant and those of respondent, can lead the court to no other conclusion than that there was deliberate purpose to place the goods of the respondent upon the market in a guise resembling the complainant's goods as nearly as possible so as to avoid a direct imitation. * * * In the preparation of his goods the respondent has closely imitated the goods of the complainant in the most prominent characteristics in which they are presented to the public. In the plain chocolate the most striking of these prominent characteristics are the shape and size of the packages, the blue wrapper and the yellow label, * * * with the prominent words, 'Baker's Chocolate.'

In all of this we fully concur, and it will not be necessary further to refer to some earmarks of intent to deceive which Judge Paul points out, such as the use of the firm name "W. H. Baker & Co.," when respondent had no partner, and the words, "Established in Mercantile Business 1785," when respondent had commenced the chocolate business only in 1894. The conclusion of Judge Paul's opinion is expressed in these words:

"The respondent entering the chocolate market under a firm name so nearly resembling that of complainant, an old-established and well-known concern, did not make the effort incumbent on him to distinguish his goods from those of the complainant so as to prevent confusion. An inspection of the great number of cans, labels, inscriptions, designations, and characteristic marks of other dealers in chocolate, American and foreign, produced as evidence in this cause, shows that there is no difficulty in one dealer so preparing his goods as to distinguish them from those of another. With the widest field from which to select wrappers, labels, cans, inscriptions, words, phrases, and designations, the respondent has so nearly simulated in these respects the chocolate goods of the complainant as to lead dealers and customers to believe that they were buying the complainant's goods, when they were really getting those of the respondent. To prevent this confusion, and to protect the complainant and the public against this unfair competition and deception, an injunction will be entered restraining the respondent in the following particulars: From using in connection with his business as a maker and seller of chocolate * * * the words '& Co.'; the words 'Established in Mercantile Business 1785'; from the use of the yellow label on his plain chocolate, and he will be required to substitute another and entirely different label therefor. * * * The court will not enjoin the respondent from using his name 'Baker' in connection with the manufacture and sale of chocolate."

And an interlocutory decree was entered substantially as set forth in the statement of facts, supra.

The conclusions of the circuit court in Virginia are expressed with no uncertain sound. Unfair competition is found, is condemned, and its continuance enjoined. Preserving to the respondent the right to use his name, the court hedges that use about with safeguards calculated to prevent his so using it as to deceive the public. Most drastic provisions to this end are contained in the decree, such as the prohibition of the further use of the yellow label. It must surely have seemed to Judge Paul that when this opinion was filed and this decree entered complainant was fully protected against this unfair competition. Certainly it so seemed to this court upon the

argument, and it was difficult at first to conceive what further relief than that embodied in the fourth paragraph of the decree, supra, could be asked for. But inspection of the new style of dressing the goods with the light blue wrapper (shown in the sample attached to appellee's brief), and the ingenious announcement thereon, "Best Quality now with Blue Label," and the words "Baker's Chocolate" still the most prominent feature of the inscription, demonstrates how the letter of the Virginia decree may be followed and its spirit violated.² As was said in the quotation supra, "complainant's goods had become well known as 'Baker's Chocolate,' and when 'Baker's Chocolate' was called for it was understood to be Walter Baker's chocolate that was intended." The public do not go into the minuter refinements of the title or the label. Whether it is described as "Walter Baker's Chocolate," or "William Baker's Chocolate," or "W. H. Baker's Chocolate," or "W. H. Baker's Best Chocolate," so long as the title contains the words which in trade and among consumers have come to be the every-day designation of complainant's goods, the chocolate so labeled will naturally be assumed to be complainant's, unless special care be taken to indicate that it is not. Of course, it would be very easy, under the Virginia decree, to mark the goods "W. H. Baker's Chocolate," and still so dress them up that no one of ordinary intelligence would be deceived as to their identity; but that presupposes a bona fide effort to "accentuate differences,"—such an effort as was made by the designer of the package of "Baker's Chocolate," which is an exhibit in this case. No such effort has yet been made, and it is hardly to be expected that any such effort ever will be made. The complainant is entitled to relief against further use of a title which causes confusion, provided such relief can be granted without depriving W. H. Baker of the right to use his own name in connection with the chocolate business. The measure of such right is tersely expressed by Judge Paul:

"The doctrine is equally well settled that equity will direct how a man shall use his name in his purpose to denote his own individuality. He will

* The following is the label to which the court here refers:

W.H. BAKER'S CHOCOLATE PREMIUM

IT IS MANUFACTURED OF THE HIGHEST GRADES OF COCOA AND GUARANTEED PURE & NOT BETTER THAN ANY OTHER CHOCOLATE MADE IN THE WORLD.

DIRECTIONS: For a beverage, grate 1/2 lb. of chocolate or an ounce of this chocolate, add about the same quantity of sugar, place them in a pint of boiling water or milk, prepare an equal portion of each. Thoroughly stir until dissolved. A few minutes boiling will show a great improvement.

W.H. BAKER, Winchester, Va.
 Manufacturer of Premium Chocolate, Cocoa, Sweet & Vanilla Chocolate

TRADE MARK. WINCHESTER, VA. NEW YORK

not be allowed to so use his own name as to work an injury to another having the same name, nor to perpetrate a fraud on the public."

See, also, *Meyer v. Medicine Co.*, 7 C. C. A. 558, 58 Fed. 884; *Landreth v. Landreth*, 22 Fed. 41; *Pillsbury v. Flour Mills Co.*, 12 C. C. A. 432, 64 Fed. 841; *Brinsmead v. Brinsmead*, 12 Times Law, 631, 13 Ad. 3, and [1897] 1 Ch. 46. And this court had occasion to refer to the same doctrine in *Duryea v. Manufacturing Co.* (Dec., 1896) 79 Fed. 651. In that case the defendants placed their goods on the market in packages which prominently displayed the words "Laundry Starch Prepared by Duryea & Co.," and it was contended that the defendants' goods competed unfairly with the starch made by complainant's predecessors, and known as "Duryea's Starch." This court said:

"It cannot be denied that by continuous and rightful use for forty years the name of 'Duryea Starch' had become identified with its 'source of manufacture,' and that an attempt by persons of the name of Duryea, or of any other name, to put upon the market their own product under the name of 'Duryea's Starch' could be suppressed. Inasmuch as defendants have not called their goods by this well-known name," etc., injunction was refused.

This principle of equity indicates quite clearly what relief may be appropriately accorded to complainant here. W. H. Baker's legitimate use of his own name is not interfered with so long as he is allowed to use it in connection with his chocolate goods, setting forth on labels or advertisements that the chocolate is "made by" or "for," or "prepared by" or "for," or "sold by" W. H. Baker, or even that it is made or prepared at W. H. Baker's factory. But he should not be allowed to use his surname, Baker, whether his given name or its initials are prefixed or not, so as to announce upon label or advertisement that the goods he sells are "Baker's Chocolate."

The interlocutory decree of the circuit court, Southern district of New York, now appealed from, is therefore affirmed in all respects, except as to the third paragraph, which should be modified so as to read:

"3. From using in connection with the business of making or selling chocolate, on labels, wrappers, cans, boxes, cakes, molds, signs, letter heads, bill heads, or advertisements, or in any other manner whatsoever, the word 'Baker,' 'Baker's,' or 'Bakers' alone, or the word 'Bakers,' 'Bakers,' or 'Baker's,' (whether the same be or be not coupled with other names or initials) in such a collocation with the word 'chocolate' (whether the same be or be not coupled with some further descriptive word or words) as to indicate that the chocolate so made or sold is a variety of 'Baker's Chocolate.' But defendant may indicate thereon in appropriate language that the chocolate is made or prepared or sold for or by W. H. Baker, of Winchester, Virginia."

Equally appropriate relief would be afforded to complainant by adopting the method used in the *Brinsmead Case*, *supra*. And since it is urged that the expense of making a complete change in all the particulars above enumerated will be extremely heavy, the mandate will, if defendant prefers, direct a modification of the interlocutory decree solely by requiring the affixing upon every package sold, in type as prominent as the title, of the statement that "W. H. Baker is distinct from and has no connection with the old chocolate manufactory of Walter Baker & Company." Unless defendant pre-

fers this change, the mandate will direct modification as above set forth.

The cause is remanded to the circuit court for further proceedings in accordance with this determination. Costs of this appeal to the appellant.

HILSON CO. v. FOSTER et al.

(Circuit Court, S. D. New York. June 4, 1897.)

1. UNFAIR COMPETITION IN BUSINESS—METHODS OF ADVERTISING.

Money invested in advertising is as much a part of a business as if invested in buildings or machinery, and when the goods of a manufacturer have become popular, not only because of their intrinsic worth, but also by reason of the ingenious, attractive, and persistent manner in which they have been advertised, the good will thus created is entitled to protection against unfair competition.

2. SAME.

The adoption of a manufacturer's distinctive means of advertising his goods, by the use, for similar goods, of means which involve nothing original, and, though not identical at any point, are similar at every point, including the use of a picture which, in general design and in the idea conveyed, is so like a picture used to advertise such manufacturer's goods as to be readily mistaken for it by the ordinary purchaser, though differing from it in details of arrangement, constitutes unfair competition.

3. SAME—EVIDENCE—PROOF OF INTENT.

Similarities in the methods of dressing up goods for the market, and of advertising them, which, when considered alone, are immaterial and insignificant, may be important as tending to establish a general design on the part of one dealer to palm off his goods as those of another, and as helping to establish the intent in more flagrant infringements of right.

4. SAME—EQUITABLE RELIEF—FALSE STATEMENTS BY COMPLAINANT.

A manufacturer of cigars placed in each box thereof a printed statement that only the best grades of Havana tobacco were used in the cigars, which were guaranteed to be of choice Havana tobacco. In fact, the cigars contained a considerable proportion of inferior tobacco, not Havana, and in some instances no Havana tobacco at all. *Held*, that this was such a misrepresentation as to disentitle the manufacturer to relief against an imitator of his labels, advertisements, etc., though found clearly guilty of unfair competition.

Rowland Cox, Morris S. Wise, and Wise & Lichtenstein, for complainant.

Esek Cowen and Einstein & Townsend, for defendants.

COXE, District Judge. This is an action to restrain unfair competition in trade. For over 10 years the complainant and its predecessors have been engaged in making and selling a brand of cigars known as the "Hoffman House Boquet." These cigars were made of tobacco selected with great skill and care and they have been introduced to the public by an elaborate and expensive system of advertising until they have become well known and popular, the annual sales amounting to many millions. Perhaps the most prominent person in perfecting and popularizing these cigars was the defendant Foster. For 17 years he had been connected with Edward and Max Hilson under the firm name of Foster, Hilson & Co.

The Hoffman House Boquet cigar originated with Foster; he watched each step of its advancing popularity and to him more than to any other man its success is due. In 1892 the firm of Foster, Hilson & Co. was converted into a corporation under the name of the Foster-Hilson Company. In April, 1893, Foster disposed of his stock in this company, and has since been manufacturing the "Banquet Hall Boquet" cigar, and introducing it to the public by means which the complainant alleges to be unfair and fraudulent.

The law relating to this subject is well understood. No man has a right to use names, symbols, signs or marks which are intended, or calculated, to represent that his business is that of another. No man should in this way be permitted to appropriate the fruits of another's industry, or impose his goods upon the public by inducing it to believe that they are the goods of some one else. If A. presents his goods in such a way that a customer who is acquainted with the goods of B. and intends to purchase them is induced to take the goods of A. instead, believing them to be the goods of B., A. is guilty of a fraud which deceives the public and injures his competitor. Where the goods of a manufacturer have become popular not only because of their intrinsic worth, but also by reason of the ingenious, attractive and persistent manner in which they have been advertised, the good will thus created is entitled to protection. The money invested in advertising is as much a part of the business as if invested in buildings, or machinery, and a rival in business has no more right to use the one than the other,—no more right to use the machinery by which the goods are placed on the market than the machinery which originally created them. No one should be permitted to step in at the eleventh hour and appropriate advantages resulting from years of toil on the part of another.

The action is based upon deception, unfairness and fraud and when these are established the court should not hesitate to act. Fraud should be clearly proved; it should not be inferred from remote and trivial similarities. Judicial paternalism should be avoided; there should be no officious meddling by the court with the petty details of trade; but, on the other hand, its process should be promptly used to prevent an honest business from being destroyed or invaded by dishonest means. Judged by these rules the defendants must be found at fault.

No one, it is thought, can read the record without being convinced that the defendants started out with the deliberate purpose to cut into the complainant's trade, occupy its territory, beguile its customers and share its profits. The purpose to injure the complainant, if not admitted, is hardly disguised. The defendants have used the same means to introduce their cigar that the complainant adopted and although there is not exact identity at any point there is similarity at every point. The defendants' advertising proceeds upon lines similar to those adopted by the complainant; every step taken by the latter is met by a similar step by the former. The complainant uses the name "Hoffman," the defendants use the same name though differently spelled. The complainant uses diamond-shaped silver and black price cards and red and gold bands; the defendants

do the same. The complainant's show cards, posters and labels represent a banquet scene in the dining room of the Hoffman House; the defendants produce a similar scene in the dining room of "The Waldorf." In the use of metal signs, in the size and shape of the cigar, in the use of a picture representing a "smoking man," in the color of the paper edging of the cigar box and in many other matters of detail the defendants have trodden closely in the footsteps of the complainant. They have evolved nothing original; the plan of their advertising has been copied directly from the complainant.

It is true that many of these similarities are, when considered alone, immaterial and insignificant. If, for instance, the complainant's right to relief depended upon the color of the bands and box binding, or the size and shape of the cigar, it would be the duty of the court to dismiss the bill as depending upon considerations too trivial and speculative to warrant the interference of a court of equity. The law is not made for the protection of degenerates and paranoiacs, but for the general public composed of men with ordinary common sense and with faculties unimpaired. The task of the court, therefore, will be accomplished if it confines its attention to those similarities which are likely to deceive the ordinary purchaser. Though many of the acts complained of are insufficient to sustain a decree when considered alone, they are all important as tending to establish the general design to poach upon the complainant's preserve at every point and help to establish the intent of the defendants in their more open and flagrant infringements.

Perhaps the most distinctive advertisement of the complainant is one representing a banquet in the Hoffman House dining room attended by a large number of America's most conspicuous citizens,—Major McKinley, Mr. Cleveland, Gen. Harrison and Mr. Depew being among them. The latter is on his feet, presumably in the act of addressing the distinguished company. A box of Hoffman House Boquet cigars is being served to the guests. The idea intended to be conveyed, and which is conveyed, by this picture is that the Hoffman House cigar is a favorite upon such occasions and is patronized by the most eminent statesmen and orators of the land. No matter how much they may differ upon other questions they are agreed upon the proper cigar to smoke when the rivalries of politics are laid aside and they meet on common ground around the convivial board. The idea was striking and original. It impressed the average smoker. A cigar which suits so many prominent individuals must be a good one. True, banquet scenes have been used before as labels for cigar boxes but not this banquet scene, the central idea of which is the partiality displayed by so many well known citizens for this particular cigar. The picture impresses the average American very much as a German would be impressed if he were informed that the cigar offered him is the brand smoked by the Kaiser and Prince Bismarck; or an Englishman, if told that for a moderate price he can cultivate the same taste in tobacco as the Prince of Wales, Lord Salisbury, Mr. Gladstone and Mr. Chamberlain.

This picture the defendants have boldly appropriated. The same distinguished company is assembled; they are drinking the same

wine and are listening to the same orator. The critical observer will note the absence of some of the Hoffman House banqueters and the addition of others made prominent by more recent events. But the central idea is there; the general impression is the same. The ordinary purchaser seeing this picture in a cigar shop would be likely to enter and take the cigar offered him supposing it was the same brand which he had learned to distinguish by this distinctive banquet scene. He would not stop to analyze the picture; he would not notice that Mr. Depew stands opposite to President Cleveland whereas in the earlier picture they are on the same side of the table; he would not notice the differences in background or table decorations. The general effect would remain in his memory and the general effect is unquestionably the same. In order to demonstrate the bold character of the piracy the complainant has pointed out instances where minute details and even mistakes have been copied; but it is unnecessary to consider these, for it seems too plain for discussion that the defendants have taken the complainant's idea and are endeavoring to march into public favor under a flag which they are not entitled to carry.

The foregoing was written under the impression obtained at the argument that the affirmative defense might be disposed of by the maxim, "De minimis non curat lex." But the more the testimony bearing on this defense has been studied, and it has been read several times, the firmer becomes the conviction that the charge of misrepresentation is most serious. The complainant has placed in its boxes of Hoffman House cigars a picture representing a stripping scene in Havana. On the reverse of the picture is the following statement:

"We use only the very best grades of Havana tobacco, and are the only house in our line in this country making a specialty of fine Havana cigars who have their own stripping factory in Cuba, under the personal supervision of our Mr. Edward Hilson. We manufacture only genuine Havana cigars, and represent our goods as they are. Our cigars are guaranteed choice Havana tobacco, not American tobaccos raised from Spanish seed.

"Very respectfully,

The Hilson Company.

"Fact. No. 1, 3rd Dist. N. Y."

It will be observed that this notice is signed by the present complainant, the Hilson Company. The notice could not, therefore, have been used in the business prior to November 29, 1893, when the change in the corporate name took place. The defendants assert that after Foster had retired and the Hilson Company began business under its present management it stated falsely that cigars made wholly and partly of domestic tobacco were genuine Havana cigars. It will be observed that the language used by the complainant is free from all doubt and ambiguity. The card says: "We use only the very best grades of Havana tobacco. * * * We manufacture only genuine Havana cigars. * * * Our cigars are guaranteed choice Havana tobacco, not American tobaccos raised from Spanish seed." The evidence of a special trade meaning for the word "Havana" is very meager and is insufficient to uphold a finding of fact. Even if there were such evidence it is doubtful if it could be considered as these cards are addressed to the consumer, who is not

supposed to know the technical language of the cigar trade. The complainant's words must, then, be given their ordinary dictionary meaning.

The complainant admits that the Hoffman House Boquet cigars are made with Havana fillers, seed binders and Sumatra wrappers; that they have, to a considerable extent, been manufactured by team work; and that they have never been manufactured exclusively of Havana tobacco. Upon these conceded facts is the complainant's representation true? Assume that an ordinary smoker goes to the complainant's factory to purchase Hoffman House cigars, and that a box is handed him by the president of the company with the oral statement, "These cigars are guaranteed choice Havana tobacco, we make only genuine Havana cigars and use only the best grades of Havana tobacco;" would not the purchaser be justified in believing that he was purchasing cigars made "only" of Havana tobacco? How could stronger language be employed? It is urged that the card does not say that the cigars are made "wholly" of Havana tobacco; but "only" is a synonym for "wholly" and the statement when read as a whole certainly precludes the idea of the use of domestic tobacco.

It is no answer to this defense to say that the defendant Foster knew of the way in which the Hoffman House cigars were manufactured. There is nothing fraudulent in the way they are made; the fraud consists in representing them to be what they are not. On the other hand it must be remembered that this is an affirmative defense grounded on fraud. Fraud must be proved and if the testimony terminated at this point it is possible that the question might be considered doubtful and the doubt resolved in favor of the complainant upon the lines pointed out in *Condit v. Glaccum*, 2 Trade-Mark Record, No. 29. Certainly this would be the inclination of the court in view of the clear evidence of infringement as before indicated. But the testimony does not stop here. Marx Steinberger was general superintendent and foreman of the complainant's factory from November, 1893, until March, 1895, and before that time he was employed in a similar capacity by the Foster-Hilson Company. He testified positively and with his memory refreshed by memoranda made at the time that large numbers of the complainant's cigars were made with mixed Havana and seed fillers, seed binders and Sumatra wrappers and that others were made wholly of seed tobacco except the wrapper, which was Sumatra tobacco. In other words, he testified that the complainant sold large quantities of cheap seed cigars in Hoffman House boxes with the written guaranty that they were "genuine choice Havanass." This evidence is wholly uncontradicted. Although Edward Hilson is directly implicated by Steinberger neither he nor Max Hilson is called as a witness. Steinberger stands not only uncontradicted and unimpeached but the inference is very strong that it was not possible to contradict him. The excuse that the Hilsons, or their superintendent, if called as witnesses might have been required to reveal business secrets seems wholly insufficient in view of the gravity of the charge and the conceded knowledge of the complainant's business already possessed by the defendant Foster.

The witness Louis Prince who was called by the defendants is in the complainant's employ as foreman of the packing department. He was an unwilling witness but in many instances he corroborated Steinberger by stating that cigars, which the latter testified were largely or wholly of seed tobacco, went into Hoffman House boxes. It is true that Prince says that he never knowingly packed a seed cigar in a Hoffman House box, but this testimony is unimportant in view of his positive statement that he did not know how the cigars packed by him were made, or what kind of tobacco went into them. There is no escape from the finding of fact that the complainant has sold large quantities of seed cigars, or cigars with mixed fillers, representing them to be genuine Havana cigars. The rule of law applicable to such circumstances is perfectly clear. Equity will refuse to aid a complainant, in cases of this character, who is himself guilty of making material false statements in connection with the property he seeks to protect. *Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436; *Cigar Co. v. Pozo*, 16 Colo. 388, 26 Pac. 556; *Pettridge v. Wells*, 4 Abb. Prac. 144; *Krauss v. Peebles' Sons*, 58 Fed. 585; *Seabury v. Grosvenor*, 14 Blatchf. 262, Fed. Cas. No. 12,576; *Prince Manuf'g Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 24, 31 N. E. 990; *Connell v. Reed*, 128 Mass. 477. It would seem that this rule might be modified so as to permit the court, for the protection of the general public, to enjoin both parties; but so long as it remains the rule of the supreme court it is the duty of inferior tribunals to follow it. The bill must be dismissed.

CORBETT v. PURDY et al.

(Circuit Court, S. D. New York. May 17, 1897.)

COPYRIGHT—WHAT IS PROTECTED—TITLES.

The right secured by the copyright laws is the property in the literary composition, and not in the name or title given to it; and an injunction will not be granted, under the copyright laws, to protect a title alone, separate from the book or dramatic composition it is used to designate.

This was a suit in equity by Adolphe Corbett against Fannie Rice Purdy and others to enjoin the alleged infringement of a copyright on a dramatic composition. The cause was heard on a motion for preliminary injunction.

James Foster Milligan, for plaintiff.

Abram Hummell, for defendants.

LACOMBE, Circuit Judge. The relevant provisions of section 4952, Rev. St. U. S., as amended by the act of March 3, 1891, are as follows:

"Sec. 4952. The author of * * * any dramatic composition * * * shall, upon complying with the provisions of this chapter, have the sole liberty of * * * publicly performing or representing it or causing it to be performed or represented by others," etc.

There is no evidence to show that defendants are publicly performing or representing complainant's "dramatic composition." The

right secured by the copyright act is the property in the literary composition, and not in the name or title given to it. In no case, so far as this court is advised, has protection been afforded by injunction under the copyright laws to the title alone, separate from the book or dramatic composition which it is used to designate. *Osgood v. Allen*, 1 Holmes, 185, Fed. Cas. No. 10,603. Whatever rights complainant may have to restrain appropriation by another of the title of his work, on general principles of equity, cannot be considered in this suit, which is a controversy between citizens of the same state, and presents no federal question. Motion for injunction denied.

RELIANCE NOVELTY CO. v. DWORZEK et al.

(Circuit Court, N. D. California. May 17, 1897.)

PATENTS—PRELIMINARY INJUNCTION—GAMBLING DEVICES.

The Wertheimer patent, No. 26,684, for a design to be placed on a case containing a coin-controlled machine, known as a "card-playing slot machine," held to cover a gambling device, for which reason a preliminary injunction would be denied, though it was claimed that the patent was applicable to other purposes; it appearing that, up to the time of the present proceeding, it had never been used except upon a card-playing machine.

This was a bill for infringement of design patent No. 26,684. Order to show cause why a preliminary injunction should not be granted the complainant pendente lite. Objected that patent covers a coin-controlling, card-playing machine used for gambling purposes. Injunction denied.

John L. Boone, for complainant.

Isaac Frohman, for defendants.

MORROW, District Judge. This case comes up on an order to show cause why a preliminary injunction should not be granted the complainant pendente lite. The bill charges the infringement of letters patent No. 26,684, issued to Benny J. Wertheimer on February 23, 1897, under section 4929, Rev. St., for a design upon the cases of coin-controlled machines, generally known as "nickel in the slot machines," which, in the case at bar, are of the kind commonly known as "card-playing slot machines."

Several objections are made by the defendants to the application for a preliminary injunction. It is claimed (1) that the defendants' design is different and does not infringe; (2) that complainant's design does not disclose originality and the exercise of the inventive faculty, it being claimed, in this connection, that complainant's patented design case is substantially the same in form and general appearance as the case of the Nafew-Goldberg Manufacturing Company; and (3) that it has no element of utility, but is used on a gambling device.

If the last ground be deemed to be supported by the proofs, it will be unnecessary to consider the other grounds. The design covered by complainant's patent is placed on a case, with a glass front, con-

taining the coin-controlled machine referred to. This machine is composed of a mechanism, chief among which is a cylinder, to which playing cards of convenient size are attached. Upon dropping a five-cent nickel coin in the slot fixed in the front of the case, and pressing the push bar, also fixed in the front of the case, the cylinder is caused to spring and revolve with some rapidity, carrying the cards on the cylinder around with it. The losses or winnings of the player are determined by the combinations formed by the cards which ultimately rest face upright in the case. This brief description of these coin-controlled, card-playing machines, upon which complainant's design is placed, will be sufficient to show the nature and purpose to which they are put. The machines are used principally in saloons, cigar stands, and other such places of resort by the frequenters and visitors thereto. The winnings of the successful player consist generally in cigars or drinks. The complainant claims, however, that these coin-controlled, card-playing machines, inclosed by its design case, may be put to other uses, among which is the exhibition of photographs, kinetoscope pictures, automatic toys, and views of celebrated places and persons. But its own affidavits show that the only use to which the card-playing machines containing its design case have been put is for gambling purposes.

It is a general principle, based upon public policy, that the patent laws of the United States do not authorize the issue of a patent for an invention which is injurious to the morals, health, or good order of society. *Bedford v. Hunt*, 1 Mason, 302, Fed. Cas. No. 1,217; *Device Co. v. Lloyd*, 40 Fed. 89. The latter case, in principle, is directly in point, the device being also a nickel in the slot machine, similar in its general operations with that involved in the case at bar. It was known as, and the patent granted for, a "toy automatic race course." Judge Blodgett held it to be a gambling device, and not a useful invention, within the meaning of the patent laws of the United States, and declined to grant the complainant an injunction pendente lite. With respect to the claim, which is made in the case at bar, that the machine could be devoted to other than gambling purposes, the learned judge said:

"It is urged that this machine is susceptible of being utilized as a toy or child's plaything; but it is a sufficient answer to this suggestion that no such use has been as yet made. The patent has been very recently issued, and it is possible that a useful application may yet be found for it; but, as the case now stands, the only use to which the invention has been put being for gambling purposes, I must hold that it is not a useful device, within the meaning of the patent law, as its use so far has been only pernicious and hurtful."

This language appears to be peculiarly applicable to the design in the case at bar. It is true that the device referred to in the case cited was an invention of a machine, while in the case at bar the patent is for a design inclosing a machine; but I see no reason why the same principle of law should not be applied to the one as to the other. In *Simonds' Summary of the Law of Patents* (page 211) he says:

"It is true that the act hereinbefore quoted [section 4929, Rev. St.] specifies as patentable 'any new, useful, and original shape or configuration of any article of manufacture'; but it is not at all unreasonable to suppose that the

legislator who drafted the clause meant that the word 'useful' should have substantially the same meaning here that it has in the part of the act creating utility patents,—that is, that the things presented for patent shall be designed for some useful purpose, in distinction from a hurtful, frivolous, or immoral purpose."

I shall, therefore, deny the application for a preliminary injunction.

STEEL-CLAD BATH CO. v. DAVISON.

(Circuit Court of Appeals, Second Circuit. May 26, 1897.)

PATENTS—ANTICIPATION—BATH TUBS.

Claim 1 of the Booth patent, No. 458,995, for a bath tub composed of a smooth sheet metal casing, having a lining of copper or other light flexible metal hammered, rolled, or pressed into close contact therewith, does not describe a patentable invention in view of the Holmes patent, No. 189,559. 77 Fed. 736, reversed.

Appeal from the Circuit Court of the United States for the Northern District of New York.

This was a suit in equity by Samuel Davison against the Steel-Clad Bath Company for alleged infringement of a patent for an improved bath tub. The circuit court entered a decree for the complainant (77 Fed. 736), and the defendant has appealed.

Henry P. Wells, for complainant.

Wm. Raimond Baird, for defendant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This appeal is from a decree of the circuit court for the Northern district of New York, which found that the defendant had infringed claims 1, 2, 5, and 7 of letters patent No. 458,995, granted to George Booth on September 8, 1891, for an improved bath tub. The specification described the invention as follows:

"The object of the invention is to construct a cheaply-made, but practically indestructible, bath tub; and it consists, essentially, of a bath tub composed of a casing made of light sheet steel, or such other light sheet metal as has a perfectly smooth surface; the said casing being lined with copper, aluminum, or other light, flexible metal, hammered, rolled, or pressed into close contact with the smooth inner surface of the casing; the said bath tub being preferably made in three sections, each section having an outwardly projecting flange formed on it to correspond with the flange on the section against which it abuts. * * * The outer casing of each section is preferably made of light sheet steel, as the surface of sheet steel is perfectly smooth, so that the inner lining, a, can be hammered, rolled, or pressed into close contact with its outer casing, A. This inner lining, a, is made of copper, aluminum, or other light, flexible metal. By using metal, like sheet steel, with an absolutely smooth surface, I am able to use an extremely thin lining, a, which enables me to produce a highly-finished bath tub at a low price, and which will be very light and portable."

The patentee also said that an outer casing of cast metal could not be used, because the inner surface of the casing could not be made sufficiently smooth to receive the lining. The top edges of the tub were bent inwardly, so that the lining was held firmly

against the outer casing. A cap around the upper edges of the tub helped to hold the lining in position. The preferable division of the tub into three sections was for convenience of transportation. The claims in controversy are as follows:

"(1) As an improved article of manufacture, a bath tub composed of a smooth sheet-metal casing, having a lining of copper, aluminum, or other light, flexible metal, hammered, rolled, or pressed into close contact with its outer casing, substantially as and for the purpose specified. (2) As an improved article of manufacture, a bath tub composed of a smooth sheet-metal casing, having a lining of copper, aluminum, or other flexible metal, hammered, rolled, or pressed into close contact with its outer casing, in combination with a capping extending over, and secured to, the upper edges of the bath tub. (5) As an improved article of manufacture, a bath tub composed of a smooth sheet-metal casing curved in cross sections, so that its upper edges incline inwardly, a lining of copper, aluminum, or other light, flexible metal being hammered, rolled, or pressed, into close contact with its outer casing, substantially as and for the purpose specified. (7) As an improved article of manufacture, a bath tub composed of three flanged, smooth sheet-metal sections, lined with copper, aluminum, or other light, flexible metal, hammered, rolled, or pressed into close contact with its outer casing, in combination with a capping extending over and secured to the flanges formed on the upper edges of the bath tub, substantially as and for the purpose specified."

The trial judge truly stated that the sheet steel and copper tub which the patentee made is cheap, strong, durable, light, and easily moved. The experts in behalf of the complainant relied strongly upon the point that it was a cheap tub, which contained no concealed woodwork, and was so constructed that the pipes and joints were exposed, and that the exterior of the tub was open to free ventilation and examination, and was therefore an improvement both upon tubs which were incased by wooden boxes, and upon expensive porcelain tubs. These sanitary advantages were not mentioned in the specification, but the tub, being, as a whole, of metal, in fact excluded woodwork; and, being elevated upon legs, it was raised from the floor, and therefore the pipes could be examined with ease. The minor improvements specified in claims 2, 5, and 7 were not of patentable importance; and if the patentee had confined himself, in the first claim, to what he actually gave to the public,—a smooth sheet-steel casing, having a lining of flexible copper, rolled or pressed into close contact with its outer casing,—the patent would have been much stronger. But he went further, and claimed a smooth sheet-metal casing of any sort, having a lining of any light, flexible metal brought into close contact with the outer casing, and thereby gave too great breadth to his patent. He evidently intended to include all sheet metal, whether of zinc, copper, or tin. Smooth sheets of metal of different kinds, rolled or pressed together, were not unknown in the art of the coppersmith, and had been used in soda fountains and in water boilers; but these examples belonged to articles which were unlike bath tubs, and are not important in this connection. The patent to Charles E. L. Holmes, No. 189,559, dated April 17, 1877, was for a portable bath tub made of two kinds of metal; the body of the metal being zinc, and the facing of tin. "The sheet," says the specification, "is formed by uniting a thin sheet of tin and a thicker sheet of zinc by rolling the

two sheets together, soldering them face to face, or otherwise producing a homogeneous sheet having tin for a facing and zinc for the body." The outer casing of each section of the Booth tub "is preferably made of light sheet steel, so that the inner lining can be hammered, rolled, or pressed into close contact with its outer casing." The distinction which the complainant's experts make between the modes of construction of the respective tubs, viz. that the Booth tub is made of two independent sheets of metal, one nested within the other, whereas the Holmes tub is made from a homogeneous sheet of compound metal, was not recognized in the original Booth specification, which said that his "lining was hammered, rolled, or pressed so as to be practically integral with its outer casing." The body of each tub can be made by rolling the two sheets of metal together, and, if the Holmes alleged invention had never existed, a tub made of sheet zinc and sheet tin combined by rolling or otherwise pressing the sheets together would have been within the terms of claim 1 of the Booth patent, unless it should be construed as being exclusively for a stationary tub which is connected with the house system of water supply. If the Booth claim should properly be thus limited, the Holmes tub is so much a part of the prior art as to deprive the claimed improvement of the character of invention, for the means of which Booth claimed a monopoly for the manufacture of a stationary tub had been used before to make a light, cheap, and durable portable tub. *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. 81. The decree of the circuit court is reversed, with costs.

BLAUVELT v. INTERIOR CONDUIT & INSULATION CO.

(Circuit Court of Appeals, Second Circuit. May 26, 1897.)

PATENTS—INVENTION BY EMPLOYEE—IMPLIED LICENSE OF EMPLOYER.

An employé who, while earning weekly wages, constructs with his employer's tools and materials, and in his shop, machines which the latter uses as part of his tools, without knowledge of any objection thereto, cannot, after obtaining a patent, enjoin his employer from further use of the particular machines.

Appeal from the Circuit Court of the United States for the Southern District of New York:

This was a suit in equity by James M. S. Blauvelt, trustee, against the Interior Conduit & Insulation Company, to restrain the alleged infringement of a patent. The circuit court dismissed the bill, and the complainant has appealed.

John Dane, Jr., for complainant.

John S. Wise, for defendant.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The complainant is the assignee of letters patent No. 456,059, which were issued on July 14, 1891, to Albert D. Prentice, as inventor, for an improvement in machine for seaming tubes of sheet metal, and, as such assignee, brought a bill

in equity in the circuit court for the Southern district of New York against the defendant to restrain an alleged infringement of said patent. This appeal is from a decree of the circuit court, which dismissed the bill.

In April, 1891, Prentice made an application for the patent in suit, which was granted July 14, 1891. Subsequently, upon an application filed September 3, 1891, by Edward F. Greenfield, the electrical superintendent of the defendant corporation, an interference was declared between these two claimants for priority of invention, which resulted in a decision in favor of Prentice, and it may be assumed that he was the original inventor of the machine described in his patent. He had made a wooden model of his invention prior to the fall of 1888, and in November of that year Greenfield called upon him to make inquiries about it, saw it, and said that he might be able to make some arrangements for its manufacture. Prentice's story is that about January 1, 1890, Greenfield sent for him to come to the defendant's shop, and agreed with him that he should build one of his machines at the company's expense, that they should have an opportunity to test the probabilities of its success, and, if the invention proved satisfactory, they were to use it, paying as royalty one-eighth of a cent per foot of tubing manufactured by its aid. He was to take out a patent in the meantime, and was to be paid a mechanic's wages for doing a mechanic's work. He was, in fact, paid at the rate of \$30 per week, and he entered upon their employment in January, 1890, but did not commence working upon these machines until about a year afterwards. From material furnished by the defendant, six or seven machines were made by him, or under his supervision, in its shop, which went immediately into experimental or practical use by the defendant. On August 3, 1891, Prentice sent to its president the following letter:

"New York, Aug. 3rd, 1891.

"Mr. Edwd. H. Johnson—Sir: I called at your office, 44 Broad street, to-day, but failed to find you. I am the inventor and patentee of machine for making hook-seam sheet-metal tubes, as now used by Interior Conduit and Insulation Co. I have failed to come to any agreement with your agent, Mr. Greenfield, in regard to the granting license, or the amount of royalties I should receive. I therefore take this opportunity to notify you to discontinue the use of said machines until such time as we shall come to a mutual understanding as to the amount I shall receive as a royalty on your invention.

"Respectfully yours, Albert D. Prentice, 257 West 21st St., City.

"P. S. Date of U. S. patent, July 14, 1891."

On August 5th he was discharged by Greenfield. On August 11th Johnson replied to the letter of August 3d, denying Prentice's right to the patented invention, and claiming that, in any event, the defendant was entitled to use it. The question of importance in the case is in regard to the right of the defendant to use the machines which were made prior to August 3d. The complainant testified that the defendant had six or seven patented machines in use when he left. He afterwards said that seven dies were made in all during his continuance with the defendant, one of which was nearly completed when he left. No machines in addition to those substantially made or supervised by the complainant, which made use

of his invention, have been made or have been used since the complainant's notice of August 3d. The defendant says that it discontinued the use of the old machines after August 1, 1893, by which it means that a new roller die was substituted in place of the die which was described in the patent, but which the complainant thinks was an immaterial change. The decision of the question turns upon the existence of the alleged contract between Prentice and the defendant. As stated by the complainant, it was a verbal contract between him and Greenfield alone, neither made in the presence of, nor, so far as appears from his testimony, within the knowledge of, any other person. The alleged facts of the contract, which Greenfield denies, must be supported by extraneous circumstances, or by the inherent probabilities of the truth of Prentice's story, or its existence cannot be affirmatively found. The circumstances which do not support the complainant's theory are the following: Although Prentice says that he was employed for the very purpose of building these machines upon a specified royalty, he did not enter upon their construction until a year after he commenced to work for the defendant; but Greenfield attempted to have the first machine made outside the defendant's shop. Prentice did not apply for a patent until after the first one, which was finished in February or March, 1891, must have been in use; and Greenfield's knowledge that a patent had been applied for or obtained manifestly came as a surprise. Furthermore, no executive officer of the corporation seems to have heard of such a contract, which was of a class which Greenfield, who was simply the superintendent of the electrical department, had no power to make. The surrounding circumstances not only do not aid Prentice, but they cast doubt upon the probabilities of the truth of his story, and verify the accuracy of the conclusion of the trial judge, who said: "His [Prentice's] claims are not supported by proper or adequate evidence. If there was such a contract with the defendant, it has not been proved." The case is, therefore, that of an inventor, who, as a workman in the employ of another, manufactures for him, in his shop, and with his materials, and upon weekly wages, machines which the employer uses as a part of his tools, without knowledge of any objection thereto, and for which the inventor, during the term of his employment, obtains a patent, and thereafter seeks to restrain the employer from the use of the particular machine or machines which had been thus made in the employer's shop under the supervision of the employé, and apparently as a part of his ordinary mechanical work. This subject was considered at length in *Gill v. U. S.*, 160 U. S. 426, 16 Sup. Ct. 322. The court said the case raised the question, "which has been several times presented to this court, whether an employé paid by salary or wages, who devises an improved method of doing his work, using the property or labor of his employer to put his invention into practical form, and assenting to the use of such improvements by his employer, may, by taking out a patent upon such invention, recover a royalty or other compensation for such use. In a series of cases, to which fuller reference will be made hereafter, we have held that this could not be done." The court further said that the principle upon which all the deci-

sions were based is "an application or outgrowth of the law of estoppel in pais." The other cases to which reference was made are *McClurg v. Kingsland*, 1 How. 202; *Solomons v. U. S.*, 137 U. S. 342, 11 Sup. Ct. 88; *Lane & Bodley Co. v. Locke*, 150 U. S. 193, 14 Sup. Ct. 78; *McAleer v. U. S.*, 150 U. S. 424, 14 Sup. Ct. 160; *Keyes v. Mining Co.*, 158 U. S. 150, 15 Sup. Ct. 772. It is not to be expected that the facts in each case should be either exactly parallel with those of every other, or with those contained in this record, but the principle which is applicable to all is the same. The decree of the circuit court is affirmed, with costs.

BRILL v. ST. LOUIS CAR CO. et al.

(Circuit Court, E. D. Missouri, E. D. May 22, 1897.)

1. PATENTS—RIGHTS OF INVENTOR PENDING APPLICATION—INJUNCTION.

The inchoate right of an inventor, after application, and while the same is undergoing examination in the patent office, does not entitle him to an injunction against an alleged infringer. Hence any acts done by another, either in the way of using the invention or of threats to use it, prior to the date of a patent, cannot of themselves be any such evidence of infringement as to entitle the patentee to an injunction in a suit brought after the grant of the patent. If, however, the threats to use the invention are of a character to fairly justify the inference that defendants intended to continue the use thereof after a patent should be issued, then complainant may have a decree enjoining the carrying out of such threats.

2. SAME—PRESUMPTIONS.

Proof of construction by defendants, pending complainant's application for a patent, of cars which would infringe the patent, does not create a presumption that defendants would continue to make such cars after issuance of the patent. On the contrary the presumption is that defendants would conform to the law rather than violate it.

3. SAME—BURDEN OF PROOF.

The fact that it is easy for defendants to disprove an intention to infringe does not make their omission to do so presumptive evidence that they entertained such an intention.

Francis Rawle and Henry Hitchcock, for complainant.
George H. Knight, for defendants.

ADAMS, District Judge. The bill charges that the complainant is the owner of several letters patent of the United States, numbered, respectively, 373,639 (dated November 22, 1887), 418,438 (dated December 31, 1889), 425,653 (dated April 15, 1890), 428,068 (dated May 20, 1890), and 430,418 (dated June 17, 1890),—all for certain new and useful improvements in car trucks, railway cars, and motor trucks for cars,—and that the defendants had, prior to the institution of this suit, infringed the same by the conjoint use thereof in manufacturing cars, and also by selling cars so manufactured. The bill further charges that the defendants give out and threaten that they will continue such infringement. On these alleged facts the complainant prays for an accounting, and perpetual

injunction restraining such threatened infringement. The defendants' answer puts in issue the validity of the patents and the alleged infringement thereof by the defendants. At the hearing the complainant withdrew from the consideration of the court the patents aforesaid numbered 373,639 and 418,438, and disavowed any right of recovery thereon. The case, therefore, stands submitted to the court on patents Nos. 425,653, 428,068, and 430,418. These three patents, as already seen, are dated, respectively, April 15, May 20, and June 17, 1890. Much proof was taken bearing on the issue of patentable invention, and the same has been critically and ably analyzed and presented in argument; but, inasmuch as I am not able to find satisfactory proof of infringement, I do not consider it advisable to state my conclusions on this issue.

The bill was filed August 15, 1890,—four months after the date of the oldest patent, and less than two months after the date of the youngest patent, in suit. Complainant's counsel does not claim to have shown by direct proof any acts of infringement occurring after the date of any of the patents, but strenuously contends that the court should indulge such presumptions and draw such inferences, from acts done by the defendant four and six months before the dates of the patents, as will establish an intention on the part of the defendants to infringe subsequent to such dates. On the assumption that complainant's patents are valid, his monopoly under any of them commenced with their respective dates. An inventor has no exclusive right to his invention at common law, but derives all such exclusive right from the grant of the government, subject to the provisions of the statutes conferring the right. These statutes (section 4884) limit the monopoly to the term of 17 years from the date of the grant, as evidenced by the patent. Manifestly, therefore, there can be no invasion of the patentee's rights by any manufacture or use of the device, the subject-matter of the expected patent, prior to the date of the patent. On this subject, Chief Justice Taney, in the case of *Gaylor v. Wilder*, 10 How. 477, observes as follows:

"The inventor of a new and useful improvement certainly has no exclusive right to it until he obtains a patent. The right is created by the patent, and no suit can be maintained by the inventor against any one for using it before the patent is issued."

The inchoate right existing in an inventor, after making an application for a patent and while the same is undergoing an examination in the patent office, does not entitle him to injunctive relief against an infringer of such right. *Rein v. Clayton*, 37 Fed. 354; *Lyon v. Donaldson*, 34 Fed. 789.

From the foregoing it must follow that any acts done by defendants, either in the way of accomplished use of complainant's invention, or of threats to make use of the same prior to April 15, 1890, the date of complainant's oldest patent, cannot, in and of themselves, be any such evidence of infringement as to entitle complainant to a decree in this case. If, however, such use or threats to make use of such invention are of such character as to fairly justify

the inference that defendants intended to continue the use thereof after patents should be issued to complainant, then complainant is entitled to a decree enjoining the defendants from carrying out their threats. An examination of the proof on this subject is, therefore, necessary.

The application for patent 425,653 was filed June 25, 1888, for patent 428,068 was filed March 15, 1888, and for patent 430,418 was filed October 2, 1888. The patentee made a brass model, consisting of trucks and wheels, embodying the invention of these patents, and exhibited it at a convention of the American Railway Association at Washington, D. C., in October, 1888. Defendant Kling, who is also the president of the defendant corporation, was present at the convention, and had an opportunity of seeing this model there. In April, 1889, the Sprague Electric Company purchased of complainant a full-sized truck embodying the inventions of these patents, and shipped it to the defendant corporation, which received it on April 29, 1889. The defendant, soon after this, constructed nine closed cars, with trucks like those received from the Sprague Electric Company, embodying the complainant's device, for the Wyatt Park Railway Company, at St. Joseph, Mo., and shipped them to the last-named company in the following month of August. The proof further shows that while complainant, Brill, was on the stand, on June 26, 1891, the following questions were put to him, and the following answers made by him, namely:

"Question. Please look at the brass model which I show you, and state what it is, and how it is connected with the defendants in this case. (Said brass model is offered in evidence, marked 'Complainant's Exhibit, Truck Model No. 4.')

Answer. The brass model is the model of our 'Truck No. 4,' as we call it in our business, and it is practically an exact copy of a truck that the St. Louis Car Company have been furnishing to different parties, and the same I have seen in St. Louis and other places.

Question. State when you saw trucks manufactured by defendants in St. Louis, and where and what you saw.

Answer. I first saw them in December of 1889, on cars operated by the Lindell Railway Company of St. Louis.

Question. Did you examine these cars carefully at the time?

Answer. I did. In fact, the trucks on them are so much like our trucks that, when I first saw them, I thought it was one of our make, and it was only upon the closest examination that I discovered that it was made by the St. Louis Car Company. It is exactly like our truck, with the exception of one small detail.

Question. Had you previously shipped any car trucks similar to the one you speak of to the defendants and when?

Answer. Several, during 1889, were sent to the defendants' shop, to be placed on car bodies that they were building."

The proof further shows that, while defendant Kling was on the stand, on November 17, 1891, the following questions were put to him, and the following answers made by him thereto, namely:

"Question. Did your company build the motor cars for the Lindell Road in this city?

Answer. Yes; they did.

Question. And I understand that your company is sued by Brill in this case for building those cars?

Answer. Yes.

Question. Please state whether or not, in the cars made for the Lindell Railroad Company, for which you are sued in this cause, there is a bar corresponding to the bar, c, of complainant's patent, No. 430,418.

Answer. No, sir; it is not used.

* * *

Question. Does it (referring to a drawing exhibited to the witness), or not, represent the truck made for the Lindell Railroad by your company, and for which you are sued by Mr. Brill?

Answer. It does."

In addition to the foregoing testimony of the witnesses relied upon by complainant's counsel as proving infringement by defendants, attention is called to the language of defendants' counsel in offering Kling as a witness, as follows:

"Counsel for defendant states that at this time he desires to call Mr. Kling to testify to the exact construction of the truck frames built for which the complainant brings action, before Mr. Smith proceeds any further with his testimony."

On this issue of information, complainant's counsel calls attention, also, to a letter written to defendant corporation, of date January 6, 1890, which is as follows:

"Philadelphia, Jany. 6, 1890.

"The St. Louis Car Company, P. M. Kling, Esq., Manager, St. Louis, Mo.—Dear Sir: Your favor of the 3rd to hand, and contents noted carefully. Our recourse in the case of an infringement is against the railroad company operating the patented device, and they are the people against whom we open suit, and usually their suit is defended by the party furnishing said patented device. From a legal point it is our place to warn the parties against whom we propose to enter suit. As we said in ours of the 12—26—'89, we practically control the patented independent rigid trucks for electric motor cars, and it is a question of but a short time when we will assert our rights, in which case it is necessary for us to proceed against manufacturer and user.

"Yours, truly,

James Rawley, Secy."

The letter of January 3, 1890, to which the foregoing seems to be an answer, is as follows:

"St. Louis, Mo., Jany. 3rd, 1890.

"J. G. Brill Co., Philadelphia, Pa.—Gents: We are in receipt of your favor to the Colfax Ave. Elec. Ry. Co., of Denver, Col., dated 12—26—'89, notifying them as to liability for infringements of your right, on pat. truck. We have contract to furnish C. A. E. Ry. Co. with our pat. truck; therefore, if you are really under the impression that your patent is being infringed upon, the proper caper will be to write us in regard to same, and not try to work a scare game on our patrons. As to your Mr. Brill coming to St. Louis, we shall be pleased to see him. Hope this will not be practiced in the future. We remain,

"Yours, respt.,

St. Louis Car Co., P. M. Kling, Mgr."

Complainant's counsel also calls attention to a letter, written by complainant to defendant corporation, of date July 18, 1890, as follows:

"Philadelphia, July 18th, 1890.

"St. Louis Car Company, S. H. Kling, Esq., Superintendent, St. Louis, Mo.—Dear Sir: For some time past you have been making rigid independent trucks for electric motor purposes, of which we have seen a number, namely, those you have made for the Lindell Ry. Co. of St. Louis, and Lafayette, Denver, and other places, all of which are direct infringements of the following patents: Nov. 22, 1887, No. 373,639, G. Martin Brill and John A. Brill; Dec. 31st, 1889, 418,438, G. Martin Brill; June 17th, 1890, 430,418, John A. Brill and G. Martin Brill; Apr. 15th, 1890, 425,653, John A. Brill and G. Martin Brill; May 20th, 1890, 428,068, John A. Brill; July 15th, 1890, 432,115, John A. Brill. The trucks you have made also infringe other applications for patents which we have before the patent office for the hanging of the motor and brake. We notify you to quit the use of these devices at once; otherwise, we shall be compelled to resort to law.

"Yours, truly,

John A. Brill."

From this evidence,—and I have endeavored to state it all, and that, too, most strongly in favor of the complainant,—it is claimed that the court ought to find, as a fact, that the defendant corporation either actually constructed and sold cars embodying complainant's invention, after complainant's patents were issued in July, 1890, or, at least, that it threatened so to do.

Complainant's counsel argue that the court should find evidence of infringement, after the issue of his patents, from the evidence of witness Brill, when he says, as already set out, that "the model shown him is practically an exact copy of a truck that the St. Louis Car Company have been furnishing to different parties," and when he says he "first saw cars manufactured by defendant corporation after his device in December, 1889," claiming that the words "have been furnishing" may relate to a time subsequent to the dates of the patent, and that the words "he first saw" cars, etc., indicate that he had seen them afterwards. This kind of evidence is too vague and uncertain to establish the fact claimed for it, and the argument is not convincing. In the light of all the evidence, these expressions of the witness clearly relate to what he had before that time sworn to, namely, the manufacture of cars by defendant corporation, in the summer and fall of 1889, for the Lindell Railway Company, and, possibly, the St. Joseph & Denver Railway Company. It may be also remarked that the inference counsel draws in argument from the language of defendants' counsel, when offering Kling as a witness, is rather forced, and exhibits more distress than confident reliance on its intrinsic value.

Complainant's counsel argue that the proof of construction by defendant of cars for the Lindell Railway Company and other companies, before the date of any of its patents, creates a presumption that the defendant would continue to so construct them after the patents were issued to complainant. I do not think such presumption obtains. Defendant had a perfect right, so far as the law is concerned, to manufacture any kind of cars, even those embodying the principle of plaintiff's patents, up to the time complainant's monopoly came into existence by the grants of patents to him. The presumption is that defendants conformed to the law rather than violated it,—that they respected complainant's rights rather than infringed them.

Again, it is claimed, by way of argument, that defendants, in order to manufacture the cars for the Lindell Railway Company and other parties in the fall of 1889, must, of necessity, have expended much money in making patterns and otherwise outfitting themselves for the work, and that the court ought to presume that defendants would not have entered upon so expensive an enterprise without intending to continue it after the grant of patents to complainant. Even if the court should take judicial knowledge of the assumed facts involved in the foregoing argument, and should indulge the presumption that defendants intended to continue the business after the grant of the monopoly to complainant,—which, in my opinion, cannot be done,—it would, for the reasons already suggested, natu-

rally draw the inference that defendants intended to continue the business lawfully; that is, under license from the patentee, rather than in contravention and violation of his rights.

Again, it is argued that the correspondence already referred to between the complainant and defendants evinces a purpose on the part of the defendants to continue infringement after the grant of letters to complainant. In the first place, the complainant's letter to defendants' customer in Denver, referred to in the correspondence, was manifestly somewhat annoying. It asserted the existence of exclusive rights on his part six months before he acquired them, and properly enough evoked the rebuke from defendant corporation found in its letter to complainant of January 3, 1890. It is claimed that this last-mentioned letter is equivalent to saying: "We intend to continue to build such trucks. If you wish to sue any one, sue us." I think this is a forced construction placed upon it. The phraseology from which this construction is drawn is as follows:

"If you are really under the impression that your patent is being infringed upon [by persons to whom we have sold trucks], the proper caper will be to write us in regard to same, and not try to work a scare game upon our patrons."

This language, in my opinion, taken in connection with the admitted fact that complainant then had no exclusive right to make the trucks, cannot be tortured into a threat on the part of defendant corporation either to continue to make the same at all after complainant should secure a patent, or to continue to do the same without license from the patentee.

Again, complainant's letter of January 6, 1890, warning defendant of his exclusive right to the alleged patented independent rigid trucks for electric motor cars, and stating that it was but a short time before complainant would assert his alleged right, was a false statement of facts; and the fact that it evoked no response from the defendants is no evidence that they were violating any rights of complainant, or that they intended to do so.

The only other letter specially called to my attention on this issue is complainant's letter to defendant corporation, of date July 19, 1890, four days after the date of complainant's latest patent. It is argued that, because defendant corporation did not answer this letter, it thereby admitted that it intended thereafter to infringe complainant's rights. This letter, already copied, charged the defendant, in effect, with having theretofore infringed complainant's rights in the matter of making cars for the Lindell Railway Company and for parties in Denver, and calls attention to the fact that the patents sued on in this case had then been issued to complainant, and notifies defendant as follows: "To quit the use of these devices at once, otherwise we shall be compelled to resort to law." The reference contained in this letter to the Lindell Railway Company and the parties in Denver, in the light of the evidence, manifestly refers to the transactions, already alluded to, in the summer and fall of the year 1889. In fact, the evidence discloses no other transactions with these parties. In other words, there is no proof of a continuation of building cars embodying complainant's device through the

six months following these specific transactions, and prior to the grant to complainant of the patents sued on. The manifest purpose of the letter is to inform defendants of complainant's perfected monopoly, and to threaten a resort to the law in case of future infringement. In the absence of evidence to the contrary, the presumption must be that defendants intended to respect complainant's rights. The bare fact that defendants did not answer this letter, and in terms admit complainant's rights, and consent to recognize them, is, in my opinion, under the circumstances of this case, no evidence at all of an intention to violate them.

Again, it is argued that, because it was easy for defendants to have disproved an intention to infringe, the fact that they did not do so is presumptive evidence that they entertained such intention. This argument shifts complainant's burden upon the defendants. The law as well as settled practice forbids this. A clear and well-defined issue as to infringement was made in defendants' answer, and six months before the trial of the case defendants' counsel notified complainant's counsel that he intended to move for a dismissal of the bill for failure to prove infringement or intent to infringe. This issue was a material issue, and upon its determination complainant's right to injunctive relief depends. For want of proof of infringement, or intention to infringe, the bill must be dismissed. The order will be made without prejudice to complainant's right to institute a new suit.

COBURN TROLLEY-TRACK MANUF'G CO. v. McCABE MANUF'G CO.

(Circuit Court, S. D. New York. April 8, 1897.)

PATENTS—ANTICIPATION—DOOR HANGERS.

The Sumner patent, No. 455,695, for a door hanger for sliding doors, whereby the door may be laterally adjusted to be slid in a plane at any desired proximity to the partition in which the doorway is formed, was anticipated by the Kasson patent, No. 369,451.

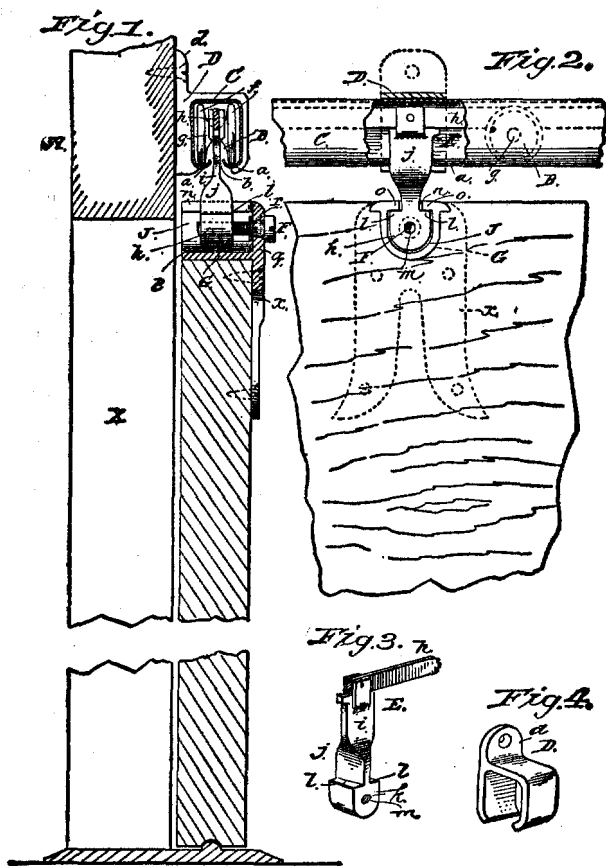
Arthur v. Briesen, for plaintiff.

Thomas Ewing, Jr., for defendant.

WHEELER, District Judge. This suit is brought upon patent No. 455,695, dated July 7, 1891, and granted to William J. Sumner for a door hanger. The specification states:

"This invention relates to improvements in sliding doors, which are suspended through trolley carriers and hangers from a trolley track thereabove, whereby they may slide longitudinally or alongside of the wall or partition,—the main object of the invention being to provide means, comprised in and between the hanger and the door, whereby the said door may be laterally adjusted, in order that it may be supported to be slid in a plane at any desired proximity to the partition in which is formed the doorway to be covered and closed by said door; and the invention consists in the constructions and combinations of parts, all substantially as will hereinafter fully appear and be set forth in the claims. The hanger consists of a longitudinal bar, to extend between and beyond and to rest on the axles of two roller carriers, and posts connected to and vertically suspended from and below said bar, being interme-

diately decreased in thickness, to permit of its free passage in the opening between the troughways of the trolley track, and provided at its extremity with an enlargement whereby shoulders are formed, and said enlargement is transversely and horizontally bored and screw-threaded.



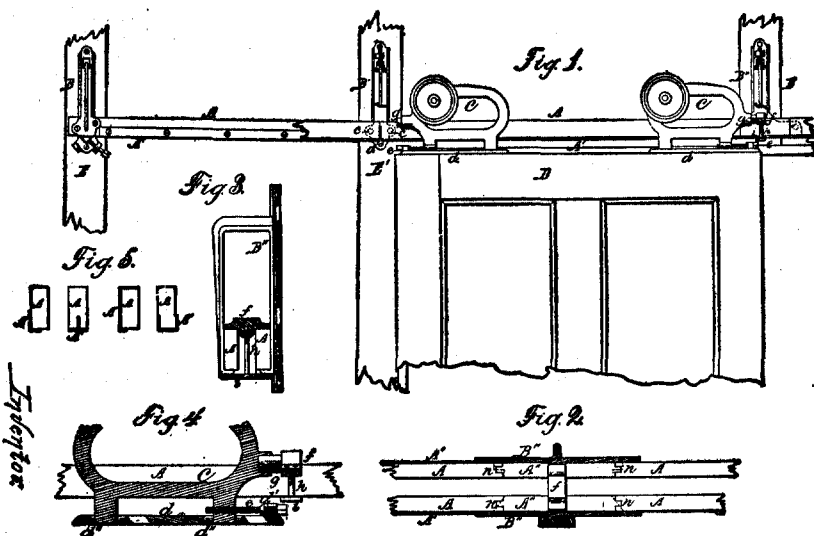
"The door at its upper side is provided with apertures therein, each having a contracted opening at its top, formed by overlying edges, and also open at one end, but closed at the other end by a wall. The head of each post suspended from the trolley track fits into the correspondingly formed apertures, being entered thereinto at the end thereof, and a screw passes loosely through a hole in the said end wall and with a screw engagement into the transverse tapped hole in the post enlargement. It being understood that the hanger posts are practically incapable of any lateral movement, it will be plain that, on turning the said screw (which is to be maintained against endwise movement), the said door will be moved laterally either towards or from the partition, according as said screw is turned to the right or to the left."

The claim in question is for:

"(1) In combination, the trolley track, roller carriers supported thereon, and a hanger supported from said roller carriers, comprising suspension posts hav-

ing terminal enlargements, and the door formed or equipped at its upper portion with transversely extending apertures and contracted openings leading therefrom to the top of the door, and in which apertures said post enlargements are entered for engagement, and an operating screw applied for securing a movement of said door laterally with relation to said suspension posts, substantially as set forth."

These things had been subjects of many patents before, including several granted to Sumner, leaving but narrow room for improvements, which have been shown in defense; and of these No. 369,451, dated September 6, 1887, and granted to William O. Kasson, is relied upon as an anticipation. The drawings of this patent show a track with roller carriages, slotted plates, *d*, at the top corners of the door, with U-shaped lugs, *d'*, at their outer ends, hangers or suspension posts or "limbs," reaching from the carriages through the slots in these plates, and screws, *e*, working through the lugs and engaging the limbs. The specification sets forth, after descriptions of various other parts:



"Provision has also been made for the horizontal adjustment of the carriage on the door, so that it may be carefully gauged with respect to the stop, or adjusted for any other purpose. The limbs of the carriage terminate in suitable dove-tail, or T-shaped, lugs, which engage with the corresponding groove in the plate, *d*, extending longitudinally from the wider apertures therein, through which the lugs freely pass. A screw, *e*, connects with the outer limb, and is journaled in a U-shaped lug, *d'*, on the upper side of the plate. To connect the parts the screw is turned up close to the shoulder, when the lugs slip through the holes in the plate, and the shank of the screw into its seat. The screw is then turned until the carriage is in the proper position."

Here are all of the parts of the combination of the claim relied upon of the patent in suit, working together in the same way, for the same purpose of adjusting a door hanging on rollers to its place in

covering the doorway. They differ somewhat in form, but the patents are not for designs, but for combinations of working parts. They suspend the doors in the same manner; one adjusts the door endwise, and the other sidewise; but the screw, driven in the same way, works in the same parts to accomplish a similar movement to effect the adjustment. The changes in form and direction appear to belong to the work of a mechanic rather than to the genius of an inventor. *Wright v. Yuengling*, 155 U. S. 47, 15 Sup. Ct. 1. Upon these views this alleged anticipation seems to be so made out as to defeat the claim relied upon. Bill dismissed.

FEATHERSTONE et al. v. DE LA VERGNE REFRIGERATING
MACH. CO.

(Circuit Court of Appeals, Seventh Circuit. May 19, 1897.)

PATENTS—NOVELTY AND INVENTION—INFRINGEMENT—GAS-LIQUEFYING PUMPS.

The Boyle patent, No. 175,020, for an improvement in gas-liquefying pumps, *held* valid, and infringed as to claim 1, which is to be construed as covering a combination in which the main feature is a removable valve cage whereby, in case of accident, a change may be quickly made, so as not to permit an injurious rise of temperature. 67 Fed. 937, affirmed.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

On November 24, 1877, James Boyle filed in the patent office his application for a patent on an improvement in gas-liquefying pumps. Three days later Mr. Boyle died. Afterwards, and on substituted claims, the patent was issued as 175,020, on the procurement of Boyle's personal representatives, and the title apparently vested in one Thomas L. Rankin as assignee. See the opinion of the supreme court of the United States. 147 U. S. 209, 13 Sup. Ct. 283. Later, and by subsequent assignments, appellee corporation became the owner of the said patent. On January 7, 1892, appellee, as complainant, exhibited its bill of complaint against John Featherstone, George Featherstone, Arthur J. Featherstone, Jacob W. Skinkle, Clarence A. Knight, and Otto C. Butz. The bill asserted the validity of the patent aforesaid, ownership of the same by complainant corporation, infringement by defendants, and that complainant was entitled to an accounting. The prayer was for an injunction and an accounting. At some time during the progress of the cause the bill was dismissed as to defendants Knight and Butz. On the 21st day of January, 1895, and at the December term, 1894, after a final hearing on the merits in the circuit court a decree was there entered in the words following: "This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed, and the court doth hereby order, adjudge, and decree, as follows: That letters patent of the United States, No. 175,020, issued to James Boyle, his heirs or assigns, March 21, 1876, for an improvement in gas-liquefying pumps, being the letters patent set forth in the bill of complaint herein, are in all respects good and valid in law, and the title thereto vested in the complainant, as alleged in said bill. That John Featherstone, George Featherstone, and Arthur J. Featherstone, the defendants herein, have infringed upon said letters patent No. 175,020, and upon the exclusive rights of the complainant thereunder, by manufacturing and selling compressors or gas-liquefying pumps for refrigerating and ice-making machines constructed in accordance with said letters patent, and embodying the invention or improvement described and claimed therein, as alleged in said bill. That complainant recover of said defendants the

profits, gains, savings, and advantages which said defendants have received or made, or which have arisen or accrued to them from their infringement of said letters patent and use of said patented invention, as aforesaid, and also the damages which the complainant has sustained thereby. That this cause be referred to Henry W. Bishop, Esq., one of the masters of this court, to take proofs, and to ascertain and take and state and report to the court an account of the number of compressors or gas-liquefying pumps for refrigerating or ice-making machines which said defendants have manufactured or sold and constructed in accordance with said letters patent No. 175,020, and embodying the invention or improvement described and claimed therein, and of the gains, profits, savings, and advantages which said defendants have received, or which have arisen or accrued to them from said infringement of said letters patent, as aforesaid, and also of the damages which the complainant has sustained thereby. That on such accounting the complainant have the right to cause an examination of the defendants ore tenus or otherwise, and also the production of books, vouchers, and documents of said defendants, and that said defendants attend for such purpose before said master from time to time, as said master shall direct. That the bill of complaint herein be dismissed, without costs, as to the defendant Jacob W. Skinkle." Afterwards, and on August 22, 1895, and at the July term, 1895, there was filed in said cause a stipulation which, barring the title of the cause and the signatures of counsel, was in words following: "Whereas, it appears that John Featherstone, George Featherstone, and Arthur J. Featherstone, as individuals, and prior to the incorporation of 'John Featherstone's Sons,' made five (5) machines of the kind found by the court in the above-named cause to infringe upon letters patent No. 175,020, and upon the rights of the complainant under the same; and whereas, it being deemed advisable that an appeal be speedily taken to the United States circuit court of appeals for the Seventh circuit: It is hereby stipulated, for the purpose of permitting such an appeal to be taken, that a decree for a nominal sum may be entered as and for the damages and profits prayed for in complainant's bill of complaint. It is further stipulated and agreed that, in the event that the findings of the United States circuit court are affirmed on appeal, a re-reference of this cause to a master may be had for the purpose stated in the interlocutory decree entered herein, and that the decree for nominal damages herein provided for shall not be taken or considered as a bar to the recovery of actual damages or profits proved before the master if a re-reference is hereafter had. It is further stipulated and agreed that the nominal sum here agreed upon shall not, in any event, or in relation to any machine or machines, be taken as the royalty, profit, or damage to be recovered, and shall not affect or limit the recovery to be had hereafter as against any or all machines for which an accounting may be desired or had. This stipulation is made solely for the purpose of enabling a prompt appeal to be taken in this case, and not for the purpose of limiting or embarrassing any other proceeding based on said letters patent No. 175,020." Afterwards, and on the same day, there was made in said cause the following entry: "This cause having been heretofore heard upon the bill, answer, replication, and proofs, and an interlocutory decree having heretofore been entered whereby it was ordered, adjudged, and decreed that letters patent No. 175,020 was a good and valid patent, that the title thereto was in the complainant, that the defendants, John Featherstone, George Featherstone, and Arthur J. Featherstone, had infringed upon said letters patent, and upon the exclusive rights of the complainant thereunder, and referring the cause to Henry W. Bishop, Esq., one of the masters of this court, to take account of the damages and profits and to report his findings, with the testimony by him taken, to the court; and the court now being advised that the parties have, for the sole purpose of permitting an appeal to be taken to the United States circuit court of appeals for the Seventh circuit, agreed that the profits and damages prayed for in said bill may be found to be nominal: It is therefore ordered, adjudged, and decreed that the complainants do have and recover of and from the said defendants, John Featherstone, George Featherstone, and Arthur J. Featherstone, the sum and amount of six cents as and for nominal profits and damages, but without prejudice to other suits or proceedings for the recovery of actual profits and damages; and it is further ordered, adjudged,

and decreed that the provisions of the interlocutory decree heretofore entered herein relating to the validity of the letters patent sued upon, the title thereto, the infringement of the said letters patent by the said defendants, John Featherstone, George Featherstone, and Arthur J. Featherstone, and the payment of costs of suit, are hereby confirmed, and made a part of this decree, and that so much of said interlocutory decree as directed the said master to take and state an accounting herein is hereby vacated and annulled." From an entry made afterwards and on the same day it appears that an appeal was allowed the three Featherstones "from the final decree heretofore entered in said cause in favor of complainant and against" them. Later, and on August 22, 1895, the three Featherstones as principals and one Thomas Burgess as security filed their appeal bond reciting as the matter appealed from that decree "in and by which the court found that there was due said complainant the sum of six cents, with costs." Following are the assignments of error: "(1) That the court erred in finding and holding that the complainant's letters patent No. 175,020 was a valid patent. (2) That the court erred in finding and holding that complainant's said letters patent was not and is not anticipated by the prior art shown and exhibited. (3) That the court erred in holding that both of the claims of complainant's said letters patent were good and valid claims in law. (4) That the court erred in finding and holding that the defendants infringed complainant's said letters patent. (5) That the court erred in finding and holding that the defendants infringed either or both of the claims of said letters patent when properly construed and limited. (6) That the findings and holdings of said circuit court are contrary to the evidence. (7) That the findings, holdings, and decree of said circuit court are contrary to law and equity."

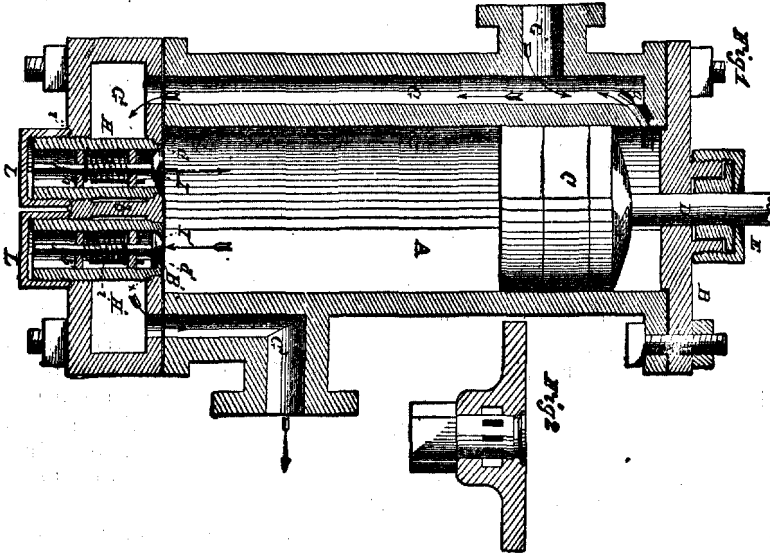
L. L. Bond, for appellants.

H. A. Banning and Edmund Wetmore, for appellee.

Before BROWN, Circuit Justice, and JENKINS and SHOWALTER, Circuit Judges.

SHOWALTER, Circuit Judge (after the foregoing recital). For reasons quite fully set forth in *Standard Elevator Co. v. Crane Elevator Co.*, 22 C. C. A. 549, 76 Fed. 767, my individual opinion is that the decree of January 21, 1895, was the "final decision" so far as concerns the ownership, validity, and infringement of the patent. On this view that part of the decree of August 22, 1895, which declares the former decree as touching the points of ownership, validity, and infringement to be "confirmed," is without legal effect, and no one of the assignments of error could be even inquired into. But assuming the former decree to have been in the respects mentioned interlocutory, it is the opinion of the court that there is no substantial error in the record. The patent in controversy concerns a force pump to be used in artificial refrigeration. Anhydrous ammonia in the gaseous state is by the downward movement of a solid piston head first compressed in the cylinder which constitutes the body of the pump, and then expelled through the outlet valve into pipes and chambers, whereby it is first condensed into the liquid form, then conducted into the refrigerating room, where it expands again into the gaseous state, taking up in so doing the heat from surrounding objects, thence conducted back again to the inlet valve of the pump, and drawn once more into the cylinder by the upward movement of the aforementioned piston head, to be again compressed by the return movement and sent again on the round described. The piston head is moved up and down by steam or some external force. The

operation of such a pump produces, maintains, and controls the state of temperature necessary for the preservation of the property in the refrigerating room, or for manufacturing operations there carried on. Boyle's patent shows two diagrams as below:



The specification of the patent contains the following statement:

"The nature of my invention consists in the construction and arrangement of a pump used in ice machines for liquefying the gas, as will be hereinafter more fully set forth. Figure 1 is a longitudinal section of my invention. Fig. 2 shows one of the valves therein. A represents a pump cylinder, provided with heads, B, and B', bolted thereon in the usual manner. C is the piston or plunger, provided with the piston rod, D, which passes through the head, B, and through a stuffing box, E, thereon. G is a tube or chamber running the entire length on the outside of the cylinder, and provided with the air inlet, G¹. This air tube communicates with the interior of the cylinder, A, close to the head, B, through a passage, a; and at the other end it communicates with one end of an air tube, G², running across the head, B', on the outer side. This air tube, G², is divided centrally by a cross partition, b, and the other end of said tube communicates with the air outlet, G³. The various air tubes or chambers are preferably cast with a cylinder and head, as shown in the drawing, but may be arranged in any other suitable manner. Through the air tube or chamber, G², on each side of the partition, b, is screwed a cage, the upper end of which extends up into an aperture in the cylinder head, B', and at the joint are suitable shoulders, x, x, so that when the cage is properly screwed up the joint will be perfectly airtight. On the upper end of the cage, H, is formed a seat, d, for the inlet valve, I, which has a stem or rod, J, extending downward through guides, h, h, within said cage, and the valve held down to its seat by a spiral spring, l, surrounding the stem between the guides. On the upper end of the cage, H¹, is formed a seat, d', for the outlet valve, I¹. The valve stem, J', guides, h', and spring, l', are the same as in the first cage, except that the spring is arranged to hold the valve up to its seat. The lower ends of the cages, H, H', are closed by means of screw-caps, L, forming tight joints with the chamber, G². The operation of the pump is readily understood without further explanation."

The original claims were two, worded as follows:

"(1) A single-acting pump for liquefying gas for ice machines, in which the gas to be compressed has a free passage into the pump over the piston head as well as through the inlet valve under the piston head, where it is compressed, thus doing away with the necessity of having a valve in the piston head as set forth. (2) In a pump for liquefying gas for ice machines, I claim the removable cages, H, H', with the valve seats, valves, and guides, substantially as and for."

Each of these claims was rejected on references, and the following were substituted:

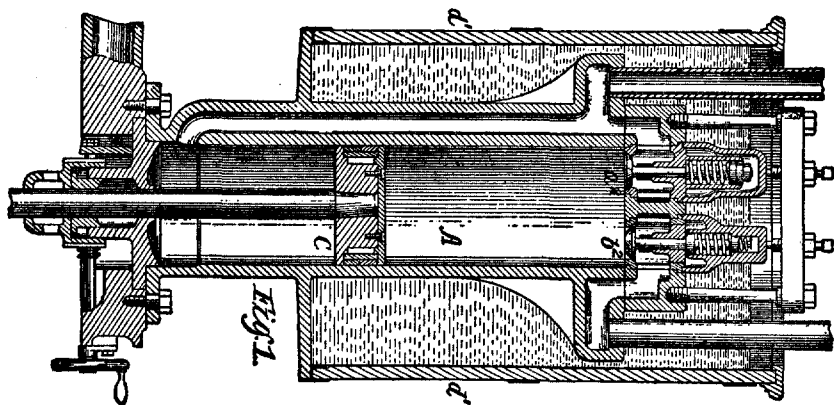
"(1) In combination with the cylinder, A, and its heads, B, B', the solid piston head, C, the tube, G, extending the entire length of the cylinder, the air tubes, G', G², air inlet, a, cages, H, H', having valves, I, I', and the outlet, G³, all constructed substantially as and for the purposes herein set forth. (2) In combination with the cylinder, A, and air tube, G², the removable cages, H, H', provided with spring valves and exterior screw threads, and exterior screw caps, L, L, all substantially as and for the purposes herein set forth."

The first claim is for a combination, one factor in which is the "cages, H, H', having valves, I, I', * * * constructed substantially as and for the purposes herein set forth." The specification and Fig. 1 of the drawings show two cages, each containing a valve, with its stem and guides, and a spring to press such valve back into its seat after the inflow of gas in the one case or the outflow in the other, whereby the appropriate valve has been pushed from its seat, has ceased. The head, B', of the cylinder, which is one of the factors of the combination, is so constructed as to leave therein the spaces on either side of the partition, b, to be occupied by the valve cages. The word "cage" implies a structure complete in itself, and containing the valve with its incidental mechanism. This structure, as described in the specification and as shown in Fig. 1, is removable as an entirety from the head, B'. It is contended that the first claim must be understood as though the cages were integral with the head, B', and not removable. This in view of the words, "removable cages, H, H'," in the second claim, and Fig. 2 of drawings. The patentee says, speaking of his drawings: "Figure 1 is a longitudinal section of my invention. Figure 2 shows one of the valves therein." The structure of the cage and its joints of connection with the head, B', is fully shown in Fig. 1. Fig. 2 was intended to show the inlet valve, and the mode of access whereby the gas is admitted to the under side of the same. Lines indicating the contour of the cage were not essential to the purposes of that figure. There is nothing in the specification to signify any possible construction of the valve inclosure other than a removable cage containing the valves. It is obvious, moreover, when the art to which the invention was to be applied is considered, that removable valve cages were deemed the important and characteristic feature of the invention.

The product of the combination of claim 1 is a state of temperature with reference not only to degree of cold, but to continuity under conditions where loss of property might result from any unduly protracted rise in temperature or stoppage of the pump. The removal of one cage in case of wear or accident and the substitution

of another within such an interval of time as will enable the machine to retain control of the temperature in a refrigerating room without endangering the property to be so preserved is the conception of the patent. If the quality of removability and substitution of cages had no other significance in this patent than mere convenience in mending the machine, the case might be different. But the removability of the cages affects the product of the combination. It would seem entirely clear that the cages, "H, H', having valves, I, I', * * * constructed substantially as and for the purpose herein set forth," of the first claim, are removable cages. Three prior patents, namely, the Seguin, the Harrison, and the Della, Beffa & West, are chiefly insisted on as anticipations. In the first of these there is no removable valve cage. Each of the others is a double-acting pump. In the Harrison it is plain that the inlet valve could not be removed unless the lower cylinder head were taken off; nor in this patent is there any valve cage severable as a structure from the lower head. In the Della, Beffa & West it does not clearly appear that the cages are removable. But the pump in each of the last-named patents, as said, is a double-acting pump. The open and unobstructed inlet, a, which is one of the factors of the first claim of the patent in suit, is not found in either. The mode of operation dependent on this open inlet, a, is not found in either. Moreover, a removable valve cage as a factor in a combination to secure the result obviously proposed by the patent in suit is not even remotely suggested by the structure of Harrison or that of Della, Beffa & West.

We cannot say that the combination of claim 1 does not contain invention, or that it is not novel. The pump as made by appellants is shown in vertical longitudinal section in the following cut:



As compared with the pump of the patent, that of appellants is inverted. The cylindrical jacket indicated by the rectangular spaces on either side is a water compartment, apparently to prevent heating. For the rest, each and every factor of claim 1 is shown. The cylinder, its two heads, and the solid piston head—that is, a piston head containing no valve opening—are obvious. The lower pipe

to the left and lengthwise the cylinder is the tube, G, of the patent. The lower end of this pipe where it enters the cylinder is the inlet, a, of the patent. The upper vertical pipe to the left is the tube, G', of the patent; that to the right, the outlet, G², of the patent. The open space above the cylinder with the partition in the center is G² of the patent. The two removable cages containing the valves above the letters, a², b², are the "cages, H, H', having valves, I, I'," of the patent. In appellants' pump each of the horizontal surfaces constituting the four shoulders of each cage is pressed against the corresponding surface of the head so as to make airtight joints by a setscrew bearing directly on the cap. In the patent the upper shoulder is made tight by a screw thread on the exterior of the lower half of the cage, and the lower shoulder by the threaded cap, L, bearing in the contrary direction. But this is a detail of construction showing a manner in which the horizontal joints, themselves the same in both devices, may be made airtight. This method of tightening the cage to the head is not specifically a feature of the first claim. Appellants' pump, in our opinion, infringes the first claim of the patent in suit. As to the second claim, however, and especially in view of what took place in the patent office, the infringement is not clear. But as to this claim the matter of infringement is immaterial. If the pump made by appellants infringes the first claim, a holding by this court that it does not infringe the second would mean nothing. Neither the decree of January 21, 1895, nor that of August 22, 1895, declares in express terms, or even by necessary implication, any infringement of the second claim. A holding by this court that the second claim is or is not infringed would, on this record, afford no ground for even partial reversal, or for any direction of any kind. The decree is affirmed.

NEW YORK FILTER MANUF'G CO. v. NIAGARA FALLS WATER-
WORKS CO.

(Circuit Court of Appeals, Second Circuit. May 26, 1897.)

1. PATENTS—INFRINGEMENT—METHOD OF FILTRATION.

The Hyatt patent, No. 293,740, for an improved method of clarifying water by introducing into it a coagulant simultaneously with its passage to the filter, thereby avoiding the use of the settling basins of the prior art, and making the process continuous, *held* (on appeal from order granting preliminary injunction) to be infringed by a process in which the coagulant is introduced a few minutes before the water reaches the filter, and the water then passes through two small tanks, which detain it but a few minutes, so that no efficient sedimentation takes place therein before the water passes to the filter. 77 Fed. 900, affirmed.

2. SAME—PRIOR ADJUDICATION—NEW EVIDENCE OF PRIOR USE.

After an exhaustive litigation upon a patent which is of known importance, and has been widely advertised, and after a careful re-examination and favorable adjudication upon its validity by an appellate court, the owner should not be prevented from receiving the advantages accruing from such decisions by mere paper affidavits in regard to prior use by individuals.

3. SAME—INJUNCTION.

A preliminary injunction against the use by a water company of a process of filtration will not be denied on the ground that defendant is a pub-

He servant engaged in supplying a city with water, where defendant has been eager that an injunction bill should be promptly brought, and has stated its desire that it should be accompanied by a motion for a preliminary injunction, so that a speedy decision could be had.

Wallace, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Northern District of New York.

The New York Filter Company brought its bill in equity before the circuit court for the Southern district of New York against Schwarzwald & Fink to restrain them from the infringement of letters patent No. 293,740, which were issued to Isaiah S. Hyatt on February 19, 1884, for an improved method of clarifying water. The validity of the patent was sustained, an injunction was decreed (61 Fed. 840), and upon appeal to the circuit court of appeals for the Second circuit the decree of the circuit court was affirmed in January, 1895. 13 C. C. A. 380, 66 Fed. 152. The New York Filter Manufacturing Company, the successor of the New York Filter Company, and the purchaser of all its assets, brought, in November, 1896, a bill in equity against the Niagara Falls Waterworks Company, before the circuit court for the Northern district of New York, to restrain the infringement of the same patent, and also made a motion for an injunction pendente lite. From the order of that court, which was dated January 8, 1897, and granted a preliminary injunction, an appeal was taken by the defendants. The Schwarzwald Case was against the use of a filter manufactured by the O. H. Jewell Filter Company of Chicago. The Niagara Falls Waterworks Company is a company for the introduction of pure water for domestic and manufacturing purposes to the city of Niagara Falls, and its filtering plant was erected by the Morrison-Jewell Filtration Company, which manufactures the same type of filter as that sold by the O. H. Jewell Filter Company. The important question upon this appeal is whether the defendant's filtering system differs so materially from the infringing process which was enjoined in the Schwarzwald Case as to remove it from the controlling effect of the former decision.

John R. Bennett and M. H. Phelps, for complainant.

F. P. Fish, Frederick H. Betts, and J. E. Hindon Hyde, for defendant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts as above). The single claim of the patent in suit is as follows:

"The method hereinbefore described of arresting and removing the impurities from water during an uninterrupted passage of same from a supply pipe into a filtering apparatus, thence through a filter-bed contained therein, and out through a delivery-pipe leading therefrom, which method consists in introducing into the water simultaneously with its passage to or into the filter a substance which will sufficiently coagulate or separate the impurities to facilitate their arrest and removal by the filter-bed, thus obviating the necessity of employing settling-basins."

The history of the art of purification of water by sedimentation and filtration, and of the different and patented art of purification by an uninterrupted process of filtration alone, is given in the decisions to which reference has been made in the preliminary statement. 61 Fed. 840; 13 C. C. A. 380, 66 Fed. 152. The construction which was given by the court of appeals to the claim, and their definition of the invention of Hyatt, are as follows:

"The patent in suit describes a departure from anything which appears to have been done or known in the prior art, so far as appears by the record. It describes a method for the purification of water by the simultaneous applica-

tion of a specified coagulant and a process of filtration, the coagulant being applied to or mixed with the water to be filtered substantially at its introduction into the filtering apparatus, and while it is flowing continuously to the filter-bed. By this method the coagulants perform their principal work within the filter-bed itself. By this change in previous processes the patentee not only dispensed with the use of settling-tanks, thus saving the time and expense required in sedimentation processes like that of Spence, but he also dispensed with the additional chemical treatment of the water, and the use of the more complicated apparatus involved in processes like that of Paget. So far as appears, no one had previously discovered that the agglomerating action of the coagulants could be obtained without waiting a considerable time for precipitation, or during the passage of the water through the filtering-bed."

The defendant's plant is a large one, and, speaking generally, thoroughly and solidly constructed. Its actual rate of flow is 3,600,000 gallons per day. That portion of the plan or method of operation which precedes the delivery of the water into the filter-beds is described by Prof. Main as follows:

"The water enters an intake bay, which is under the floor of the pump room. A dilute solution of alum is forced continuously through a small pipe into the stream of water which is flowing constantly into the open end of the intake main. The end of the alum pipe passes some five or six feet into the intake main, so as to deliver the alum solution well within it. The alum solution is prepared in special tanks, which are shown in the drawing. A small pump, which is kept running at a fixed rate, draws from the alum tanks and delivers the solution as described. The intake main is connected with two basins, which are alike in dimensions and arrangement. Gate valves are provided, so that either one may be cut off for any purpose while the other is kept in operation. When the gates are open, the water in these basins stands at the same level as that in the river. The basins are provided each with three transverse partitions, as shown more clearly in the detailed drawing. The water entering near the bottom passes first over a plank partition, which does not reach to the water level. It then passes downward and under the middle brick partition, through the archway in the bottom. After this it passes upward, and over the last plank partition, and then downward to the suction pipe connected to a large rotary pump, which is driven by an electric motor. This description applies to both basins, as they are alike, and each is provided with a rotary pump. The rotary pumps deliver the alum-charged water into the supply main, which feeds all the filters simultaneously."

The combined capacity of these basins is 28,760 gallons, so that, as the outflow of the water is about 2,500 gallons per minute, the time required for the passage of a given quantity of water through the basins is about 13 minutes, and the water, as it flows over partitions and through an archway, has little rest. The cost of these basins was \$3,500. The patent declared that by the use of the described uninterrupted process the patentee dispensed "with the employment of settling basins or reservoirs as now commonly employed," and in the concluding sentences of the decision of the court of appeals it was said that settling-tanks were used in some of the plants of the defendant between the introduction of the coagulant and the filter-bed, and in this plant the method of the complainant was not appropriated. The defendant therefore urges that, inasmuch as these two basins are settling-tanks, it is freed from the charge of infringement. It is obvious that the patentee was referring to the reservoirs or settling-tanks which, in almost every pre-existing system for the purification of water which contained suspended impurities, had played an important part. The only known testimony in the Schwarz-

walder Case in regard to the use of settling-tanks by the O. H. Jewell Company was that an hour elapsed in its plants at Columbia, S. C., and Chattanooga between the admission of the alum and the passage of the water to the filter-bed; that at Chattanooga the re-agent was fed into the pumps about half a mile from the filtering-bed, and that at Columbia a large subsidence tank is provided to receive the water before it enters the filters, and that settling-tanks were used at Louisville. The concluding sentences of the opinion were inserted out of caution, so as to show that these tanks, as thus stated and described, and with no more knowledge in regard to them than had been thus scantily given, were not to be included in the finding of infringement. The declaration was not that any basin which may be called a settling-tank could take the system with which it was connected outside the scope of the patent, and it is therefore necessary to look at the real function of these basins, and ascertain what they are in fact. If they had been designed to assist materially in the subsidence of suspended impurities, they would probably have been constructed so as to allow more time for the attainment of that result. The whirling of 3,600,000 gallons of water per day through small tanks in 13 minutes would seem to be inefficient for sedimentation to a material degree, but the examination of the tanks themselves by Prof. Main and Mr. Kendrick on October 28, 1896, which was made with great precision, and with the attendance of the defendant's selected experts, leaves no doubt that on that day no material deposit of sediment could be found, and that, so far as those in immediate charge of the tanks were concerned, an accumulation of sediment was neither anticipated, nor was habitually removed. On December 7, 1896, three scientists visited the defendant's plant, at its request, and each found sediment in the tanks, but their general statements on the subject give inadequate data of how much they found. If they had been able to make such computations as to present the amount in figures, rather than by the use of words of general import, their examination would have furnished an exactness of information which is now lacking. Our conclusion is that sedimentation is not effected or promoted by these two basins in any material degree. They are "settling-tanks" or reservoirs in name only. Manifestly, a more important difference, in the minds of the three experts, between the filtrating system of the defendant and the patented method consisted in the fact that the coagulating action of the aluminum sulphate was begun shortly after its admission to the water, and was completed in the basins by the time the water was about to enter the filter. It is said that it is desirable that this reaction should take place before the water reaches the filter-bed, otherwise the water is likely to remain turbid after it passes the filter. It cannot be of practical importance that the coagulating action should take place a few moments only before the entrance of the water into the bed, but the additional point is made that such a process of formation differs from that of the patent, which demands that the salts, or their equivalent, should be introduced into the water coincidentally with its entrance into the filter-bed, and that the sticky hydrate should be formed within the bed. The claim of the patent

said that the method consisted "in introducing into the water, simultaneously with its passage to or into the filter, a substance which will sufficiently coagulate or separate the impurities to facilitate their arrest and removal by the filter-bed." It is true that in the specification the water pipe and the pipe containing the coagulating agent met near the filter-bed, and that the contents of the two pipes passed into the filter together, but the novelty of the process did not consist in the formation of the hydrate at or after the exact instant of time when the solution enters the filter-bed, and accordingly the court of appeals, in defining the patented method, said that the coagulant was to be "applied to or mixed with the water to be filtered substantially at its introduction into the filtering apparatus, and while it is flowing continuously to the filter-bed. By this method the coagulants perform their principal work within the filter-bed," and settling-tanks are dispensed with. To urge that the defendant does not infringe because it mingles the inflowing current of water and the solution of alum while the water is flowing continuously to the filter-bed, but a few minutes before it reaches it, savors of technicality. The defendant has adopted the Hyatt method of clarifying water from suspended impurities by an uninterrupted process of filtration, which is accomplished by introducing into the water while it is continuously flowing to the filter-bed a sufficient quantity of a coagulant.

It is next said that new issues have been presented in the defendant's affidavits and in patents not in the Schwarzwald record, which affect the validity and scope of the patent. The patent of most apparent importance which is referred to was issued by the United States to Franz Pichler and Karl Sedlack—No. 278,178, dated May 22, 1883—for an apparatus for purifying and softening water. It was evidently particularly designed for the softening of water, and consists of an inlet pipe, preferably of two branches, one for the influx of water, the other for the re-agent. The fluid then flows into a series of purifying chambers and of sediment chambers, the latter being of larger cross section than the other chambers, so that the movement of the liquid shall be considerably slower and the deposit of the impurities shall be secured before the water finally reaches the filter. The specification presents the deposit of sediment in the sediment chambers of gradually increasing capacity as the chief feature of the invention, and the entire description contained in the paper patent shows that the alleged invention has no patentable relation to Hyatt's process. Affidavits were also presented in regard to the use of settling basins between the point where the water receives the re-agent and the filter-bed, which were used in two sugar refineries in New Orleans before the date of the Hyatt invention. The Planters' Refinery plant is described with the greater particularity. The water went into a settling tub, where it received its re-agent. It then passed through 3 other settling tubs, and thence to 10 filters, each 3 feet in diameter and 25 feet high. The dimensions of the tubs are not given. The plant delivered about 100,000 gallons per day. If the drawing which the affiant annexed to his affidavit shows the size of the tubs as compared with that of the filters, the settling-tanks had a value for sedimentation, and were

in fact used for that purpose. Certainly they were far more important than the basins of the defendant. Inasmuch as the main inquiry before the circuit court was whether the defendant's tanks are settling tanks in name only, the fact that other people had used tanks of a size and character which made them efficient throws but little light upon the issues involved in the present appeal.

The affidavits of three gentlemen that the beneficial character of salts of iron as a re-agent was suggested by one or more of them to Mr. Hyatt during his experiments in New Orleans prior to his application for a patent are inconsequential.

Three instances of the construction of filters of the Hyatt type, in a more or less perfect form, prior to the date of his invention, are next stated in affidavits. These instances are by Raynor, in New York, in 1878; by Peterson, in St. Louis, in 1882; and the alleged manufacture and use by B. T. Loomis, in Baltimore, in December, 1882. It must be recollected that the Schwarzwald Case was contested with earnestness, and at great expense. The pre-existing patents were produced in abundance, and an earnest effort was made to show the history of the art of filtration in all the forms in which it had been practiced. After the decision of the court of appeals, a motion for a preliminary injunction was brought, in accordance with the declared wishes of the defendant. Under such circumstances, where a new defense is interposed, the evidence to support it must be so cogent and persuasive as to impress the court with the conviction that, if it had been presented and considered in the former case, it would probably have availed to a contrary conclusion. *Electric Manuf'g Co. v. Edison Electric Light Co.*, 10 C. C. A. 106, 61 Fed. 834; *Bresnahan v. Tripp Giant Leveller Co.*, 19 C. C. A. 237, 72 Fed. 921. The account of the Raynor and the Peterson anticipations in 1878 and in 1882, in view of all the presumptions in the case, makes no impression upon the mind. The Loomis Case is stated with more detail. He was a manufacturer of filters in Baltimore, and in 1879 or 1880 made an experiment for the purification of foul water flowing from a factory and dye works in Wilmington, which was abandoned because the filters became clogged with the impurities in the waste water. In December, 1882, Mr. Loomis says that he applied his alum-feeding device to a filter in his shop, and successfully used it, in connection with the filter, for several months. He subsequently attached his feeding device to some of the filters, which were delivered in response to orders for filters from purchasers outside of Baltimore; but their names or residences, or the dates of the sales, or what the purchasers actually did with the alum-feeding devices, are not stated. Whether they were sold before or after the date of the Hyatt invention is not known. None were ever sold in Baltimore, which was his principal market. His prior use was, therefore, the use in his own shop, and whether this was experimental, for purposes of an advertisement, which was never responded to by his customers in Baltimore, can only be ascertained by investigation. As Mr. Loomis presents his case in his affidavit, this defense is not cogent or persuasive enough to impress us with the conviction that it would have availed in the Schwarzwald Case.

It is believed that after an exhaustive litigation upon a patent which is of known importance, and has been widely advertised, and after its careful re-examination and a favorable adjudication upon its validity by the appellate court, this class of paper affidavits in regard to priority by individuals ought not to be permitted to delay the owner of the patent from receiving the advantages which accrue from his successful struggle with infringers.

The next point is that the defendant is a public servant, is engaged in supplying the city of Niagara with pure water, and therefore ought not to be enjoined. The defendant was eager that a bill for an injunction should be promptly brought, and stated its desire that the suit should be accompanied by a motion for a preliminary injunction, so that a speedy decision could be had. Under these circumstances, its point that the order for an injunction is inequitable is deprived of force.

The order for an injunction pendente lite is affirmed, with costs.

WALLACE, Circuit Judge (dissenting). I am unable to concur in the opinion of the court. In my opinion, the patent to Pichler & Sedlack, of May 22, 1883, negatives the novelty of the patent in suit, and discloses apparatus in all essentials like the alleged infringing apparatus of the defendant. In the Schwarzwaldner Case, in which the patent in suit was considered by this court (13 C. C. A. 380, 66 Fed. 152), the Hyatt patent was sustained, not because the use of the coagulants therein described was new for the purification of water, but because the method of using the coagulants while the water was flowing continuously to the filter-bed was supposed to be new, "the coagulant being applied to or mixed with the water to be filtered substantially at its introduction into the filtering apparatus, and while it is flowing continuously to the filter-bed." The patent to Pichler & Sedlack describes this method, although the continuous flow of the water is somewhat retarded on the way to the filter-bed by partitions which form sediment chambers, and catch some part of the suspended impurities.

RUBIN et al. v. STURTEVANT et al.

(Circuit Court of Appeals, Second Circuit. May 26, 1897.)

1. RESCISSION OF SALES—BREACH OF WARRANTIES—EXECUTORY CONTRACTS.

When there is an express warranty upon an executory contract of sale, and the articles which are the subject thereof do not correspond to the warranty, the vendee may return them, as not being what he has agreed to buy, and rescind the contract; and if several distinct articles at different prices are embraced in the contract, though covered by the same warranty, a right of rescission exists as to each.

2. SAME—RESALE BY VENDEE.

When the vendee in an executory contract of sale rescinds the contract and returns the goods, because they do not correspond to a warranty, but the vendor refuses to receive them, it is proper, if not obligatory, for the vendee to take such measures as are expedient to save unnecessary loss to

the vendor, and if he sells them, exercising reasonable diligence, he is responsible only for the proceeds.

8. SAME—ACTION FOR PRICE—EVIDENCE.

When the vendee in an executory contract of sale has rejected and returned the goods, but the vendor has refused to receive them, in an action by the vendor for the price, evidence of attempts to induce the vendor to arbitrate is competent on behalf of the vendee to explain a delay in selling the goods to save loss.

In Error to the Circuit Court of the United States for the Southern District of New York.

Manheim & Manheim, for plaintiffs in error.

Stern & Rushmore, for defendants in error.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the plaintiffs in the court below to review a judgment entered upon the verdict of a jury.

The action was brought to recover the agreed price for goods sold and delivered by the plaintiffs to the defendants. The defense was a recoupment of damages for breach of warranty by the plaintiffs of the quality of the goods. The plaintiffs admitted the warranty, but denied the breach. The jury found upon this issue for the defendants, rendering a verdict for the plaintiffs for the sum of \$1,106.25, being the purchase price of part of the goods and the sum realized by the defendants from a sale of the balance at auction.

It appeared upon the trial that in June, 1895, the defendants, merchants in business at Zanesville, Ohio, ordered of the plaintiffs, manufacturers of fur garments at New York City, 173 fur capes, at separate specified prices, which were to be perfect and like certain samples. Pursuant to the order the capes were made and shipped by the plaintiffs in July, and received by the defendants about the 1st of August. The defendants retained some of the goods as acceptable, but, insisting that the rest did not correspond to the warranty, and were unmerchantable, reshipped them to the plaintiffs at New York City, notifying them accordingly. The plaintiffs declined to accept the goods, and in the following December the defendants caused them to be sold at auction. It appeared that there had been a steady decline in the market prices of fur goods since August, and that in December prices were 50 per cent. lower than in August. The evidence for the plaintiffs tended to show that the goods were in all respects perfect and according to the sample, and that they were at the time of the shipment equal in value to the agreed price. Evidence on the part of the defendants was given showing the amount which the goods brought at the auction sale, and also tending to show that the goods, in their imperfect condition, were not worth more than 25 or 30 per cent. of the market value of perfect goods. The defendants were permitted to show, against the objection and exception of the plaintiffs, that the expenses of the auction sale were \$67.

The trial judge instructed the jury that the plaintiffs were entitled to recover the price of the goods which were accepted by the defendants, and, as to the rest of the goods, that, if they did not correspond

to the warranty, the defendants were entitled to return them, and, if the plaintiffs refused to accept them, the defendants were entitled to sell them on account of the plaintiffs, and were to respond only for the proceeds realized from the auction sale. The plaintiffs excepted to the latter part of the instruction, and asked the court to instruct the jury that the defendants were only entitled to recoup the difference in value between perfect goods and the goods as they were at the time of the sale and delivery. This instruction was refused, and the plaintiffs excepted.

Error is assigned of the instruction which was excepted to, and of the refusal to instruct as requested by the plaintiffs, and also of the ruling of the court in admitting the evidence of the expenses of the auction sale.

When there is an express warranty upon an executory contract of sale, and the articles which are the subject of the contract are found, when delivery is tendered to the vendee, not to correspond to the warranty, two remedies are open to him: He may return the articles and rescind the contract, or he may accept them and, affirming the contract, recover upon the warranty. *Pope v. Allis*, 115 U. S. 363, 6 Sup. Ct. 69; *Bagley v. Cleveland Rolling-Mill Co.*, 22 Blatchf. 342, 21 Fed. 159; *Day v. Pool*, 52 N. Y. 416; *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. 51. The right to rescind arises, not because the contract of warranty is broken, but because the articles do not correspond with the contract of sale, and the vendee is not bound to accept that which he did not agree to buy,—a consideration which has sometimes been overlooked in the adjudged cases.

A rescission contemplates that both parties shall be placed in statu quo, and ordinarily the vendee of goods who proposes to rescind the contract for their purchase must rescind in toto. But, where the contract of purchase embraces a number of distinct articles at different prices, then, even if they are of the same general description, so that a warranty of quality would apply to each, the contract is not entire, but is, in effect, a separate contract for each article, and a right of rescission exists as to each. *Manufacturing Co. v. Wakefield*, 121 Mass. 91. But, if one consideration is to be paid for all the articles, so that it is not possible to determine the amount of consideration paid for each, the contract is entire, and there cannot be a rescission without an offer to return the whole. *Miner v. Bradley*, 22 Pick. 457; *Lyon v. Bertram*, 20 How. 149.

In the present case the defendants elected to rescind, and were entitled to rescind as to that part of the goods which did not correspond with the warranty; but, by the refusal of the plaintiffs to receive the returned goods, they found themselves in the custody of the goods at a distant city. It then became proper for them, if it was not obligatory, to take such measures as would be most expedient to save unnecessary loss to the plaintiffs. If they had stored them, they would have been entitled to recover the reasonable expenses. If it was more expedient to sell them, and if they exercised reasonable diligence in selling them, they only became responsible for the proceeds. See *Story, Sales*, §§ 408, 409, where the authorities are cited. There was a long delay in making the sale, but the circumstances

which might supply an explanation for the delay are not in the record, beyond the fact that the defendants were endeavoring to induce the plaintiffs to arbitrate their differences. By the exception to the instruction given by the trial judge, and the request for the instruction which he refused, the plaintiffs sought to have the rule of damages applied to the case which would have been appropriate if the warranty had been made upon an executed sale, instead of upon an executory contract of sale.

Error is also assigned of the admission of evidence, introduced by the defendants, showing their attempt to induce the plaintiffs to arbitrate. This evidence was competent, as tending to explain the delay which occurred in selling the goods.

Error is also assigned of the reception in evidence of certain letters, written by the defendants to the plaintiffs during the period between the reshipment of the goods and their sale at auction. We find no objections or exceptions in the record to the admission of these letters, except to the letter of October 11, 1895. This was a letter from the defendants proposing to arbitrate. It was admissible for reasons which have been stated. If it contained other matter which was inadmissible for any reason, an objection should have been taken to reading that part of the letter. No such objection was taken.

We find no error in the rulings at the trial, and conclude that the judgment should be affirmed.

THE IONA.

SPEEDING et al. v. HARD et al.

(Circuit Court of Appeals, Fifth Circuit. May 4, 1897.)

1. SHIPPING—CUSTOM OF PORT—DELIVERY OF COFFEE.

Evidence *held* to show a custom at the port of New Orleans that, in delivering coffee, the ship is to unload it on the wharf, pile it on skids in separate lots according to the bills of lading, and there make delivery to the several consignees; but *held*, further, that there was no sufficient proof of any custom as to the length of time that the coffee shall be allowed to remain upon the wharves after unloading.

2. SAME—CHARTER PARTY—CESSER OF LIABILITY CLAUSE.

A provision in the charter party that charterer's responsibility is to cease as soon as the cargo is all on board, and bills of lading signed, does not also operate to release the ship from responsibility at that time; and a provision in the charter party that cargoes are to be delivered according to the custom of the port still binds the ship.

3. SAME—BILLS OF LADING.

Bills of lading which contain no reference to the charter party do not, as between the shipowner and the charterer, operate as new contracts, and their stipulations as to mode of delivery do not supersede the provisions of the charter party on the same subject.

4. ADMIRALTY PLEADING—AMENDMENTS.

An amendment to the libel, filed after the ship has been released on stipulation, setting up a claim not included in the original libel and not germane to the subjects thereof, cannot be allowed.

Appeal from the District Court of the United States for the Eastern District of Texas.

This was a libel in rem by Hard & Rand against the steamship Iona (Speeding, Marshall & Co., claimants), to recover the amount of certain exactions made by the master before he would consent to deliver cargo. The district court rendered a decree for libelants in the sum of \$650.57, with interest, and the claimants have appealed.

The libel in this cause is brought for the recovery of an amount of \$468.75, which the master of the steamship Iona exacted from consignees before he consented to deliver cargo at New Orleans. These charges are for stevedores, for handling coffee from the end of ship's tackle, for trucking and piling the same, and for watching cargo on the dock. The libelants paid these charges under protest, and now sue to recover them. The grounds upon which the action is based are that the charter party contains a clause providing that the cargo or cargoes shall be received and delivered according to the custom of the port of loading and discharging, and that, according to the custom of the port of discharging (New Orleans), libelants were entitled to have the cargo delivered upon the wharf to each consignee to whom bills of lading had been issued, with 48 hours for removal after discharge of the cargo. The respondents claim that they had the right to collect the charges in question for two reasons, to wit: (1) That bills of lading were issued, which superseded the charter party, both under its own terms and under well-established principles of law; and (2) because no custom has been established as claimed by the libelants. The libel in this cause was filed December 20, 1893. The ship was released December 26, 1893. On February 17, 1894, an amended libel was filed, claiming a further amount of \$76.22, amount of certain other charges paid by libelants, the items of which will be found in the record. To this amended libel an answer was filed, substantially similar to the answer filed to the original libel. Upon the above issues testimony was duly taken, and after trial a decree entered in the lower court in favor of libelants for the sum of \$606.57, with interest at 6 per cent. per annum from the date of the decree, March 18, 1896, until paid. From this decree claimants prosecute this appeal. The errors assigned are as follows: (1) That the court erred in decreeing in this cause for libelants for any amount whatsoever, but should have decreed in favor of respondents in manner and form by them prayed for. (2) That libelants claim to recover in this cause for the reason that the charter party sued upon contains a clause providing that the cargo or cargoes shall be received and delivered according to the customs of the port of loading and discharging, and that according to the custom of the port of discharge, to wit, New Orleans, libelants were entitled to have the cargo delivered upon the wharf to each consignee to whom bills of lading had been issued, with 48 hours for removal after discharge of the cargo. That the court erred in sustaining said claim of libelants, for the reason that bills of lading were issued subsequent to and superseding the charter party both by its own terms and under well-established principles of law; that by said bills of lading it was provided that the cargo should be delivered from the ship's tackle, where the ship's responsibility ceased. (3) That the evidence in this cause utterly fails to establish a custom in reference to the loading and discharging of cargo at the port of discharge, as claimed by libelants. (4) That the court erred in decreeing in favor of libelants upon the claim set forth in the amended libel, which libel was filed after said steamship had been released on stipulation, and upon a claim not germane to the claim set forth in the original libel, but entirely distinct from and independent thereof, and that libelants were without right by amendments to increase the liability of the stipulators, or of claimants or respondents, in a matter entirely disconnected from the subject-matter of the original libel, which said amended libel was duly excepted to on trial of said cause.

E. B. Kruttschnitt, for appellants.

J. Ward Gurley, Jr., and D. C. Mellen, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and NEW-MAN, District Judge.

PARDEE, Circuit Judge (after stating the facts). This suit is founded on a charter party which contains, among others, the following provisions:

"The bills of lading to be signed without prejudice to this charter, and any difference to be settled before vessel sails." "The cargo or cargoes to be received and delivered according to the customs of the ports of loading and discharge." "Charterers' responsibility to cease when cargo is all on board and bills of lading signed, but master or owners to have an absolute lien on cargo for freight, dead freight, or demurrage."

The bills of lading issued to the charterers and others made no reference to the charter party, and contained, among other provisions, the following:

"To be delivered from the ship's tackle, where the ship's responsibility shall cease." "The goods to be discharged from the ship as soon as she is ready to unload at the quay or into hired lighters, if necessary, but at the expense and risk of owners of the goods." "Goods to be taken delivery of as soon as they can be discharged from the steamer, the goods to be and remain at consignee's risk or expense immediately after being placed in the lighters or on the quay."

The evidence in the case proves a custom in the port of New Orleans, in regard to the delivery of coffee, that the ship is to unload the coffee from the vessel onto the wharf, pile it upon skids in separate lots according to the bills of lading, and there make delivery to the several consignees. The ordinances of the city of New Orleans provide that all produce, wares, goods, and other articles landed on the wharves or levees by any vessel or other water craft shall be laid as near as possible to the paved part of the levee approaching the street, so that the bank of the river and wharves be neither obstructed nor incumbered thereby, and fix 48 hours as the longest time that said produce, goods, wares, or other articles shall be allowed to remain on the wharves or landings. We find in the evidence no sufficient proof of any custom in the port of New Orleans as to the length of time that coffee, after being unloaded from a ship, shall be allowed to remain upon the wharves.

The first contention of the appellants is that the effect of the "cesser of liability" clause in the charter party is to take away all right of action by owners or charterers on the charter party when cargo is all delivered on board and bills of lading signed. The cases cited in support of this contention (*Sanguinetti v. Navigation Co.*, 2 Q. B. Div. 238; *Gullischen v. Stewart*, 13 Q. B. Div. 317) are conclusive as to the proposition that, after cargo is all on board and bills of lading issued, no right of action remains by the owners of the ship against the charterers upon a charter party which contains a "cesser of liability" clause in favor of the charterers; and very properly so, because that is the exact language of the clause itself. Under the charter party in hand, charterers' responsibility is to cease as soon as the cargo is all on board and bills of lading signed; but, conceding this, it by no means follows that the responsibility of the ship, which in the main begins when cargo is loaded on board, shall also cease, and we find no adjudged cases asserting any such

effect to be given such stipulation. Charter parties frequently contain important stipulations which are to be performed by the ship at the end of the voyage, and, unless it clearly appear from the contract that such stipulations are to be avoided on delivery of goods on board, no construction having that effect can be given to the cesser clause. The present charter contains a provision that goods were to be delivered according to the custom at the port of discharge, but of what use was it to insert such provision in the charter party, if all responsibility under the charter party was to cease when cargo was all on board? The same may be said of other provisions in the charter party in regard to the employment of a stevedore and the designation of wharf for unloading at the port of destination.

Appellants' next contention is that the bills of lading, which contain no reference to the charter party, supersede all stipulations contained in the charter party in regard to the delivery of the goods. This contention has been well examined, and, as sought to be applied in this case, we are satisfied it is not sound. "They [bills of lading] do not, as between the shipowner and the charterer, operate as new contracts or as modifying the contract in the charter party." *Carv. Carr. by Sea*, 152, 159, 163; *Abb. Shipp.* 277; *Pars. Adm.* 286; *Lamb v. Parkman*, 1 Spr. 343, *Fed. Cas.* No. 8,020; *The Chadwicke*, 29 *Fed.* 521; *Steamship Co. v. Theband*, 35 *Fed.* 620; *Gledstanes v. Allen*, 12 *C. B.* 202; *Faith v. East India Co.*, 4 *Barn. & Ald.* 630; *Wagstaff v. Anderson*, 5 *C. P. Div.* 177; *Capper v. Wallace*, 5 *Q. B. Div.* 166. See *Leduc v. Ward*, 20 *Q. B. Div.* 475, 479. This disposes of the first three assignments of error.

The fourth and last assignment of error is that the court below erred in decreeing upon the amended libel. The amendment is not germane to the claim set forth in the original libel, and it should not have been allowed. *The Oregon*, 158 *U. S.* 186, 15 *Sup. Ct.* 804; *The Beaconsfield*, 158 *U. S.* 303, 15 *Sup. Ct.* 860. *The Charles Morgan*, 115 *U. S.* 70, 5 *Sup. Ct.* 1172, treats of amendments in the appellate court, and holds that, to be allowed, they must be confined to the original subject of controversy. The decree of the district court should be amended by reducing the amount awarded to the sum of \$521.90, the amount of principal and interest claimed in the original libel,—to date of decree below,—and as so amended the decree appealed from should be affirmed, the appellants to pay the costs of the district court, and the appellees the costs of appeal, including the costs of transcript. So ordered.

CARLETON et al. v. JENKS et al.

(Circuit Court of Appeals, Sixth Circuit. May 17, 1897.)

No. 451.

1. SALES—PERFORMANCE—ACCEPTANCE.

Where, after a new boiler is made and placed in a vessel under a contract, the owners of the vessel, after thorough inspection by the captain, engineer, and manager, made at the request of the contractors, accept the machinery and take the vessel away, without any further requirement, they are precluded from afterwards raising any question of the nonperformance of the contract in respect to the manner of fastening the boiler in place. Nor, after such inspection and acceptance, will the owners be considered as relying upon representations of the contractors in respect to the sufficiency of the fastenings, the same being fully opened to inspection, and presumed as much within the knowledge of the captain and engineer as of the contractors themselves; and the rule of caveat emptor applies.

2. SAME—IMPLIED WARRANTIES.

The rule in respect to an implied warranty that work and materials furnished shall be suitable and adapted to the purpose for which they are intended has no application in respect to an alleged defect which is open, and as plainly observable to the purchaser as to the seller.

Appeal from the District Court of the United States for the Eastern District of Michigan.

This is the case of a libel in personam filed by the appellants in the court below for the purpose of recovering of the appellees damages alleged to have resulted to the steamer H. D. Coffinberry and her machinery in consequence of a breach of contract by the appellees, in failing to secure by sufficient fastenings in the steamer a new boiler which the appellees had built and put into the steamer in the spring of 1892. The appellants, desiring to put a new boiler into the vessel and make other changes in the machinery, applied to the appellees to make a bid or name a price for which they would furnish the boiler and make certain alterations in the machinery, by compounding the engine. After some verbal negotiations had taken place, the appellees mailed to the appellants the following letter:

"Port Huron, Mich., Jan. 7, 1892.

"Messrs. Carleton, Bunce & Others, City: Gentlemen: We will furnish boiler and compound steamer Coffinberry as follows: Boiler to be 10 ft. dia., 16 ft. long; return-flue fire box marine boiler, with water bottom; to be allowed 125 pounds steam. Engines to be compounded by putting in two cylinders, 17 inches dia., 36 inches stroke, connecting same to present cylinders, valve gear, and throttle. Old boiler to be taken out of the boat and delivered on the dock by us; you to cut away the present woodwork around the boiler so that we can get it out without hoisting it higher than the rail; we to put the new boiler down in its place, furnish new breaching to connect to old stack, four cast-iron saddles for fire box to rest on, repipe the new boiler all up ready for use, furnish new steam reverse gear; all to be done for \$7,200.00 (seven thousand two hundred dollars). If new grate bars are wanted, price to be \$100.00 (one hundred dollars) extra. You to deliver boat at our dock in Black river, and do all carpenter or wood work. This price does not include any repairs on old work. Trusting you may decide to have us do this work for you, we remain,

"Yours, truly,

Phoenix Iron Works,

"By O. L. Jenks.

"Dictated by O. L. Jenks."

This proposition was accepted by the appellants, and the appellees proceeded with the work, and constructed the boiler and machinery contemplated

by the contract. They took out the old boiler, and had the new one placed in the steamer about the 20th of May, 1893, when they notified Mr. Carleton, the managing man for the appellants in this business, that the machinery was ready for their acceptance, and asked when he would come to where the steamer was lying to see about it, to which he replied that he had wired Symes, the captain of the boat, "to accept the machinery if it worked all right"; but, a day or two after, Carleton himself came from Cleveland to Port Huron, where the vessel was, and there personally inspected the work, including the boiler fastenings. The vessel was inspected by the United States inspector of steam vessels, and found to conform to legal requirements. The chief engineer of the steamer was also present. According to Capt. Symes' testimony, the turn-buckles of the straps which held the boiler to its place were set up tight, and the fastening in this respect was thought to be sufficient. The appellants contend, and gave some testimony in the court below which, as they claim, supported their contention, that at the time of this inspection the agents of the appellants called the attention of the appellees to what they thought an insufficiency of the fastenings of the boiler, in that the cradles upon which the bottom of the boiler rested were insufficient, and not attached with sufficient security to the timbers of the vessel, and that Mr. Jenks, for the appellees, replied that there was no defect in that respect, that the fastening was strong and sufficient, and that they would warrant it to be so. The vessel went into business directly after, and worked through the season until about the 25th of August, when the vessel, being out on Lake Huron, encountered a heavy gale, in which she careened somewhat, and the boiler slid along the timbers, out of its place, crushing the connecting machinery, and so wrenching and injuring the timbers of the vessel as to spring a leak, the consequence of which was to compel those navigating the steamer to run her upon the beach to save her from sinking in deep water. Considerable loss was sustained by the libelants from the injury which happened to the machinery, as well as to the vessel itself, and the loss of earnings during the time the vessel was delayed in consequence of the disaster. No complaint was made by the appellants of any fault on the part of the appellees in respect to the manner in which the boiler was put in for several months afterwards. The appellants recovered the insurance which had been placed upon the vessel. The notes which had been given by the appellants for the work had been transferred, and were held by a bank at Port Huron, which was calling for payment; and on February 27, 1893, Mr. Carleton addressed the following letter to the cashier:

"Dear Sir: Replying to your favor of the 25th inst., would say that the notes given the Phoenix Iron Works were lien notes on the steamer Coffinberry, and signed by only part of the owners; and as the other owners refuse to pay any share of the debts, and said to let her go at marshal's sale, we concluded to let her go; and I wrote the Phoenix people to that effect, and asked them to file a libel for the amount of their claim or the amount of the notes they hold against us, so as to make the owners stand their share. I have already paid eleven thousand dollars of the bills personally, and do not feel like paying any more. Trusting this will prove satisfactory to the holders of the note, I am,

"Yours, truly,

E. M. Carleton."

On February 24th he had written to the appellees as follows:

"Gentlemen: I have been absent from the city a good deal of the time lately; hence the delay in answering your last favor. I do not agree with you in your version of the contract, but, aside from that, the conditions are such that a part of the owners of the boat refuse to pay their share of the bill; and, as other creditors are pushing us, think you had better have your libel on the boat, and have her sold at marshal's sale. I can see no other way out of the matter, and think the sooner it is done the better for all.

"Yours, truly,

E. M. Carleton."

The first complaint of the alleged failure of the appellees to properly fasten the boiler was made about the 13th of February, 1893. The reason which the

appellants gave for this delay in informing the appellees of the disaster which had happened, and of their claim to recover therefor on account of the insufficiency of the fastenings of the boiler, was that they had been engaged in collecting the insurance from the underwriters, and feared that the raising of a controversy in respect to the fastenings of the boiler would develop a question of the seaworthiness of the vessel, and embarrass them in recovering the insurance. The appellees, in reply to the complaint of the owners of the steamer, insisted that they had fully executed their contract, and that the work had been accepted by the owners of the vessel after they had been requested to make an inspection to satisfy themselves of the fulfillment of the contract, and after such inspection had been fully made. They therefore refused to acknowledge any liability for the damage which had occurred. The appellants thereupon brought their suit, claiming to recover, not only upon the construction contract above set forth, as embodying, according to their claim, an obligation on the part of the manufacturers of the boiler to secure it properly in place, but also upon the ground that the respondents had given an express warranty that the fastenings were secure. The respondents (the present appellees) appeared and answered, setting up substantially the defense above stated, and denying the making of any warranty; and upon the issues joined the case went to trial before the district judge. Proofs were taken, and the court, being of opinion that the work stipulated for by the contract had been performed, and accepted by the appellants after an inspection of it, and, further, that the guaranty which the appellants relied upon in respect to the security of the boiler fastenings was not in fact made, entered a decree dismissing the libel, whereupon the libelants brought the case here on appeal.

Harvey D. Goulder, for appellants.

T. E. Tarsney, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge, having stated the case as above, delivered the opinion of the court.

The first question on this appeal presented by the appellants arises upon the construction of the contract of January 7, 1892. It is insisted by them that this contract, upon its fair interpretation, required the contractors not only to build and set the boiler in place on the vessel, but also required that they should fasten it down so that it would not, in the ordinary incidents of navigation, be moved out of its place by the motion of the vessel. The appellees deny that the contract extended to impose such an obligation as this, and contend that their duty was discharged when the boiler was properly put in its place.

Proof was taken in the court below with respect to the conduct of the parties at the time when the inspection was made in respect to the boiler fastenings, as indicating the view which the parties respectively took of the obligations of the contract in this particular. It must be conceded that, if the decision of the case turned upon this question, it would be a matter of considerable difficulty; but we do not find it necessary to decide it. It is shown beyond doubt that when the time arrived for the completion of the contract, and the boiler was put in its place, the contractors made special request of the owners of the steamer to examine the work for themselves, for the purpose of determining whether it was satisfactorily done, and

that, in pursuance of that request, Mr. Carleton (the manager), Capt. Symes, and the chief engineer were all present for that purpose, had full opportunity to inspect the boiler and its fastenings, and did in fact inspect them and comment upon the fastenings, in respect of the very subject upon which complaint is now made. Without requiring any alterations to be made or anything further to be done by the appellees, the work was accepted, and the steamer, with its machinery, taken away. After this inspection, made for the purpose of determining the question of their acceptance, and the taking the machinery away without any further requirements, we think the appellants were properly held to have been concluded from afterwards raising the question of the nonperformance of the contract. *Beverley v. Coke Co.*, 6 Adol. & E. 829; *Parker v. Palmer*, 4 Barn. & Ald. 387; *Bianchi v. Nash*, 1 Mees. & W. 545; *Norton v. Dreyfuss*, 106 N. Y. 90, 12 N. E. 428; *Iron Co. v. Pope*, 108 N. Y. 232, 15 N. E. 335; *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349; *Studer v. Bleistein*, 115 N. Y. 316, 22 N. E. 243; *Hirshhorn v. Stewart*, 49 Iowa, 418. The two cases in 115 N. Y. and 22 N. E. contain very full and elaborate discussions of the law on this subject.

A suggestion is made in behalf of the appellants that the appellees were skilled in their work, and that for that reason they (the appellants) were entitled to rely upon the representations made by the manufacturers, that the fastening was sufficient, and that, their acceptance being founded upon a representation which turned out to be untrue, the appellants are not bound by such acceptance. We are unable, however, to find much force in this suggestion. It might have significance if the question related to the construction of the boiler itself, and applied to inherent defects, or those which were not as readily observable to the other party as to the manufacturers; but the matter of the fastenings to the boat was open, and as much exposed to the inspection and judgment of the appellants as to the manufacturers, and the requirements would seem to be as much within the knowledge of the manager, the captain of the boat, and more especially the chief engineer, who had immediate charge of the machinery, as to any one. In these circumstances, the doctrine which the appellants invoke would not have application. *Dounce v. Dow*, 57 N. Y. 16; *Gurney v. Railway Co.*, 58 N. Y. 359; *Dounce v. Dow*, 64 N. Y. 411; *Benj. Sales*, § 701. But it is contended that in fact the appellants raised a question as to the sufficiency of the fastenings of the boiler at the time of the inspection, and that thereupon the appellees entered into an express agreement to warrant the fastenings to hold; and the appellants claim that this was a continuing guaranty, upon which the owners of the vessel might take the machinery, and look to the manufacturers if any damage should subsequently ensue in consequence of any defect in the fastenings. We have looked through the evidence bearing upon the question whether any express guaranty was in fact given or intended, and we quite agree with the conclusion which was reached by the learned judge in the court below,—that the remarks made by Mr. Jenks, who represented the manufacturers on the occasion of the inspection, and

which are now claimed to have been a warranty, were nothing more than an opinion upon, or an expression of confidence in, the mode and sufficiency of the fastenings, and that they were not intended or understood to be in the nature of a contract. The decisive test as to whether the words used constitute a warranty or not is well stated in *Benj. Sales*, § 613, as follows:

"Whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case there is a warranty; in the latter, not."

Having reached this conclusion upon the facts, we do not find it necessary to consider the question discussed by the court below in its opinion, as to whether evidence of the supposed guaranty was admissible, in view of the existence of the written contract, or whether, if the guaranty was made, it rested upon any sufficient consideration. No doubt, where there is a warranty, express or implied, on the part of the vendor of goods, the acceptance of them by the buyer does not preclude him from relying upon the warranty. The warranty "survives the acceptance," and one of the remedies which the buyer has in case there is a breach of the warranty is to sue the vendor for the damages he has sustained thereby. And so where work and materials go together. *Waring v. Mason*, 18 Wend. 426; *Vincent v. Leland*, 100 Mass. 432; *Milton v. Rowland*, 11 Ala. 732; *Muller v. Eno*, 14 N. Y. 597; *Underwood v. Wolf*, 131 Ill. 425, 23 N. E. 598. But that rule has no application to the present case. We have, as already stated, found that here there was no express warranty, and there can be no implied warranty, that the work and materials furnished were suitable and adapted to the purpose, in respect to the defect which it is claimed existed here, where it was open, and as plainly observable to the vendee as it was to any one. *Jones v. Just*, L. R. 3 Q. B. 197; *Bridge Co. v. Hamilton*, 110 U. S. 108, 3 Sup. Ct. 537; *Dushane v. Benedict*, 120 U. S. 630, 636, 7 Sup. Ct. 696. In *Bridge Co. v. Hamilton*, *supra*, Mr. Justice Harlan, delivering the opinion of the court, states the essentials to such an implied warranty as was found in that case to be "the construction by a company whose business it is to do such work, to be used in the same way the maker intended to use it, and the latent defects in which, as the maker knew, the buyer could not, by any inspection or examination at the time, discover; that the buyer did not, because in the nature of things he could not, rely on his own judgment, and, in view of the circumstances of the case and the relations of the parties, he must be deemed to have relied on the judgment of the company, which alone, of the parties to the contract, had or could have knowledge of the manner in which the work was done." The subject is fully discussed, and the distinction stated, in 2 Story, Cont. § 1071 et seq., from which it clearly appears that if the work is open to the inspection of the buyer, and the opportunities for forming a judgment of its sufficiency are open to the buyer as well as to the seller, the rule of *caveat emptor* applies.

It is right to add that we are impressed with the belief, upon consideration of the evidence, that the misfortune which befell the Coffinberry was due mainly, if not altogether, to the weakness and imperfections of the timbers in the frame of the vessel. She was comparatively old, and, although probably not much decayed, yet she had become somewhat loose jointed in that part of her structure where the boiler was located, and it is probable that the strain and working of the timbers when the vessel was racked by the storm had much to do with the displacement of the boiler; and we think the probabilities are more than even that the defects in the timber structure had more to do with the disaster than any defect inherent in the fastenings themselves. We conclude that the decree in the court below should be affirmed, with costs, and it is so ordered.

THE PEERLESS.

MANNING v. THE PEERLESS.

(District Court, E. D. New York. May 21, 1897.)

APPLICATION OF PAYMENTS—ACCOUNTS.

One owing wharfage for a yacht, paid \$200, which was applied by the creditor upon a claim for brokerage on the purchase of the yacht. This brokerage was primarily the debt of the seller, and the creditor had originally charged it to him and rendered a bill therefor. Subsequent to the payment the creditor had rendered bills to the purchaser of the yacht which showed the application of the \$200 to the brokerage demand. To these the creditor paid no attention, having always denied liability for the brokerage. *Held*, that this rendering of bills did not bring the case within the rules applicable to accounts stated, and that the \$200 should be credited upon the wharfage account.

Peter S. Carter, for libellant.
Paul M. Turner, for claimant.

BENEDICT, District Judge. The question to be decided in this case is one of application of payments. The libel is to recover wharfage on the yacht Peerless. On a reference to ascertain the amount of the claim, it appeared that the libellant had not credited to the claimant \$200 paid by him to the libellant on the wharfage account; the said sum having been credited by the libellant upon another account, to wit, upon a claim held by the libellant for brokerage for selling the yacht. When the \$200 was paid by the claimant to the libellant, he made no designation of any account to which it should be credited; and the libellant, on receiving the money, credited the same upon the account which he sets up against the claimant for brokerage on the purchase of the yacht in Boston. The question is whether he can so credit this amount.

It is to be noticed that the liability which the libellant asserts against the claimant is not a primary liability. The yacht was sold to the claimant Ackerly by a man by the name of Lewis, in Boston, and Ackerly was not bound to pay the brokerage by usage. His lia-

bility must depend, therefore, upon a special agreement on his part so to do. The question is whether the evidence shows any such agreement on his part. The seller, Lewis, is not called as a witness. The claimant denies his liability, and denies any agreement to pay the brokerage. The brokerage in the first instance was charged by the libelant to Lewis, and I find no evidence in the case which would justify finding that Ackerly assumed that debt. The fact that, when the boat was sold, the present libelant charged the brokerage to Lewis, and rendered him a bill therefor, is adverse to the contention that there was then an agreement by Ackerly to pay brokerage. A man named Mitchell appears to have had much to do with the sale of the yacht to Ackerly, but he is not called as a witness, nor is there evidence that, if he had authority to bind the claimant, he ever did so. It is true that the libelant rendered to Ackerly some bills in which the \$200 was credited on the demand for brokerage, to which Ackerly paid no attention, but the liability for this brokerage he had always denied. Bills rendered under such circumstances do not bring the case within the rules applied to accounts stated.

In my opinion the \$200 was improperly disallowed as a credit, and should be credited upon the bill for wharfage, which was the only stated account then existing between the parties. The report is confirmed, except as to the \$200, and a decree may be entered for the sum of \$1,025.75.

THE MAYFLOWER.

MENDELSSOHN PARK EXCURSION & AMUSEMENT CO., Limited, et al.
v. HEWITT et al.

(Circuit Court of Appeals, Third Circuit. April 5, 1897.)

No. 11, March Term, 1897.

COLLISION—STEAMER WITH WHARF BOAT.

Where a wharf boat sunk immediately after being struck by a steamer, and when she was raised it was found that a new and strong plank connected with the knee which received the blow was split a distance of many feet, and opened so as to admit water freely, *held*, on the weight of the evidence, that the sinking was due to the blow, so as to make the steamer liable, though the wharf boat was previously in bad condition and sometimes leaked.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

This was a libel in rem by Isaac Hewitt and James Hewitt, doing business as the McKeesport Wharf-Boat Company, against the steamboat Mayflower (the Mendelssohn Park Excursion & Amusement Company, Limited, claimant), to recover damages for an alleged collision. The libelants were the owners of a wharf boat which was moored at McKeesport, on the Monongahela river, and was used by them as a landing for packets and as a produce and provision store. They alleged that on the evening of October 31, 1894, the Mayflower, in attempting to land at McKeesport, struck a knee of the wharf boat, thereby causing a long split in one of her bottom planks; and that from the effects of this injury she sank the same night, and a lot of their produce was lost or dam-

aged. The respondents deny the fact of collision, and assert that, if it be found in fact to have occurred, the libellant's watchman was negligent in not promptly discovering the injury, and taking steps which would have prevented the boat from sinking. The evidence was very conflicting, but the court below found, after a careful examination of it, that "the Mayflower must be adjudged to have struck the wharf boat, and that her subsequent sinking was the result of the blow"; and also that the facts did not warrant the conclusion that the subsequent conduct of libellant's watchman was such as to charge them with the loss caused by the sinking of the boat. The court, however, permitted libellants to submit further testimony to show damage resulting from the loss of the use of the boat, and thereafter, to wit, on January 4, 1897, filed the following additional opinion (per Buffington, District Judge):

"We have re-examined the proofs submitted on the former hearing, and also those taken subsequent thereto. The last-mentioned testimony, and the forcible argument of counsel thereon, go a long way towards challenging the correctness of the conclusion arrived at on the former hearing; but, after careful consideration of the entire proofs, we will adhere to the one then reached. The proofs, however, satisfy us that respondents should not pay all the bills claimed for repairs. A substantial portion of these repairs was necessitated, not by the collision, but by the condition the boat was in prior thereto. The claim for prospective profits is not allowable under the proofs."

Marcus W. Acheson, Jr., for appellants.

Samuel McClay, for appellees.

Before DALLAS, Circuit Judge, and BUTLER and KIRKPATRICK, District Judges.

BUTLER, District Judge. The district court found the Mayflower responsible for the loss sustained by the wharf boat; that the latter sank in consequence of a blow inflicted by the former, as charged in the libel. The very able argument presented on behalf of the Mayflower has not satisfied us that this finding is wrong. It seems to be fully sustained by the proofs. No doubt the wharf boat was in bad condition, and sometimes leaked; but this does not appear to have had anything to do with her disaster. She was afloat and safe when struck, and directly after sank. When raised, a plank, new and strong, connected with the knee which received the blow, was split a distance of many feet, and forced open sufficiently to admit water freely. It cannot well be doubted that this was the cause of sinking, notwithstanding some testimony to the contrary. Nor do we find anything that would justify us in interfering with the damages awarded. The subject appears to have been examined with care by the court, and, while there may possibly be room for doubt respecting some of the items allowed, we think the decree cannot safely be disturbed. It is therefore affirmed.

FOX v. SOUTHERN RY. CO. et al.

(Circuit Court, W. D. North Carolina. May 20, 1897.)

1. REMOVAL OF CAUSES—TIME OF APPLICATION.

The requirement in Judiciary Act 1887-88, that the petition and bond for removal shall be filed at or before the time the defendant is required by the state law or rules of court to plead, is an imperative limitation, which cannot be extended by stipulation of the parties, or by the discretionary action of the judge in each particular case.

2. SAME—REMOVAL PAPERS—PRESENTATION TO STATE COURT.

The cause must be remanded where it appears that the petition and bond were filed in the clerk's office of the state court in vacation, and there is nothing to show that they were ever presented to the court in session. No implied presentation at the ensuing term can be inferred where, by previous stipulation, the cause has been continued beyond that term, and is therefore not open to judicial notice or action.

This was an action by W. A. Fox, administrator, against the Southern Railway Company and others. The case was heard on a motion to remand to the state court.

B. F. Long and L. S. Overmon, for plaintiff.
Charles Price and G. F. Bason, for defendants.

DICK, District Judge. The transcript of record filed by the defendant at this term shows the following facts and proceedings:

This civil action was commenced in the state court by a writ of summons duly issued on the 8th day of October, 1896, returnable to the November term, 1896, of Iredell superior court. This writ was duly served on the Southern Railway Company on the 22d of October, 1896. At the said November term no pleadings were actually filed and entered of record, but the following stipulation of counsel was filed on the 10th of December, 1896, and was agreed to be entered of record:

"In this case it is agreed between the attorneys for the plaintiff and the defendants that the plaintiff have to the 26th of December, 1896, to file complaint, and the defendants till February term to file answer as of the November term of this court."

The complaint was filed December 21, 1896, and the answer was filed January 28, 1897, and both pleadings were entered as of the preceding November term. On the 20th of January, 1897, the following stipulation of counsel was filed in the office of the clerk of the state court:

"In this case it is agreed by the counsel of the plaintiff and for the defendants that this cause be continued to the May term of Iredell superior court."

On the 28th of January, 1897, a petition and bond, with sufficient surety, were filed by the Southern Railway Company in the office of the clerk of the state superior court of Iredell county, alleging facts and asserting principles of law in conformity with the provisions of the act of congress of August 13, 1888. It does not appear of record that this petition and bond were ever presented to said state court while in session, or were accepted or refused by a judge of said court. On the 29th of January, 1897, the plaintiff caused a

writ of summons to be issued against the Western North Carolina Railroad Company, returnable to May term, 1897, of the superior court of Iredell county, which was duly served on the 5th day of February, 1897.

The third section of the act of congress of March 3, 1887, corrected by the act of August 13, 1888, provides that a nonresident party defendant desiring to remove a cause from a state court to a federal court for trial must file his petition and bond "at the time, or any time before the defendant is required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff." The legislation of congress in regard to the removal of causes from state to federal courts has at different times varied in statutory provisions. The framers of the constitution of the United States apprehended that local influences, sectional prejudices, and state pride and jealousy would render state courts partial, unsatisfactory, and unsafe tribunals for the trial and determination of suits and controversies between citizens of different states; presuming that a citizen of a state in which a suit was brought would have in his home court an unfair and unjust advantage over a nonresident defendant. In order to guard against this apprehended mischief, the constitution extended the judicial power of the United States to controversies between citizens of different states, to be exercised and applied in common and impartial national tribunals, equally related to both parties, competent and ready to do prompt, equal, and exact justice between them, as citizens of the United States, and under legal obligation to administer the laws of the states in all respects, when applicable. Similar considerations induced the enactment of the twelfth section of the judiciary act of 1789. That section conferred upon a nonresident defendant sued in a state court the personal privilege of removing such suit for trial to the next term of the federal court held in said state, if a petition and bond for such purpose were filed in the state court at the time of entering his appearance. He was required to act promptly, and as soon as possible. If he filed a demurrer, plea, or answer, or otherwise recognized or submitted to the jurisdiction of the state court, he would have waived the benefit of his personal privilege of removal. The disturbed and inharmonious condition of public affairs brought about by the antagonisms and conflicts engendered and aroused by the late Civil War induced congress to extend the time for making application for the removal of causes from state courts to federal courts on the grounds of diverse citizenship of the parties. Numerous decisions of state and federal courts were made, construing such removal statutes, in which there were diversity and conflict, resulting in dissatisfaction and discontent among the people and the courts of some of the states, as they regarded the extension and exercise of national judicial power as unjust aggressions upon the constitutional and inherent rights of the states. The third section of acts of March 3, 1887, and August 13, 1888, was manifestly intended to remedy the evils arising from diversities of procedure and decisions in the courts, and to contract the jurisdiction of the courts of the United States,

and restrict it more nearly within the limits of the earliest statute. *Martin's Adm'r v. Railroad Co.*, 151 U. S. 673, 14 Sup. Ct. 533. This statute was intended as a substitute for previous legislation on the subject, and expressly repealed all laws and parts of laws in conflict with its provisions. The rule of limitation as to the time of application for the removal of a cause from a state court to a federal court on the grounds of diverse citizenship of the parties is positive, and was intended to be imperative, so as to make certain, fixed, definite, and uniform the time of application for removal in accordance with the positive laws of the state, and the uniform and established rules of court, and not leave the matter to be regulated by the stipulations of parties, or the discretionary action of a trial judge, in each particular case. This act, being so clearly remedial in its nature, should be liberally construed, with a view to effectuate the beneficent public purposes for which it was intended, and thus advance the comity between state and federal courts; produce more harmony of judicial decisions, and greater regularity and certainty of procedure in the administration of justice. The Code of Civil Procedure of this state, in sections 206 and 207, requires a plaintiff to file his complaint in the clerk's office on or before the third day of the term to which the action is brought, and the defendant is required to appear and demur or answer at the same term to which the summons is returnable. Section 283, Code Civ. Proc., provides that:

"The time for filing the complaint, petition or of any pleading whatever may be enlarged by the court for good cause shown by affidavit, but it shall not be enlarged by more than ten additional days, nor more than once, unless the default shall have been occasioned by accident over which the party applying had no control, or by the fraud of the opposing party."

In the case now before this court the transcript shows that the defendant petitioner was duly served with process to appear at November term, 1896, of Iredell superior court. It was conceded on the argument that petitioner at that term was represented by properly authorized attorneys. From the entry made of record of the agreement of counsel, it may be inferred that no pleadings were actually filed at said term, but were subsequently filed as of said term. The defendants were sued as joint tort feorsors. In such action their liability was joint and several, and each party had a right to offer a separate defense. The Southern Railway Company, on its appearance at November term, was required by state laws to demur or answer, and was entitled to a motion to dismiss the action for the want of complaint, although the other defendant had not been served with process. It also had the right at that term to file a petition and bond for removal of the action, and have their merits adjudged by the court. If the same had been presented, and been refused or disregarded, the case would have been removed to this court by operation of law, if the petition and bond were sufficient in law to authorize removal. The stipulation extending the time for filing pleadings, made by counsel of both parties for their mutual convenience, and by agreement entered of record, did not have the force and effect of dispensing with the requirements of positive law, and extending

the period in which an application for removal could be lawfully made. Such stipulation was not a rule of court made in conformity with the laws of the state, but was manifestly in disregard of such laws. If a judge had made an order extending the period for pleadings, founded upon affidavit for cause shown, in accordance with state laws, such order would have extended the operation of the removal statute for the period which the judge could grant as matter of right and law; but a mere discretionary order, made with consent of parties, would have no such effect. The object and purposes of this remedial statute would be defeated if its requirements could be changed or modified by the stipulations of parties, or the discretionary orders of trial judges in the courts of the several states. I am of opinion that the stipulation of the counsel of parties entered into on the 10th of December, 1896, was, on the part of the petitioner, a full acquiescence in the jurisdiction of the state court to try and dispose of the case in the course of regular procedure, and this acquiescence was further manifested and confirmed by the agreement of counsel made on the 20th January, 1897, continuing the cause for trial over the next February term to the subsequent May term of the state court.

There is another fatal objection to the application for removal, appearing on the face of the record. The petition and bond for removal were filed in the clerk's office in vacation, and seem to have never been presented to the court in session. No implied presentation to the court in session can be inferred from the fact that the petition was in the clerk's office of the court, which soon afterwards was in regular session; for by previous agreement of counsel the cause had been continued beyond the next regular term, and was not open for judicial notice, consideration, and action at that term. A sufficient petition and bond to have the legal force and effect of removal must be actually or impliedly presented to a state court in session, with power to hear and consider the application. The removal statute imposes a duty upon the state court to accept a sufficient petition and bond, and proceed no further in the cause against the petitioner. It is certainly courteous, reasonable, just, and lawful that such court should have opportunity of performing its duty by considering and acting upon the application before it surrenders its original and concurrent jurisdiction, or before it is deprived of jurisdiction by the operation of paramount laws of the United States. A wise and just public policy requires federal courts, in the exercise of their rightful jurisdiction, to accord to state courts the most liberal and cordial comity that is consistent with their legal duty in the enforcement of paramount national laws.

As I am of opinion that the facts and proceedings appearing in the transcript, and the principles of law above announced, are fully sufficient to warrant an order remanding this case, I have deemed it unnecessary to consider and determine other questions presented by counsel on the argument. Let an order be drawn remanding this case to the superior court of Iredell county, with costs to be taxed by the clerk of this court against the Southern Railway Company.

In re FOLEY.
SMITH v. FOLEY.

(Circuit Court, D. Nevada. May 28, 1897.)

No. 605.

1. REMOVAL OF CAUSE—PROBATE PROCEEDINGS—COMMUNITY PROPERTY.

Proceedings in a probate court to determine whether the property of a deceased person is separate or community property cannot be said to be "a suit of a civil nature at law or in equity," within the meaning of the removal act of 1887-88; and such a proceeding cannot be removed to a federal court, though the opposing parties are citizens of different states.

2. SAME—SEPARABLE CONTROVERSY.

In a proceeding for the determination of the question whether the property of a deceased person was separate or community property, there cannot be any separable controversy between any of the persons claiming rights to share in the distribution of the property.

3. SAME—ADMINISTRATION PROCEEDINGS.

The federal courts will not interfere with the custody of the estate of a deceased person by the state probate court in which proceedings are pending for the administration of such estate, by removing such proceedings to the federal courts.

Motion to remand.

Robert M. Clarke, for petitioner.

G. W. Baker and T. V. Julien, for respondents.

HAWLEY, District Judge (orally). Petitioner is the Minnie D. Foley mentioned in *Foley v. Hartley*, 72 Fed. 571, as the widow of M. D. Foley, deceased. She has since intermarried with Oscar J. Smith. On December 31, 1896, after her marriage, she filed in the state district court of Washoe county (having jurisdiction of probate matters) an amended petition for the partial distribution of the estate of M. D. Foley, deceased, in which, among other things, it is alleged that a portion of said estate is separate property of said deceased, and a portion community property, not subject to administration and distribution, except for the payment, pro rata, of the debts of said deceased, and pro rata expenses of administration; that the other heirs of said estate, designated in *Foley v. Hartley* as the "nonresident heirs," claim that all of the property of said estate is separate property, subject to administration and distribution. And petitioner prays that it be adjudged and determined what portion of said estate is community property, and not subject to distribution, and what portion is separate property, and subject to administration and distribution, etc. The nonresident heirs petitioned the state court to remove the proceedings to this court, which application was denied. They thereupon procured and caused to be made a transcript of the record on removal, and filed the same with the clerk of this court. The grounds of the motion to remand the cause are:

"(1) That the state court is in the possession of the property by its officer, the administrator, and is proceeding to administer the estate, and to determine, upon the petition for distribution, the persons who are entitled to share in the

distribution of the estate, and the proportion that each is entitled to have; and having acquired jurisdiction, and being actually engaged in determining the question, its jurisdiction is exclusive, and, upon the principle of comity, the federal court will not interfere. (2) That the proceeding is a matter of probate jurisdiction and inquiry, and that the federal courts have no probate jurisdiction. (3) That the matter in controversy is not a suit 'of a civil nature at law or in equity,' within the meaning of the removal act of 1887-88. (4) That one of the petitioners is an alien, and is not entitled, under the removal act of 1887-88, to remove a cause. (5) That Vernon Harrison Hartley and George H. Thoma, guardian of Vernon Harrison Hartley, who were on the opposite side of the controversy from the petitioner, Mrs. Oscar J. Smith, are residents and citizens of the same state of which Mrs. Oscar J. Smith is a resident and citizen, and for this reason all the parties on one side of the controversy are not citizens of different states from the parties on the other side of the controversy."

The interest and claim of Vernon Harrison Hartley, the alleged minor heir, is set forth in the petition, and the motion to remand applies to him as well as to the nonresident heirs; but he being dead, and there being no revival of the former proceedings as to him, this court cannot determine any question concerning his rights. But inasmuch as the state court has taken jurisdiction of the petition of Mrs. Smith, and is proceeding to determine the nature of the property,—whether separate or community,—and the interests of the respective parties in the distribution thereof, it is deemed advisable to dispose of the motion, in so far as it relates to the contest between Mrs. Smith and the nonresident heirs. In considering the question whether the petitioner is entitled to have the proceedings herein remanded to the state court, or whether respondents are entitled to have the issues tried in this court, it is deemed proper to refer to certain facts and some general principles of law which should be constantly kept in mind in determining questions of this character. The administrator of the estate of M. D. Foley, deceased, is a party respondent. He is an officer of the state court. As such officer, he is lawfully in the possession of the property of the estate. His possession thereof is virtually the possession of the state court. Naturally, the jurisdiction of that court has attached to the assets of the estate. They are in gremio legis. The law of the state in relation to the rights of all parties having any claims or demands against, or interest in the property of, an estate, will always be observed in the national courts. The property of the estate is not, during the progress of administration, subject to seizure or sale. The national courts cannot enforce any judgment or execute any decree against the estates of deceased persons, in the regular course of administration in the state courts, contrary to the law of the state upon the subject. It will readily be seen that the administrator or executor of an estate could not perform his duty under the law if the property placed in his charge could be taken away from him, and appropriated to the payment of one or more claims against the estate, to the injury of all others. These propositions have been frequently announced, followed, and, so far as this court is advised, always sustained, by the national courts. *Vaughan v. Northup*, 15 Pet. 1, 6; *Williams v. Benedict*, 8 How. 107, 112; *Peale v. Phipps*, 14 How. 368, 374; *Bank v. Horn*, 17 How. 157; *Pulliam v. Osborne*, Id. 471; *Yonley v.*

Lavender, 21 Wall. 276, 280; Heidritter v. Oil-Cloth Co., 112 U. S. 294, 304, 5 Sup. Ct. 135; Walker v. Brown, 11 C. C. A. 135, 63 Fed. 204, 212. It is a rule of general application in the United States courts that, where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court. Hagan v. Lucas, 10 Pet. 400; Peck v. Jenness, 7 How. 612, 625; Taylor v. Carryl, 20 How. 583; Freeman v. Howe, 24 How. 450; Ellis v. Davis, 109 U. S. 485, 498, 3 Sup. Ct. 327; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27; Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355; Borer v. Chapman, 119 U. S. 587, 600, 7 Sup. Ct. 342; In re Tyler, 149 U. S. 164, 181, 13 Sup. Ct. 785; Byers v. McAuley, 149 U. S. 608, 614, 13 Sup. Ct. 906; In re Chetwood, 165 U. S. 443, 457, 17 Sup. Ct. 385; Ball v. Tompkins, 41 Fed. 486, 490; Compton v. Jesup, 15 C. C. A. 397, 68 Fed. 263, 279; Foley v. Hartley, 72 Fed. 570, 573; Gamble v. City of San Diego, 79 Fed. 487, 500. It follows from the views expressed in the foregoing authorities that the national courts have no jurisdiction in ordinary probate matters in the settlement of the estates of deceased persons. They cannot appoint administrators or executors, nor regulate the proceedings provided by the laws of the state for the discharge of the duties of their trust. They cannot probate a will. These and other matters that need not be further mentioned belong exclusively to the jurisdiction of the state courts that are invested with authority to act in the settlement of the estates of deceased persons. In re Cilley, 58 Fed. 977; In re Foley, 76 Fed. 390, 394; Armstrong v. Lear, 12 Wheat. 169; Fournvergne v. City of New Orleans, 18 How. 470. But, in the regular course of the administration of an estate, nonresidents may have the right to institute an independent action in the national courts to establish a claim or demand against the estate, or to have such matter adjudicated upon, if the requisite citizenship exists, by a removal from the state court, if there controverted. As was said in Hess v. Reynolds, 113 U. S. 73, 77, 5 Sup. Ct. 377, 378:

"It may be convenient that all debts to be paid out of the assets of the deceased man's estate shall be established in the court to which the law of the domicile has confided the general administration of these assets. And the courts of the United States will pay respect to this principle, in the execution of the process enforcing their judgments of these assets, so far as the demands of justice require. But neither the principle of convenience, nor the statute of a state, can deprive them of jurisdiction to hear and determine a controversy between citizens of different states, when such a controversy is distinctly presented, because the judgment may affect the administration or distribution in another forum of the assets of the decedent's estate. The controverted question of debt or no debt is one which, if the representative of the decedent is a citizen of a state different from that of the other party, the party properly situated has a right, given by the constitution of the United States, to have tried originally, or by removal in a court of the United States, which cannot be defeated by state statutes enacted for the more convenient settlement of estates of decedents."

See Payne v. Hook, 7 Wall. 425; Yonley v. Lavender, 21 Wall. 276; Borer v. Chapman, 119 U. S. 587, 7 Sup. Ct. 342; Clark v. Bever, 139 U. S. 96, 103, 11 Sup. Ct. 468; Byers v. McAuley, 149 U. S. 608, 620, 13 Sup. Ct. 906; Wickham v. Hull, 60 Fed. 326, 330;

Walker v. Brown, 11 C. C. A. 135, 63 Fed. 204, 211; In re Foley, 76 Fed. 390, 395. A nonresident creditor of the estate may also, under certain conditions, maintain a suit in equity, for fraud, to set aside a sale of real estate made under authority of the probate court. Johnson v. Waters, 111 U. S. 640, 4 Sup. Ct. 619; Arrow-smith v. Gleason, 129 U. S. 87, 9 Sup. Ct. 237. In Byers v. McAuley the court said:

"The federal court erred in taking any action or making any decree looking to the mere administration of the estate, or in attempting to adjudicate the rights of citizens of the state as between themselves. The state court had proceeded so far as the administration of the estate carries it forward to the time when distribution may be had. In other words, the debts of the estate had been paid, and the estate was ready for distribution, but no adjudication had been made as to the distributees; and in that exigency the circuit court might entertain jurisdiction in favor of all citizens of other states, to determine and award their shares in the estate. Further than that it was not at liberty to go."

The question, and the sole question, to be determined upon the amended petition, arises under the provisions of the statute of this state, as to whether the property of the deceased is separate or community property. The state court has exclusive jurisdiction to determine that question. The question which is presented upon the amended petition is entirely different in its character from any of the cases which authorize the federal courts to take jurisdiction, either by the commencement of an independent suit, or by the removal of a cause regularly pending in the state court. The case is in many essential particulars dissimilar from the facts as presented in Foley v. Hartley, 72 Fed. 571, and In re Foley, 76 Fed. 390. There the only issue in dispute was "whether or not M. D. Foley, in his lifetime, in writing, acknowledged Vernon Harrison Hartley to be his son, in the presence of a competent witness." That question may be involved in the present controversy. But the parties in the present proceeding, upon the amended petition for distribution, are different, and additional issues are raised. Mrs. Foley was not a party in the former case. It was there admitted that she was entitled, as against the nonresident heirs and the minor heir, to one-half of the estate of M. D. Foley, deceased. The contest was solely between the nonresident heirs and the minor heir, as to which was entitled to the other half of the estate. Mrs. Foley, after her marriage, and by her amended petition, has presented an entirely different question. She claims that a part of the estate is community property. She therefore has an interest therein adverse to the nonresident heirs, and adverse to the minor heir. Proceedings in the probate court to determine the question whether the property of a deceased person is separate or community property cannot be said to be a "suit of a civil nature at law or in equity," within the meaning of the removal act of 1887-88. In the determination of the question as to the character of the property, there cannot, in the nature of things, be any separable controversy. All persons claiming any right to share in the distribution of the property are equally interested in the proceedings. Their rights must be measured and determined by the same rule. It cannot be held that the nonresidents would be entitled to have that question, as to them, determined in

the federal court, while other claimants, who are residents of the state, would be compelled to try the same issue, as between themselves, in the probate court of the state. Courts have never recognized any such a divided jurisdiction. It certainly will not be claimed that, as to the nonresident heirs, no portion of the property is exempt from distribution, but, as to the resident heirs, some portion of it is. "To entitle a defendant to a removal on account of the separability of the controversy from the rest of the case, there must exist a separate cause of action, on which a separate suit could be brought, and complete relief afforded, distinct from the rest of the case, and of which all the parties on one side are citizens of different states from all the parties on the other. The case must be separable into parts, so that in one of the parts a controversy will be presented wholly between citizens of different states, which can be fully determined without the presence of the other parties to the suit." 2 Post. Fed. Prac. § 384, and authorities there cited. But it is claimed that the proceedings in the matter of the estate of M. D. Foley, deceased, were removed to this court in 1895, and that the whole matter as to the respective rights of the parties to share in the distribution is therefore not within the jurisdiction of the state court, and that the amended petition should have been filed in this court. The answer to this claim will be found in the opinion of this court in *Re Foley*, 76 Fed. 392-395, and need not be repeated. This court has no jurisdiction in respect to the general administration of an estate. Let an order be entered remanding the proceedings upon the amended petition to the state court.

BENNER v. HAYES.

(Circuit Court of Appeals, Seventh Circuit. June 19, 1897.)

No. 357.

APPEAL—DISMISSAL—COLLUSION.

An appeal will be dismissed when it appears that the parties have settled their differences, and that the further prosecution of the appeal is collusive.

Appeal from the Circuit Court of the United States for the Southern Division of the Northern District of Illinois.

This was a suit in equity by Lorenzo D. Benner against Eugenio K. Hayes for alleged infringement of letters patent No. 232,137, granted September 14, 1880, to Tyler C. Lord, for improvements in check-rowing attachment for corn planters. The circuit court dismissed the bill, holding that, if complainant's device was patentable at all, the patent must be limited to the mechanical arrangement by which the rope or cable is permitted, on the removal of obstacles, to straighten itself, and that, so construed, it was not infringed by defendant. From this decree the complainant appealed.

Taylor E. Brown, for appellant.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

PER CURIAM. It is apparent that there is no longer a real controversy between the parties to this suit, their differences having been adjusted, and that the prosecution of the appeal is collusive. The appeal is therefore dismissed.

WEBB v. PHILLIPS et al.

(Circuit Court, of Appeals, Sixth Circuit. May 24, 1897.)

1. DEEDS—SUFFICIENCY OF DESCRIPTION.

As part of his chain of title to a certain tract of land, plaintiff offered in evidence a deed by which one D. conveyed to one B. all his "interest in a tract of land in the county of E., Kentucky, patented in the name of C.," and warranted the title "against all persons * * * except so far as he may have heretofore sold"; also another deed, by which B. conveyed to one M. "all the lands in C.'s survey allotted to him in the division, * * * except what has heretofore been sold by him or those under whom he claims." It appeared that D., before his sale to B., had made sales to sundry persons; that, in a partition of the C. survey, the lands so sold by D. were not definitely marked in allotting to B. his portion as grantee of D.'s interest; and that M., in subdividing the land, after he acquired B.'s title, into parcels of which one was conveyed to plaintiff's predecessor, failed to distinguish the lands which had been sold out of the share originally of S. *Held*, that these deeds were inoperative to convey any particular land, and accordingly were insufficient to show title in plaintiff, and they could not be aided by attempts to locate the lands conveyed by D., where the calls of the descriptions thereof could only be located by probabilities.

2. REPLEVIN OF TIMBER—PROOF OF TITLE TO LANDS.

Though proof of actual possession of land will make a *prima facie* case of title and right, as against any but the true owner or one connecting his title with him, sufficient to support replevin for timber severed from the land, proof of a short possession, at a remote time, by the plaintiff or his predecessor in title, is insufficient for that purpose.

3. SAME—DAMAGES FOR DETENTION—INTEREST.

In an action of replevin, the jury may be instructed to render a verdict for interest on the value of the goods from the date of the taking, as damages for detention, or simply to fix the date of the taking, and judgment may then be entered for the interest computed from that date.

In Error to the Circuit Court of the United States for the District of Kentucky.

• This was an action of replevin, begun by William F. Webb, the plaintiff in error, to recover the possession of a large number of logs lying in and about the mouth of Contrary creek, a stream running into the Kentucky river. The suit was begun by petition according to the practice in the courts of Kentucky, wherein the plaintiff alleged that he was the owner and entitled to the possession of the said logs, and that defendants had possession thereof, and wrongfully detained the same. The defendants were Thomas J. Phillips and D. S. Harris, who appeared, and, for answer or plea, first denied that the plaintiff, William F. Webb, was the owner or entitled to the possession of the logs sued for in the action, and, second, asserted that the defendant D. S. Harris was the true and lawful owner of all the logs described in plaintiff's petition. At the conclusion of plaintiff's testimony, the court, upon motion of defendants, instructed the jury to find for the defendants, and assessed the value of the property taken by the plaintiff from the possession of the

defendants at the sum of \$2,460, as of December 15, 1892. It was thereupon adjudged by the court that the defendants recover of the plaintiff the logs in the petition mentioned, or, if not to be had, "\$2,460.00, and that said defendants recover interest on said sum from December 15, 1892, at the rate of six per cent. per annum until paid, and also their costs herein expended."

The plaintiff in error has assigned as error—First, that the court erred in instructing the jury peremptorily to find for the defendants; and, second, that it was error in the court to render judgment for interest on the sum assessed as the value of the logs taken by the plaintiff from the possession of the defendants from December 15, 1892. Other errors are assigned, but in substance they are embraced by the first error mentioned. The evidence submitted by the plaintiff below tended to show that the logs in suit had been cut from a tract of some 3,000 acres lying in Lea county, Ky., and claimed by plaintiff under a deed from Augusta Kuchenmeister, made in 1888. For the purpose of showing title to the logs, plaintiff undertook to show title to the land from which they had been severed without his license. For this purpose he first introduced a patent from the commonwealth of Virginia, dated January 4, 1786, to John Carnan, for a body of land described as containing 29,000 acres, which included the lands claimed by plaintiff. For the purpose of connecting himself with this patent, he introduced and read a number of intermediate conveyances, as follows: (2) Deed from John Carnan to Thomas Flahaven, dated 10th May, 1793. (3) Deed, William Cowland to Thomas Champney, 12th June, 1798. (4) Deed, Richard Champney to Thomas Duckham, 15th February, 1817. (5) Deed, Thomas Duckham to Daniel Breck, 17th July, 1838. (6) Deed, Daniel Breck to N. C. Morse, 13th September, 1865. (7) Deed, N. C. Morse to August Kuchenmeister, 23d November, 1875. (8) Deed, N. C. Morse to August Kuchenmeister, 16th December, 1875. (9) Deed, A. Kuchenmeister to Peter Romeister, 12th April, 1876. (10) Deed, A. Kuchenmeister to Peter Romeister, 12th April, 1876. (11) Deed, Peter Romeister to Augusta Kuchenmeister, 13th April, 1876. (12) Deed, Peter Romeister to Augusta Kuchenmeister, 13th April, 1876. (13) Deed, Augusta Kuchenmeister to William F. Webb, the plaintiff, July 13, 1888. For the purpose of showing possession by the plaintiff of the land from which the logs in question had been taken, there was offered in proof a lease from N. C. Morse, conveyee under the deed from Daniel Breck, aforesaid, to one John Warner, dated January 26, 1872. To show that said Warner had taken possession under this lease, the plaintiff's witness, W. L. Hurst, testified that he was a lawyer and the agent of N. C. Morse, and that he visited the lands in question for the purpose of looking after trespassers in January, 1872. When on or in the vicinity of the lands, the witness says he heard that one John Warner was preparing to build a house, and go in possession within the boundaries of the lands claimed by Morse. The witness, as to this lease, said: "When I heard Warner was about to build a house, and was cutting a lot of timber, I advised him not to do that, that Morse owned the land, and that he must take a lease under Morse, and he readily agreed to do so." At that time the witness says Warner was not living on the land; that there was no cabin there; that he learned that he had cut some timber, and was preparing to put up a house. This lease was for 100 acres of land on the waters of Contrary creek, at a place known as the "Maple Slashes," and was within the exterior lines of the deed from Augusta Kuchenmeister to Webb, the plaintiff, in consideration of which lease, said Warner was permitted to clear, use, and occupy 100 acres of land, and to range his stock over the remainder, and agreed to hold possession for said Morse and his vendees of all the other lands of said survey, "in conjunction with any other tenants of said Morse in said survey." The witness continues, speaking of the time after he had made this lease to John Warner: "After that, I don't know how long, but may be the next fall (I don't know that I learned it then) I learned that the old man had gotten out, and that Aaron [Warner] had taken possession." As to the exact time when he learned that Aaron Warner had taken possession of the place cleared by John Warner, he says: "I did not learn that for some time. I don't think I learned it that fall. I know that Aaron had gotten in there. When I gave the old man the lease, I thought the thing was all right." It appears that this Aaron Warner was the son of John Warner,

to whom the lease had been made. It further appears from plaintiff's proof that Aaron's possession was adverse, but whether for himself or some other claimant of this title does not appear, though it does appear that the witness Hurst, as attorney for N. C. Morse, afterwards instituted an action to oust him from the possession, which action was unsuccessful, the witness Hurst saying that "Aaron Warner proved that he had been in possession for more than two years, which fact operated to defeat the suit." From the evidence of plaintiff it is not clear whether any appeal was taken from the judgment of the justice of the peace before whom the suit against Aaron Warner was brought or not, but, if an appeal was taken to a higher court, it does appear that Aaron Warner was successful in his defense, and remained in possession, holding adversely to the title of said Morse. There was evidence as to certain other leases made by said Morse to parcels of the lands claimed by him, but these were ineffective to show any actual possession within the boundaries of the tract of land claimed by Webb; either because there was a total failure to show that the parcels so leased were within the boundaries claimed by him, or that any possession had ever been taken thereunder by the lessees.

J. O'Hara, for plaintiff in error.

Wm. W. Sudduth, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

LURTON, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

To entitle the plaintiff to recover the logs in question from the defendants, it was essential for him to show either a general property, or a right to their possession. Plaintiff sought to show title and right of possession by evidence of title to the lands from which they had been severed by defendants without his consent. While the timber stood on the land, it was part of the realty. When severed, its character was changed, for it became personalty; but the title was not changed if the severance was wrongful, for it continued to be the property of the owner of the land, and could be taken by him from any one who had thus acquired possession. *Schulenberg v. Harriman*, 21 Wall. 44-64.

Plaintiff's proof failed to show a connected legal title to the land from which these saw logs had been severed. Without considering a number of objections which were made to his chain of title, it is sufficient for the purposes of this case to say that the deed from Daniel Breck to N. C. Morse, made September 13, 1865, was inoperative as a conveyance of any particular land. Breck's immediate grantor was Thomas Duckham, who, by deed of July 17, 1838, conveyed to Daniel Breck "all of said Duckham's interest in a tract of land in the county of Estill, Kentucky, patented in the name of John Carnan, containing 29,000 acres," and warranted the title "against all persons claiming by, through, or under him, except so far as he may have heretofore sold by written contract." There was no other or further description of the interest intended to be conveyed. It appears that there were many persons claiming interests under this Carnan patent,—some by virtue of conveyances from Flahaven, to whom Carnan had conveyed a part of the lands, and others under agreements or contracts with Duckham or his vendors. For the purpose of ascertaining these interests and partitioning the

land embraced within the Carnan patent, a suit in equity was instituted by Duckham against one Fishal and others. In 1852 an order was entered appointing commissioners to survey the entire John Carnan patent, and divide it among the heirs of one Haggins, and the heirs of one Beatty, and Daniel Breck, who, pending the suit, had taken a conveyance from Duckham of his interest in the John Carnan tract of land, and who had intervened and become a party to the said suit. The said commissioners reported a plan of division between the parties thus interested in the said land, which report was confirmed August, 1853, and the parties interested ordered to release to one another the tracts allotted them. No deeds appear to have been executed according to the directions of this decree. September 13, 1865, Daniel Breck conveyed to N. C. Morse "all the lands in John Carnan's survey and patent of 29,823 acres allotted to him in the division between him and Haggins' heirs and Samuel Beatty," etc., "except what has heretofore been sold by him or by those under whom he claims, and excepting also the claim of any one whose actual adverse possession has been so long as to bar a right of entry." This is the only description of the lands intended to be conveyed by the deed to said Morse. In the decree of partition, before mentioned, there occurred the following paragraph:

"But it is alleged that Duckham has sold and conveyed portions of said tracts, before or since he conveyed one moiety of the 23,000 to James Haggins, so that Haggins' heirs will not have their moiety unless all such sales be allotted to Breck, as assignee of Duckham. To enable the court to decide on this part of the case, the surveyor and commissioners are directed to ascertain and lay off in quantities and value, as near as may be, charging to Breck any land sold by Duckham before his deed to Breck and to Haggins' heirs all the land sold by the ancestors or themselves, and make a division, so as to give each party their equal moiety, noting upon their plat and in their report the tract or tracts sold, when and to whom sold, as nearly as they can ascertain."

The surveyor and commissioners did not ascertain and lay off the lands theretofore conveyed by Duckham, though there appear in the record filed in this cause of the proceedings in the case of Duckham against Fishal and others no less than 12 deeds made by Duckham prior to his conveyance to Breck, of lands lying within the general boundaries of that portion of the Carnan grant claimed by him. For purposes of partition, the commissioners and surveyor appointed under the said decree divided the lands into a number of large tracts, numbered from 1 to 8, inclusive. Lots Nos. 4, 5, and 6, according to this plan of division, were allotted to Daniel Breck. Touching so much of the decree as directed that the sales made by Duckham or others should be surveyed and laid off on the plan of said division, the commissioners reported as follows:

"The parties, on account of trouble and expense, superseded the necessity by consent of running and marking the long lines, and agreed that the division might be made on paper. They were unwilling that the sales made by Duckham and others should be surveyed and laid down on account of trouble and expense, but, from what the commissioners have learned, the principal portion of the land sold by Duckham are located in the lots assigned to Breck. The division was made, as near as might be, with the object that the Breck lots might be incumbered with the Duckham sales. Robt. Wickliffe, Esq., for

Haggins' heirs, and Hon. Daniel Breck for himself in person, consented, and directed the division in part to be made on paper."

No evidence was offered by the plaintiff to show the location of the lands theretofore conveyed by Duckham, nor was there any proof offered to show that the timber cut by the defendants had not been taken from the lands excluded from those set off to Breck as aforesaid. After Morse acquired Breck's title, he caused the land claimed by him to be subdivided into a large number of lots, most of which contained 100 acres each. Of these lots, Morse conveyed to August Kuchenmeister, through whom Webb holds, lots Nos. 20 to 45, inclusive, each containing or purporting to contain 100 acres, and three smaller parcels, one of 15 acres, one of 13, and one of 10 acres, the whole including 2,438 acres, and being but a part of that set off to Breck by the decree of partition in the suit heretofore mentioned. No notice appears to have been taken of the fact in making this subdivision that within the general boundaries of the land conveyed by Breck to Morse were included no less than 12 parcels theretofore conveyed by Duckham, Breck's predecessor in title, to other persons, and that the deed under which Morse claimed title excluded all such prior conveyances from the land conveyed by Breck to him. To what extent these excluded tracts or parcels were included within the lots conveyed by Morse to Kuchenmeister, and ultimately by Kuchenmeister's vendee to the plaintiff, was not shown. It is true that 12 deeds made by Duckham to various parties prior to his sale to Breck were included in the record of the partition suit put in evidence by plaintiff; but no evidence was offered to show the location of those parcels. Counsel for the plaintiff in error have endeavored to locate these excluded lands by aid of the calls in the report of partition and the calls of the several deeds, and thus show that none of them are within the tract of land claimed by Webb, from which these logs were cut. This, in our judgment, is utterly inadmissible, in view of the character of the calls and general description of the excluded parcels, and cannot be regarded as a substitute for a survey and definite proof. To illustrate the impossibility of establishing plaintiff's title by this method of locating excluded parcels, it is only necessary to set out the boundaries of one of these Duckham deeds, being that from Duckham to John Akers, dated October 17, 1835. The description in that deed is as follows:

"* * * A certain tract or parcel of land, part of a survey of twenty-nine thousand acres patented to John Carnan, lying and being in the county of Estill and state of Kentucky, a'd and bounded as follows [to wit]: Beginning at the first falls of Contrary creek from the thicket where the cut out road passes; thence, up a small branch nigh the said falls, to a poplar tree, where there is three out of one root at Miller's old trace; thence, with the said trace, to the thicket; thence, crossing the road, and down the path between the two creeks opposite Barker's Rock house, to a stake; thence a straight line across to the path that leads to the Rock Shole; thence, up the path, to the place of beginning. * * *"

The counsel for plaintiff in error frankly admit the difficulty of locating a tract whose area is not given, upon a record which contains no legal evidence as to the locality of the "first falls of Contrary creek," or "the thicket where the cut road passes through,"

or "of Miller's old trace," or "the Rock Shole," or the "poplar tree where there is three out of one root," but have advanced a theory based on what they call the "probabilities," which, however plausible, cannot be accepted as a basis for supporting a title. It may be that each of these excluded parts can be identified by proof, and the deed made certain as a conveyance of land; but upon this record no such identification of the lands excluded from those included in the deed can be made, and the deed must therefore be treated as insufficient evidence of title. Plaintiff should have gone further, and shown by proof that the land covered by his deed did not include the excluded lands. The burden of doing this was upon him, and he has not discharged it. It was essential that plaintiff should show that the trespass committed by defendants in entering upon lands claimed by him was within the limits of land conveyed to him, and this he could only do by showing that these logs were not cut within one or other of the tracts of land excluded from the conveyance under which, through subsequent deeds, he now claims. This is not an open question in the land law of the state of Kentucky. *Dembitz*, Land. Tit. 40, 41; *Madison v. Owens*, Litt. Sel. Cas. 281; *Taylor v. Taylor*, 3 A. K. Marsh. 20; *Guthrie v. Lewis*, 1 T. B. Mon. 142; *Hawkins v. Barney's Lessee*, 5 Pet. 457; *Land-Grant Co. v. Dawson*, 151 U. S. 603, 14 Sup. Ct. 458.

There was evidence that N. C. Morse, one of plaintiff's predecessors in the title, took possession of the land conveyed to him by Breck through one John Warner, who entered under a lease executed in 1872. The evidence of an actual possession by John Warner under this lease is most doubtful. That he accepted the lease was proven. But that he ever took actual possession is not shown, save in the most equivocal way. But, assuming that he did take possession, he stayed in possession at most but a few months. In some way, the clearing which John Warner made or started to make, and the cabin he began to construct, were taken possession of by one Aaron Warner, a son of John. It is also clear that Aaron was holding for himself, or some one other than Morse, for he is shown to have remained in possession more than two years, and at the end of that time to have successfully resisted an action by Morse to dispossess him. Thus, whatever possession Morse or any of plaintiff's predecessors in title may have had lasted less than a year, and terminated more than twenty years before this suit was brought. From the time John Warner abandoned the possession, the lands claimed by plaintiff have been vacant and unoccupied, except in so far as occupied and claimed by Aaron Warner in hostility to the title Webb claims. There was therefore no actual possession by plaintiff at the time defendants entered and severed the logs in question from the soil.

Proof of actual possession of land will make a *prima facie* case of title and right as against any but the true owner or one connecting his title with him. Upon such evidence, a *prima facie* case of right to the dominion and possession of timber severed from the land by a mere wrongdoer would support an action of replevin. Such evidence at the common law and under the law of Kentucky would

support ejectment against one not showing a better title. *Allen v. Rivington*, 2 Saund. 111; *Jackson v. Hazen*, 2 Johns. 23; *Smith v. Lorillard*, 10 Johns. 338-355; *Steele's Heirs v. Logan*, 3 A. K. Marsh. 394; *Campbell v. Roberts*, Id. 623; *Fowke v. Darnall*, 5 Litt. 319; *Bower v. Higbee*, 9 Mo. 259; *Harlan v. Harlan*, 15 Pa. St. 507; *Powell v. Smith*, 2 Watts, 127. But mere evidence that at a remote time the plaintiff or one under whom he claims had had a short possession is insufficient to sustain ejectment, under the well-settled law of Kentucky.

In the case of *Sowder v. McMillan's Heirs*, 4 Dana, 456, it was determined that the priority of possession which will enable a plaintiff to recover in ejectment is a possession continuing at the time of the entry by the defendant or those under whom he claims. It is the fact that the entry of the defendant ousted the plaintiff from possession which justifies the maintenance of ejectment on the *prima facie* case arising from mere proof of possession. It is therefore clear that a possession which was abandoned more than 20 years before the entry of defendants will not raise a *prima facie* case of right, unless it was continued long enough to give title under the statutes of limitation in force. Of this there was no pretense. Plaintiff failed to show constructive possession by proof of title, and he failed to show actual possession which might have been sufficient against such intruders as we must assume defendants to have been on this record. There was therefore no error in directing a verdict for the defendants, as no other result could have been legally reached on the evidence submitted by plaintiff.

There was no error in entering judgment for the defendants on the verdict for the value of the saw logs, with interest from the date they were taken out of the possession of defendants. The Kentucky Code provides as follows:

"In an action for the possession of specific personal property the plaintiff may have judgment for its delivery, if it can be had; and, if not, for its value and for damages for its detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant for the return of the property, or its value if a return can not be had, and damages for the taking and withholding of the property." Carroll's Code, § 388.

The jury were instructed, in substance, to find the value of the property taken from the defendants' possession as of December 15, 1892, that being the date when taken, and that they could add to this interest for detention, at not exceeding 6 per cent. per annum, or that, if they simply fixed the date when taken and value on that date, interest from that date would follow as matter of law. The jury did return that they found for the defendants, "and assess the value of the property at \$2,460.00, as of December 15, 1892." It was not error to instruct the jury to find interest upon the value of property thus wrongfully taken from defendants' possession as damages for detention; nor was it error to render judgment upon such a verdict for the value thus assessed with interest from that date. There is no direct authority in the decisions of the Kentucky court, but, under like statutes, interest has been held to attach from the date of the taking, as damages for the detention. *Cobbey*, Repl. §§

880, 877, 888; Ice Co. v. Webster, 125 U. S. 426, 8 Sup. Ct. 947; Kelly v. McKibben, 54 Cal. 192; Hurd v. Gallaher, 14 Iowa, 394. Judgment affirmed.

POSTAL TEL. CABLE CO. V. VANE.

(Circuit Court of Appeals, Seventh Circuit. June 12, 1897.)

No. 802.

1. RECEIVERS' CERTIFICATES—EXTENT OF LIEN—TELEGRAPH WIRES.

The B. Telegraph Co., being in possession of a telegraph line consisting of four wires strung on poles, contracted with one V. to string six additional wires, which were furnished by the telegraph company. About the time when this work was completed, the telegraph company was placed in the hands of receivers in a suit in a New York court. V. thereupon disconnected the wires strung by him, at one end of the line, and grounded the ends, so that they could not be used. By an order of the New York court the receivers were authorized to issue receivers' certificates, which should be a first lien on all the lines of telegraph of the company and to secure the same by a mortgage. The receivers thereupon made such mortgage, covering all the property of the company, real and personal, and issued the certificates. Thereafter, by a decree of the United States circuit court in Indiana, where the wires had been strung by V., in a suit in which the same receivers of the B. Telegraph Co. had been appointed, the making of the mortgage and issue of the certificates were ratified and approved. V. was a party to the suit in Indiana, but made no objection to the order for the issue of the certificates, and asserted no claim to the wires, which were sold to a third party under foreclosure of the lien of the receivers' certificates. Subsequently V. claimed to have the wires sold for the payment of his claim as being still in the possession of the court, and not having been covered by the lien of the certificates. *Held*, that no such claim could be maintained, either upon the ground that the six wires strung by V. were not lines of telegraph, because of the grounding of the ends of the wires, or upon the ground that V. was at the time in possession of the wires; his possession being merely that of an employé of the telegraph company.

2. APPEAL—JOINDER OF PARTIES.

An appeal may be prosecuted by one party to the record, as against another, without joining other parties who are in no way interested in or affected by the controversy between the appellant and appellee.

Appeal from the Circuit Court of the United States for the District of Indiana.

Otto Gresham, for appellant.

Addison C. Harris, for appellee.

Before JENKINS and SHOWALTER, Circuit Judges.

SHOWALTER, Circuit Judge. On the 4th day of October, 1884, the Bankers' & Merchants' Telegraph Company of Indiana, a corporation created under the laws of that state, exhibited its bill in the circuit court of the United States for the district of Indiana against the Bankers' & Merchants' Telegraph Company of New York, a corporation organized under the laws of the state of New York, wherein it averred that the New York company was a principal or parent corporation, "with auxiliary or subordinate corporations, under the same name, for local convenience and requirements, in the states of

Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Ohio, Indiana, Illinois, Michigan, Tennessee, Kentucky, Texas, New Hampshire, and elsewhere, and likewise in Baltimore, in the state of Maryland, and in the District of Columbia." It was further averred "that all the said corporations so existent are separate and distinct corporations of each of the states aforesaid, and are controlled and managed by, and wholly identified with, the said Bankers' & Merchants' Telegraph Company of New York, with local organization, for purpose of convenience, in conformity with law; the capital stock of said corporations being largely in possession of the said principal, parent, or head corporation." The bill went on to allege, in substance, that the New York corporation had constructed and operated, as part of its telegraph system, the telegraph lines of the complainant in the state of Indiana; that, in the construction and management of these lines of complainant, the New York company had incurred debts to divers persons and corporations; "that the said debts, or portions thereof, are claimed to be in law and equity just obligations against the property of complainant," but that a large portion of the general indebtedness of the New York company was not chargeable upon the property of the complainant, and that the New York company was wholly insolvent; "that the value of your orator's property consists in its being kept together and intact, to be operated as a whole, without a break or division, in connection with the property and lines of said Bankers' & Merchants' Telegraph Company of New York, and under one head or management, and that, owing to the peculiar nature of the business, the management has to be centralized and managed accordingly; that, owing to the said intimate relations between your orator and the said Bankers' & Merchants' Telegraph Company of New York, and owing to its management, operation, and control of your orator's lines and property, the accounts and business thereof have been so blended together that it is impossible for your orator to state, it having no information with respect thereto, what proportion of said property is the property of your orator, and what proportion thereof is distinctly the property of said Bankers' & Merchants' Telegraph Company of New York;" that a suit had lately been commenced by one Austin G. Day, in the supreme court of the state of New York, wherein Richard S. Newcombe and James G. Smith had been duly appointed receivers of the said New York company, and all its assets, property, and effects had become vested in said receivers. Among other things, it was prayed in the bill that said Newcombe and Smith be appointed receivers of the telegraph property of complainant and defendant in the state of Indiana; in other words, that the receivership in New York be by the order of the court extended so as to cover the property of the complainant and defendant in the state of Indiana. On the day of the filing of this bill, namely, the 4th of October, 1884, an order was made in said cause, whereby Newcombe and Smith were appointed receivers "of all and singular the lines, property, and assets, real, personal, or mixed, of the complainant, the said Bankers' & Merchants' Telegraph Company of Indiana, and respondent, the said Bankers' & Merchants' Telegraph Company of

New York, with the usual powers and duties of receivers," etc., "including the power and authority to demand, sue for, collect, receive, and take into their possession all the goods, chattels, rights and credits, moneys and effects, lands and tenements, of every kind and description, belonging to said complainant and respondent, or either of them, situated within the jurisdiction of this court, and manage and hold the same under the authority of this court." The usual provision for a bond and an injunction followed in the order.

It may be assumed, from the showing of the record, that a corporation called the Merchants' Telegraph Construction Company, or receivers thereof acting in its behalf, had, prior to the time of the appointment of the receivers by the New York court, seized in some way for debt the lines of the Bankers' & Merchants' Telegraph Company of New York, situated in Ohio. On the 3d day of November, 1884, the following order was entered in the supreme court of New York in the case of Day against the Bankers' & Merchants' Telegraph Company of New York:

"Upon the order herein, dated October 30, 1884, wherein John H. Ward, Esq., was appointed referee to take the testimony and proofs, and report thereon, with his opinion, in the matter of the Merchants' Telegraph Construction Company, upon reading and filing said order, the petition of the receivers of the Bankers' & Merchants' Telegraph Company, upon which said order was granted, the referee's oath herein, the testimony and proofs taken before said referee, and his report and opinion thereon, and due deliberation having been had thereon, and it appearing satisfactorily to the court that it is for the best interest of the Bankers' & Merchants' Telegraph Company, and those therein interested, that a redemption of the lines mentioned in said report should be had at once, it is, on motion of Joseph Fottreca, counsel for said receivers, ordered:

"(1) That the receivers of the Bankers' & Merchants' Telegraph Company be, and they are hereby, instructed to at once issue special receivers' certificates, in an amount not exceeding one hundred and fifty thousand dollars, to be payable at such time as said receivers may think best, not exceeding two years from their date, and to be redeemable by said receivers at any time within said period, to bear interest at the rate of six per cent. per annum, payable semiannually, and to contain such conditions as may be deemed necessary and requisite, said issue of said certificates to be secured by a trust deed, in the nature of a first mortgage lien, for \$150,000 on all the lines of telegraph at and between Freeport, in Ohio, and Hammond, in Indiana, and at and between Pittsburg, in Pennsylvania, and Indianapolis, in Indiana, with a branch to Cincinnati, in Ohio, and to cover all the intermediate points, and to be prior as a redemption debt to every other lien, claim, or incumbrance thereon.

"(2) That of said issue of \$150,000, an amount of \$130,000 in said certificates, so secured, be delivered to said Merchants' Telegraph Construction Company, or to such persons as it shall designate, in full liquidation and payment of the indebtedness of the Bankers' & Merchants' Telegraph Company to it, in relinquishment of the possession and substitution of the receivership of said construction company.

"(3) That the balance of said \$150,000 in duplicate, to wit, \$20,000, to be applied to the completion of the lines between Pittsburg and Indianapolis, and that the said receivers have such power and authority with reference thereto as is necessary to finish the construction thereof and place the same in working order.

"(4) That the said receivers have full power and authority to make, execute, and deliver such instruments, writings, or papers, under seal or otherwise, as may be requisite and necessary to effectuate the plan for the redemption of said lines above named, and to fully carry out and consummate the provisions of this order."

Between the 6th and 12th days of November, 1884, the certificates were issued, and the mortgage to secure the same made and delivered. Each certificate contains the following recital:

"Said certificates are hereby declared to be a debt of the receivers, incurred for the benefit and protection of the property in their hands, and, until full payment thereof, to be a first lien and charge upon all telegraph lines and property which are located between Freeport, O., and Hammond, Ind., and between Pittsburg, Pa., and Indianapolis, Ind., and between Richmond, Ind., Eaton, O., and Cincinnati, O., according to a certain deed of trust, or mortgage, given to secure this issue of certificates covering said lines and properties, executed by said receivers to the Farmers' Loan & Trust Company, as trustees, dated November 7, 1884. Transferable upon the books of the receivers upon surrender of this certificate."

The mortgage, in its introductory part, contains, among others, the following recital:

"Whereas, heretofore certain lines of telegraph were built, or partly built, for the Bankers' & Merchants' Telegraph Company, by the Merchants' Telegraph Construction Company or its assignors, said lines extending from Freeport, in the state of Ohio, through said state, to Indiana, and through said state to Hammond therein, and likewise from a point at or near Pittsburg, in the state of Pennsylvania, westward, through Pennsylvania and Ohio and Indiana, to Indianapolis, in the state of Indiana, with a branch from said last-named line to Cincinnati, in the state of Ohio; the said lines aggregating about 765 miles of pole line, be the same more or less."

Also, after setting forth in part the order of November 3d by the New York court, the paragraph marked "1" as before quoted in this opinion being therein recited in full, the following:

"And whereas, to that end, the parties of the first part have issued, or are about to issue, special receivers' certificates, as directed by said order of said supreme court of the state of New York, in an amount of one hundred and fifty thousand dollars, to cover all the lines and property, of every kind and nature, in and between the points and places mentioned in said order, which are and are to be prior as a redemption debt to every other lien, claim, or incumbrance on said lines, and to be a first lien and charge thereon."

And afterwards, as descriptive of the property mortgaged, the following:

"All and singular the said line or lines of telegraph to, from, and between the said points and places hereinbefore at large set forth and described, and so much thereof as may now be built, or which may be hereafter constructed and completed, together with all the lines, property, franchises, telegraph lines, cables, poles, wires, instruments, tools, apparatus, offices, fixtures, contracts, leases, rights, claims, interests, and demands, of every kind, nature, and description whatsoever, now held, owned, or possessed by the said receivers, or by the Bankers' & Merchants' Telegraph Company, or which may be at any time hereafter acquired in connection with said line of telegraph, more particularly hereinbefore described."

Later, and at the November term of the circuit court of the United States for the district of Indiana, and on the 3d day of December, 1884, in the cause first above mentioned, was entered an order in words following:

"Upon reading and filing the petition of Richard S. Newcombe and James G. Smith, as receivers of the Bankers' & Merchants' Telegraph Company, appointed herein by this court, together with all the papers and documents thereto annexed, and it appearing to be necessary and essential that the lines mentioned and described in said papers be forthwith redeemed, so as to save to the said receivers and the interest they represent the large amounts now

invested therein by the Bankers' & Merchants' Telegraph Company, now represented by said receivers, it is, on motion of counsel for said receivers, ordered that the prayer of the said petition be, and the same hereby is, granted, and the action of the said receivers in making, executing, and delivering the certificates and mortgage mentioned and described in the said papers is hereby approved, ratified, and confirmed, and the order of the supreme court of the state of New York, dated the 3d day of November, 1884, is hereby made the order of this court, with the same force and effect as if originally made herein, and the action of the receivers thereunder, so far as the same affects property within this state, and concerning the making and issuing of such certificates and mortgage, is hereby confirmed and approved.

"And it is further ordered that the said one hundred and thirty thousand dollars of receivers' certificates shall be delivered to the receivers of the said Merchants' Telegraph Construction Company.

"And the order of the supreme court of the state of New York, above mentioned, is in the words following, to wit: [Here followed a copy of that order.]"

Afterwards, at said November term, and on the 15th day of December, 1884, there was made in said cause the following entry:

"Come the parties, and it is now ordered that the order entered in this suit on the 3d day of December, 1884, be, and the same is, modified so as to read as follows: [Here followed the entry of December 3d, except the paragraph containing the direction to deliver, etc., next before the last in said entry, as above quoted.]"

It is to be implied, from the record, that a portion of the receivers' certificates, to the face value of \$130,000, were, in November, 1884, delivered to the Merchants' Telegraph Construction Company, in extinguishment of its lien on the lines in Ohio, and that by said company, or its receivers, said certificates were assigned to one Stokes, or to Stokes and De Castro. In the same month Stokes and De Castro turned them over for their full face value in cash to one Mackay, and about October, 1885, Mackay assigned them for value to appellant. It appears that a portion, closely approximating one-half, of these certificates, has been surrendered or extinguished, and that the appellant, about the date last mentioned, went into possession of the lines, or a portion thereof, in Ohio. The indications, from the record, are that the mortgage given to secure these certificates was foreclosed in a court in Ohio in 1885, and the certificates, to the extent mentioned, used in buying the lines in that state at a sale made by the sheriff. The remainder of the certificates, something more than \$65,000 on their face, at the time of the hearing in the circuit court and the entry of the decree from which this appeal was taken, was still held by appellant. In November, 1884, when the order was made and the certificates issued, the poles on the line from Freeport, across Indiana, to Hammond, in that state, supported ten wires; in June, 1884, there were but four wires on this line. The work of constructing it had been done by the Merchants' Telegraph Construction Company for the Bankers' & Merchants' Telegraph Company of New York, pursuant to a contract between the two companies, and the latter company was then in possession. On the 17th of said month of June, the appellee, Vane, who, as foreman of the Merchants' Telegraph Construction Company, had superintended the work of building the four wire pole line from Freeport to Hammond, contracted with the Bankers' & Merchants' Telegraph Company of New York to do the work of stringing upon this line six ad-

ditional wires, furnished by said company. He completed this work, and these wires, being the lower six of the ten, were strung—that is to say, in place and attached to the poles—over the entire route from Freeport to Hammond when the receivers were appointed. His claim, or the unpaid portion thereof, against the Bankers' & Merchants' Telegraph Company of New York, for doing this work, is \$13,771.12. After the appointment of the receivers, and after the order for the certificates, Vane did work on the line between Hammond and Chicago for which his claim, or the unpaid balance thereof, against the receivers, is \$1,898.33. In June, 1884, and while Vane was stringing the six additional wires, and up to the time when the receivers were appointed, the four wire pole line from Freeport to Hammond was not only in the possession of the Bankers' & Merchants' Telegraph Company of New York, but that company was using the same in the business of telegraphing as part of its system of telegraph lines. The receivers succeeded to the possession, and for a time continued such use. Later, in the course of this and other litigations in which the Bankers' & Merchants' Telegraph Company of New York became involved, it transpired that that company had, long prior to the filing of the bill in Indiana, so contracted with another corporation, called the American Rapid Telegraph Company, that the latter company had become vested with the ownership of the four wire pole line from Freeport to Hammond. But the proprietorship of the Rapid Company did not extend to the lower six wires, and such proprietorship over the four wire pole line was, by the contract, subject to the easement or right in the Bankers' & Merchants' Telegraph Company of New York to have the six wires remain and be supported and be used as telegraph wires on said poles. The right, to the extent here indicated, in the Rapid Company, was enforced in a certain foreclosure litigation by the bondholders of the Rapid Company, and afterwards this right was recognized by the circuit court of the United States for the district of Indiana, and said four wire pole line was by an order of that court released from its custody, and the same has been since used and possessed by a stranger to the present litigation; the court, so far as appears, not having parted with its possession of, or jurisdiction over, said six strung wires.

During the November term, 1884, of the circuit court of the United States for the district of Indiana, Vane dealt with the receivers as such. He had notice of their appointment, and was put upon inquiry as to the status of the property in question, but he failed to advise the court in any way at that term touching his claims. Afterwards, and at the May term of the said court, and on the 7th of May, 1885, he filed his intervening petition, making the receivers parties defendant. They appeared, but what they answered is not shown in the record. The matter was referred to a master, and on January 30, 1886, he filed his report. On May 6, 1886, a decree was entered after a hearing of exceptions to this report. On appeal to the supreme court of the United States this decree was affirmed. 10 Sup. Ct. 60. It was determined by this decree that Vane had valid claims against the Bankers' & Merchants' Telegraph Company

of New York and the receivers in the sums already mentioned, but no lien of any kind for either claim. This decree was pronounced on the assumption by the court that the four wire pole line from Freeport to Hammond, and the six strung wires, constituted a single property, and belonged to the Bankers' & Merchants' Telegraph Company of New York. On December 7, 1889, Vane filed another intervening petition. On January 23, 1890, the receivers answered. On September 18, 1890, Vane filed a supplementary petition. This the receivers answered November 17, 1890. Vane then filed a replication, and on November 21, 1890, the matter was again referred to the master. On May 16, 1895, the report of the master came in. On May 23, 1895, exceptions were filed by the receivers. Pending the hearing on the exceptions, and on July 8, 1895, Vane filed a further petition, making parties thereto this appellant and the Farmers' Loan & Trust Company, and calling for an answer from each. The Farmers' Loan & Trust Company was not brought into court, and did not appear. On October 2, 1895, appellant filed its answer, setting up its ownership of the receivers' certificates, and claiming the first and paramount lien on the six strung wires, and, apparently under the impression that such answer on its part might be taken as a cross petition, took some testimony in support thereof. But we find no replication to this answer, nor was any reply to it called for, nor was any filed. Upon this state of the record the court made a decree which is the subject of this appeal. By this decree it was adjudged that the six strung wires last mentioned were still in the custody of the court, that appellant had no lien upon or claim against said property, that the same be sold clear of any lien, and that the proceeds of the sale be applied—First, in liquidation of Vane's claim for the \$1,898.33; secondly, in liquidation of Vane's claim for the \$13,771.12; and that the remainder of the fund be paid into the registry of the court.

It is insisted, in support of this decree, that the six strung wires in question were not included as part of the property made subject to the receivers' certificates. Counsel for appellee quotes from the order of the court the following language:

"Said issue of said certificates to be secured by a trust deed, in the nature of a first mortgage lien for \$150,000, on all of the lines of telegraph at and between Freeport, in Ohio, and Hammond, in Indiana, * * * to be prior as a redemption debt to every other lien, claim, or incumbrance thereon."

It seems that Vane, about the time of the appointment of the receivers, and after the six wires had been strung to the town of Hammond, disconnected the said six wires at their western ends, and grounded the same; that is to say, carried the ends to the ground, so that they could not, for the time being, be used. In view of this fact, the insistence is that the six wires were not "lines of telegraph" between Freeport and Hammond, within the meaning of the order. It will be seen, from the recitals already quoted in this opinion, that the certificates contained on their face the statement that they were to be a lien on all property of the Bankers' & Merchants' Telegraph Company of every kind. In the mortgage securing these certificates, all such property, real and personal, was alienated as security for

these certificates; and, after the certificates and mortgage had been made, an order of the court in Indiana in express terms ratified and confirmed what had been done by the receivers. But, apart from these statements in the receivers' certificates and in the mortgage, we are of opinion that, on the face of the orders, the six wires were made subject to the lien of the receivers' certificates. These wires were none the less "lines of telegraph at and between Freeport, in Ohio, and Hammond, in Indiana," merely because Vane had seen fit to detach and run them into the ground at their western ends.

It is argued, again, that Vane was, at the time of the order, himself in possession of the six strung wires, and that for this reason the said order did not cover these wires as part of the property subjected to the lien of the certificates. If the owner of land contract with a third person to build a fence on that land out of lumber there provided by such owner, the entry of such contractor, and his use of the lumber in building the fence, do not give him the possession either of the land or of the lumber as against his employer. He is a mere licensee for the purposes of entering and doing the work. He has in a certain sense the custody, but as against the owner not the possession, any more than a servant of a householder would have possession, as against his master, of the utensils with which he does his work. In June, 1884, the Bankers' & Merchants' Telegraph Company was in possession of the four wire pole line. That company furnished the six wires, and on the 17th of that month engaged Vane to do the work of stringing these wires. The four wire pole line was real estate. Vane was authorized to enter and put up the six wires. The possession of the entire property, including the six wires, remained in the Bankers' & Merchants' Telegraph Company until such possession became vested in the receivers as officers of the court, and such possession was so in said receivers when Vane assumed to ground the western ends of the wires. Moreover, it had already been decided, on Vane's first petition, that, while his claims were good, he had no lien on the property here in question, either at common law or in equity, or under any statute. To this effect is the opinion of the circuit court in *Bankers' & Merchants' Tel. Co. of Indiana v. Bankers' & Merchants' Tel. Co. of New York*, 27 Fed. 536, and also the opinion of the supreme court of the United States on the appeal in the same case; said cause being entitled, on such appeal, *Vane v. Newcombe*, 132 U. S. 220, 10 Sup. Ct. 60. It seems entirely clear that the six wires were in possession of the court by its receivers when the certificates were issued.

It appears that Vane was made a party to the suit in Indiana during the term at which the order was made for the issue of these receivers' certificates, but, as already stated, he did not, during that term, make any objection to that order, or ask the court to vacate or modify the same, or bring his own claims in any way to the attention of the court. After the court had made that order, and the certificates had been disposed of, and the action of the receivers in that behalf confirmed, and the term at which this was done had elapsed, the court could not unfix the lien of the certificate holders. The action of the court in that matter became final, and the power of revi-

sion ceased with the term. In our opinion, the court in Indiana could not in Vane's behalf displace the lien of the certificates held by this appellant, as was attempted to be done in the decree appealed from. There appears to be no contention between the parties upon the validity of these receivers' certificates. The propriety of the action of the court upon the showing made at the November term, 1884, when the order was entered, is not in any way questioned; the only point on behalf of Vane being that the order then made did not comprehend the six wires.

It is further insisted, on behalf of appellee, that this appeal ought to be dismissed, because appellant alone prosecuted the same; whereas, it is said, the receivers and the Bankers' & Merchants' Telegraph Company of New York and the Bankers' & Merchants' Telegraph Company of Indiana were parties to the record, and interested in the decree, and there was no summons and severance whereby appellant acquired the right to prosecute this appeal without joining the others. But, in so far as concerns the subject-matter of this decree, neither the claim of Vane nor that of this appellant is disputed by the receivers, or by either of the corporations mentioned. There was no controversy except between the appellant and the appellee. Upon the question as to priority between the two, it matters not to either of the other parties what is done. So far as the Farmers' Loan & Trust Company is concerned, it was simply the trustee in the mortgage to secure the certificates. If it were present in the case, it could have no interest whatever, except that now represented by this appellant. But the Farmers' Loan & Trust Company was not even a party to the proceeding. It was not summoned, and did not voluntarily appear. The appeal, therefore, was properly brought by this appellant alone. The motion to dismiss the appeal is overruled, the decree is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

BOSWORTH v. TERMINAL R. ASS'N.

(Circuit Court of Appeals, Seventh Circuit. June 8, 1897.)

No. 367.

1. RECEIVERS—RIGHT TO APPEAL—DECREES AWARDED PREFERENCES.

A receiver has the right of appeal from an order or decree, in the suit in which he is appointed, with respect to any claim asserted by or against the estate which he represents, or respecting his personal rights, but he has not the right of appeal from a decree declaring the respective equities of the parties to the suit. Accordingly, *held*, that a receiver of a railroad had no right to appeal from a decree awarding a preference to a claim for supplies over the debt secured by the mortgage in course of foreclosure.

2. SAME—ALLOWANCE OF APPEAL.

The allowance, in the usual course of practice, of an appeal taken by a receiver, does not clothe the receiver with an interest which he has not, nor authorize an appeal which he has not a right to take.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

In a suit brought by the Mercantile Trust Company on the 21st day of September, A. D. 1893, to foreclose a mortgage upon the Chicago, Peoria & St. Louis Railway, the court appointed a receiver, with the authority usually conferred upon receivers in the charge and operation of railways and in the general administration of the estate, and required the receiver to pay (1) all past-due taxes; (2) all current operating expenses; (3) all past-due wages; (4) "all claims for materials and supplies which have been incurred in the operation and maintenance of said property during the six months last past, and all ticket, trackage, and traffic balances due from said railroad." To this last item the Mercantile Trust Company objected, which objection the court overruled. On the 27th day of May, 1895, the Terminal Railroad Association of St. Louis, the appellee, filed its intervening petition, asserting a claim against the railway company, amounting to \$8,162.11, for switching, engine and car repairs, etc., done within six months prior to the date of the order appointing a receiver, and asking for the allowance of the claim as a preferential claim under the order of the court appointing the receiver. An answer was filed to this petition by the receiver, asserting that the facts stated might be true for anything known to the contrary, but, being stranger to the matters, he demanded strict proof, and denying that the petitioner was entitled to the relief demanded. The intervening petition, under a general order of reference, went to the master, whose report was to the effect that the claim was a just one, and that the amount is a lien upon the property of the railway company prior and superior to the claims of the mortgage bondholders under the order appointing the receiver, and that it should be paid out of the surplus income, or from a sale of the property of the railway company. To this report the receiver filed exceptions, not impugning the finding of the master that the claim was a just one against the company, but to the finding that the claim should be paid from the surplus income, or from a sale of the property of the railway company, "whereas," the exception proceeds, "the said master should have found that the aforesaid amount is due the said petitioner, but is not a lien upon the property of the railway company prior or superior to the lien of the mortgage bondholders." Upon hearing, the court, on July 30, 1896, overruled the exceptions, and entered a decree allowing the claim at the amount stated, and declaring that it was a claim of the character embraced in the order appointing the receiver, to be paid as a preferred claim, and directing that the receiver pay to the intervener the amount of the claim "out of the income of said receivership, if any such income is in his hands, and, in case he has not the funds in hand for this purpose, it is ordered, adjudged, and decreed that the same be paid out of the proceeds of the sale of the mortgaged premises in preference to the mortgage debt, and, until paid, the same is hereby declared a lien upon the said mortgaged estate superior to the lien of the mortgage herein." To this decree the receiver assigned error, in substance, to the effect that the court erred in adjudging that the claim of the intervening petitioner was entitled to priority to the mortgage debt. The receiver thereupon prayed an appeal, which was allowed.

Bluford Wilson and Philip Barton Warren, for appellant.

Samuel P. Wheeler (Millard T. Watts, of counsel), for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). The contention of the receiver is thus stated in the brief of his counsel:

"The question thus presented to this court for determination is one as to the displacement of vested contract liens by unsecured creditors. There is no controversy as to the labor having been performed or the materials furnished within the six months next prior to the appointment of the receiver of the insolvent corporation, nor as to the value of the same. The only controversy is as to whether or not the appellee is entitled, on its petition and proof made thereunder, to have the vested lien of the mortgagee displaced to the extent of his claim."

He insists that the provision in the decree appointing a receiver, providing for the payment of certain claims as preferential, created no vested right; and that, within our ruling in *Transportation Co. v. Anderson*, 46 U. S. App. 138, 22 C. C. A. 109, and 76 Fed. 164, the decree in that regard was interlocutory, and is not controlling of the subsequent action of the court; and that, within the doctrine declared in *Turner v. Railway Co.*, 8 Biss. 315, Fed. Cas. No. 14,258; *Fosdick v. Schall*, 99 U. S. 235; *Trust Co. v. Souther*, 107 U. S. 591, 2 Sup. Ct. 295; *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675; *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. 809; *Wood v. Deposit Co.*, 128 U. S. 416, 9 Sup. Ct. 131; *Kneeland v. Trust Co.*, 138 U. S. 509, 11 Sup. Ct. 426; *Thomas v. Car Co.*, 149 U. S. 111, 13 Sup. Ct. 824; *Farmers' Loan & Trust Co. v. Green Bay, W. & St. P. Ry. Co.*, 45 Fed. 664,—before a claim can be deemed to be preferential to the mortgage debt, there must be first established a diversion of income from the payment of operating expenses to the payment of interest; and that, failing diversion, there can be no restoration. The broad ground is taken that a court of equity, assuming, at the request of a trustee, the operation of a railway, has not the right to provide for the payment, out of the income or the corpus of the road, of operating expenses incurred within a limited time prior to the suit, unless there has been diversion of income, and then only to the extent of such diversion.

It is, however, objected by the appellee that with this question the receiver is not concerned, and that, the justice of the debt being conceded, it is none of his affair that it is preferred by the decree to the mortgage debt. This contention, we think, must be sustained. While it is true that a receiver is the instrument of the court for the conservation of the estate which the court has taken into its possession for administration, it is also true that in a sense he represents all parties in interest. His duty is to defend the estate against all claims which he deems to be unjust. His duty is to conserve the estate as a whole for its distribution by the court among those who shall be adjudged to be entitled. He represents the estate, with right to sue to recover demands due to it, with right to defend it against claims asserted. In this respect we concur with the circuit court of appeals for the Fourth circuit that this duty carries with it the right and the duty, in case of doubtful claim, to take the judgment of the court of last resort. *Thom v. Pittard*, 8 U. S. App. 597, 10 C. C. A. 352, and 62 Fed. 232. This right and duty should, however, be limited in its exercise to those cases in which the estate, as a whole, is interested to enforce a right or to defend against a claim asserted. In respect to many matters the receiver has no right of appeal, while in respect to others his right to appeal may not be gainsaid. Thus, he may rightfully appeal from a decree refusing him compensation, or disallowing his accounts, or establishing a claim against the estate, or denying a claim asserted for the estate. He has no right to appeal from a decree removing him from his position, for that is matter of discretion with the court appointing him, and he holds his position by the sufferance of the court; nor has he the right of appeal from a decree authorizing an issue of receivers' certificates,

or directing a particular management of the trust property, or directing sale of the mortgaged property, or confirming its sale, or directing the turning over of property in his hands; for he is neither the censor of the court, nor interested in the event. Illustrations might be multiplied. The true line of demarcation we think to be this: He has the right of appeal with respect to any claim asserted by or against the estate, for therein he is the representative of the entire estate. He has the right of appeal from any decree which affects his personal right, for therein he has an interest. But he has not the right of appeal from a decree declaring the respective equities of parties to the suit. He should therein be indifferent, and not a partisan. His duty is to all parties in common. He should not become the advocate of one against another. *Trust Co. v. Sullivan*, 46 U. S. App. 601, 603, 23 C. C. A. 458, and 77 Fed. 778.

The record here is not complete. There has been brought to this court only so much of the record as is thought to bear upon the particular question which the receiver desired to present. It was, however, conceded at the argument that, prior to the decree appealed from, the railway had been sold under decree of sale, and had passed out of the possession of the receiver, and into the possession of the purchaser, and that the receiver had not in hand moneys with which to pay the debt adjudged. That this debt was a just claim against the estate is not doubted, and is conceded. No objection is taken to its allowance, nor is it questioned that, under the decree appointing the receiver, it was a proper claim to be paid in preference to the mortgage; but the receiver asserts that the decree allowing preferential claims was improvident, and that the mortgage had preference in payment, because there had been in fact no diversion of income to the payment of interest. Neither the trustee nor the bondholders nor the purchaser is here objecting. Who made the receiver the guardian of their interests in this regard? What duty is imposed upon him to assert the supposed right of one creditor over another in respect to a common fund; and this, whether the estate remains in his custody or has passed from his possession and control under decree and sale? By what right does he become the partisan advocate when his duty demands of him impartiality and indifference with respect to the division of this common fund? By what authority may he assert the rights of a purchaser? By what right does he undertake to prevent the enforcement of this claim against the purchased estate, presumably by the decree of sale charged as a lien upon it? He has no such right. He is, in so doing, an interloper, obtruding himself, in breach of his duty, where he has no right, and in a matter with which he is not concerned. To sanction such action is to encourage vexatious litigation at the expense of the estate, which should be cast upon the interested parties, and to hold out the temptation to a receiver and his counsel to swell the cost of administration by assuming litigation with which he has not right to interfere.

It was held in *Farlow v. Kelley*, 131 U. S. Append. cci., that the allowance by a circuit court of an appeal taken by a receiver is equivalent to leave by the court to the receiver to take an appeal, and it is

urged that, since the appeal here was allowed by the circuit court according to usual practice, we are bound to entertain it, and to determine the question which the receiver has presented. In some states it is held that no case may be appealed by a receiver without permission, notwithstanding parties may appeal as of right and without leave. The supreme court, in the case referred to, merely holds that, if leave were essential, it was granted by the usual allowance of an appeal; but it is nowhere held, and the doctrine cannot be sanctioned, that the allowance of an appeal can operate to clothe the receiver with an interest which he has not, or can impose upon an appellate court the duty of hearing and determining a moot question. The appeal will be dismissed.

BECKER v. HOKE et al.

(Circuit Court of Appeals, Seventh Circuit. June 19, 1897.)

No. 412.

1. CORPORATIONS—STOCKHOLDER'S BILL FOR RECEIVER—EQUITY JURISDICTION.

A bill by a stockholder for the appointment of a receiver cannot be sustained where it declares no contest concerning property, no dispute of any kind between the parties, and no dereliction in duty by the corporation or its officers, but merely alleges its insolvency, the recovery of certain judgments against it from which it desires to appeal, but which it will be unable to supersede because of its insolvency, and that its assets will be wasted if sold under such judgments.

2. SAME—COLLUSIVE BILL—DISMISSAL.

A bill by one owning an insignificant amount of stock, asking a federal court to appoint a receiver, should be dismissed by the court sua sponte, where it appears on the face of the bill that the same is collusive, and is brought to hinder and delay creditors who have recovered judgments in the state courts, and are there seeking the appointment of a receiver and the setting aside of mortgages and judgments on judgment notes, made by the directors to themselves as individuals.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

This is an appeal from a decree of the court below denying the intervening petition of Charles Becker, receiver of the North & South Rolling-Stock Company, appointed by the circuit court of St. Clair county in the state of Illinois, on November 30, 1896. The North & South Rolling-Stock Company is a corporation organized under the laws of the state of Illinois, its principal business being to make, purchase, or lease various kinds of freight cars, and to hire them out to railroads for a compensation. At the times in question it was the owner of 76 stock cars, 242 box freight cars, 100 refrigerator cars, and held under lease 100 refrigerator cars, 156 box cars, and 61 coal cars. John S. Berthold was president of the company, and Curtis M. Jennings was its secretary and treasurer. They were also co-partners in a business carried on at the city of St. Louis, under the firm name and style of Berthold & Jennings. George S. Hoke was a clerk of the firm of Berthold & Jennings, and claimed to be the owner of one share of the North & South Rolling-Stock Company. The capital stock of that company was \$300,000, divided into shares of \$100 each; its board of directors consisting of three members, Berthold, Jennings, and Hoke. Berthold and Jennings were each the holders of 1,000 shares of the capital stock, but it was alleged that nothing had been paid thereon. Henry O'Hara was also a subscriber for 1,000 shares of the capital stock of the com-

panty, and it is charged that nothing whatever had been paid by him on such subscription. The management of the company was under the control of Berthold and Jennings. On June 24, 1896, Henry O'Hara obtained a judgment in the state court of East St. Louis, St. Clair county, Ill., against the North & South Rolling-Stock Company, for the sum of \$60,639.70 and costs of suit. On the 14th day of August, 1896, an execution was sued out upon the judgment, and a demand made of the company for its payment, which was not complied with, nor was any property turned out upon which to levy or satisfy the execution, and the same was returned, "No property found." On the same day, and in the same court, Henry O'Hara obtained a certain other judgment against the North & South Rolling-Stock Company for the sum of \$2,620.28 and costs of suit, upon which execution was issued to the sheriff, and under which the sheriff threatened to levy upon and sell the cars of the defendant corporation. On August 11, 1896, the rolling-stock company, by J. S. Berthold, its president, and C. M. Jennings, its secretary, executed to the firm of Berthold & Jennings a chattel mortgage upon 100 refrigerator cars, 16 box cars, 226 box cars, and 76 stock cars, described, to secure three promissory notes, dated August 11, 1896, executed by the North & South Rolling-Stock Company, by its president, Berthold, and its secretary, Jennings, each payable to the order of Berthold & Jennings, one of said notes being for the sum of \$20,096.75, payable at six months from that date, with interest at 6 per cent., and each of the other notes being for the sum of \$7,682.40, one maturing February 1, 1897, and the other February 1, 1898, each bearing 6 per cent. interest after due. This mortgage was filed for record August 12, 1896. On the same day, the North & South Rolling-Stock Company, by its said president and its said secretary, executed to C. M. Jennings, its secretary and treasurer, the promissory note of the corporation, payable upon demand for the sum \$3,260.60, in the form of a judgment note, and this note was indorsed by C. M. Jennings to the firm of Berthold & Jennings. On the same day, that corporation, by the same officers, executed a like note to the order of J. S. Berthold, its president, and for the sum of \$8,300, which note was indorsed by Berthold to the firm of Berthold & Jennings. On August 12, 1896, judgment by confession in favor of Berthold & Jennings was entered in the circuit court of St. Clair county, Ill., upon the two notes of \$8,300 and \$8,260.60, respectively, and execution upon the judgment was issued to the sheriff of the county of St. Clair, who levied the same upon all the property of the North & South Rolling-Stock Company which could be found within the county, including the property embraced in the chattel mortgage. On the 1st day of September, 1896, O'Hara and the Bannantine Galvanized Iron Manufacturing Company (the latter claiming as assignee of O'Hara) filed in the circuit court of St. Clair county, Ill., a bill in the nature of a creditors' bill, setting forth the judgments obtained by O'Hara; the organization of the company, with Berthold as its president and Jennings as its secretary, and their subscription to the stock of the company, and that nothing had been paid thereon; their possession of the funds of the company; the execution by them as officers to themselves as creditors of the chattel mortgage hereinbefore set forth, and the execution of the several notes, and the entry of judgment thereon, as hereinbefore described; that, to obtain an undue advantage over other creditors of the North & South Rolling-Stock Company, Berthold and Jennings, at the time of the execution of the chattel mortgage and notes, paid to themselves, on an alleged indebtedness of their own, out of the funds of the company, a sum in excess of \$40,000, and kept the property and effects of the company out of the state, and concealed and covered up, so that the same cannot be reached by execution. The bill prayed that the chattel mortgage be vacated and set aside; that the judgment obtained by Berthold & Jennings be vacated, and the execution thereon be quashed, and that they be required to discover, make known, and surrender all property of the North & South Rolling-Stock Company that could be applied in satisfaction of the O'Hara judgments; that Berthold and Jennings be required to refund and bring into court all money obtained by them as preferences; that disposition may be made thereof as might accord with equity; that they be required to surrender any property that they may have belonging to the company; that they be required to pay whatever may be due by them, respectively, upon the stock held by them,

so far as may be necessary to satisfy the O'Hara judgments; that a receiver be appointed to take charge of the property, funds, and possessions of the North & South Rolling-Stock Company, with the usual powers of receivers; and that an injunction issue to restrain them from selling, transferring, or mortgaging the property of the company, and from removing the same from out of the state; and that they and the sheriff be enjoined from the further enforcement of the execution issued upon the judgment set forth, and for such equitable relief as the nature of the case may require. On October 7, 1897, the North & South Rolling-Stock Company filed its answer to this bill, as did also the sheriff. On the 30th day of November, 1896, the circuit court of the county of St. Clair, upon that bill, appointed Charles Becker, the appellant here, receiver of the property of the North & South Rolling-Stock Company, with the usual powers of receivers in like cases, and he duly qualified as such officer.

On the 10th day of September, 1896, George S. Hoke, who is a clerk in the office of Berthold & Jennings, and holds one share of the capital stock of the rolling-stock company, and who was one of the three directors of the company, filed his bill in the circuit court of the United States for the Southern district of Illinois as a stockholder, setting forth the property of the company; the recovery by O'Hara of his judgments; the issuance of the execution and demand for its payment; the recovery of judgment by Berthold & Jennings; the levy of execution issued thereon upon the property of the company; the execution of the chattel mortgage to Berthold & Jennings; the insolvency of the North & South Rolling-Stock Company; that that company believes the judgments obtained by O'Hara to be excessive, illegal, and unjust, and was seeking to perfect an appeal from such judgments, but was unable to give the necessary bonds; that it had prepared bills of exceptions, which had been presented to the judge of the court who tried the causes; and that, as soon as these bills were signed, the company would sue out writs of error to the appellate court of the Fourth district of Illinois, and expect that the appellate court will reverse both of such judgments; that the cars of the company are not in service, and are not being maintained, and are subject to charges for traffic, storage, and switching charges, and are scattered over the country; that the cars are not equipped with air brakes and automatic couplers, and by law should be so equipped by the 1st day of January, 1898, which will require the expenditure of a very large sum of money which it is impossible for the company to raise. It further represents that, if the sale of the property is permitted upon execution under the judgments, the assets of the company will be sacrificed, wasted, and destroyed, and the interest of the stockholders ruined. This bill was filed against the North & South Rolling-Stock Company, as sole defendant. The prayer of the bill was for a receiver of the property of the North & South Rolling-Stock Company to operate and manage the business of the company, subject to the further orders of the court, and to restrain the North & South Rolling-Stock Company, its officers, agents, and servants, from in any manner interfering with the possession or occupation of the property and business of the company by the receiver so to be appointed. Upon the same day, without the issuance of process, the defendant corporation appeared to the suit of George S. Hoke, and, without answer or opposition from it, the court below entered an order appointing Frederick C. Dodds, one of the appellees, receiver of the property of the North & South Rolling-Stock Company, "subject to all prior liens of any person or corporation, as the same may hereafter be established or determined by the court," directing the receiver to lease the rolling stock, and requiring the defendant corporation to deliver to the receiver all property and effects belonging to it, and restraining the company as prayed in the bill. It will thus be seen that, while the bill in the state court was filed nine days before the bill was filed in the United States court by Hoke, the receiver appointed in the state court was not appointed until nearly two months subsequent to the appointment of the receiver in the United States court. The order or decree of the state court appointing the receiver recognized that fact, which had been brought to its attention, and directed its receiver that, as to all the property in actual possession and custody of the receiver appointed by the circuit court of the United States, the receiver in the state court should apply in due and legal form of law to the

United States circuit court for the release of said property from such possession and custody, "which application he is hereby authorized to make, and to institute and carry on all proceedings, legal and equitable, necessary and proper for that purpose." In conformity with that direction, Mr. Becker, the receiver appointed by the state court, filed his intervening petition in the circuit court of the United States in the suit of Hoke against the North & South Rolling-Stock Company, setting forth substantially the facts herein stated, and representing that the jurisdiction of the circuit court of St. Clair county attached before the filing of the bill by Hoke in the circuit court of the United States, and that the fact of the filing of such bill in the state court was concealed from the circuit court of the United States by Hoke, and was not filed in good faith, but was filed at the instance of the North & South Rolling-Stock Company, and through Berthold and Jennings, for the purpose of preventing the collection of the judgments of O'Hara; and he prayed that Hoke, the North & South Rolling-Stock Company, and Dodds, receiver, might be required to answer the petition, and that the property of the North & South Rolling-Stock Company which had been taken possession of by Dodds, receiver, should be turned over to him, and that all moneys and earnings of the property and cars should be accounted for to him. This petition was answered by Hoke, and by the North & South Rolling-Stock Company, but these answers do not vary the statement of facts as here made. On the 14th day of January, 1897, the intervening petition of Becker, as receiver, was heard in the court below, and on the 6th day of April, 1897, a decree was entered denying the prayer of the petition, and dismissing the same, with costs. An appeal was allowed to this court to review that ruling.

Gustavus A. Koerner, Mortimer Millard, and W. L. Granger, for appellant.

Samuel P. Wheeler, Charles P. Wise, and George F. McNulty, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). The argument sought to present for our determination a question both interesting and delicate: Which court—that of the United States or of the state—first acquired jurisdiction of the property of the North & South Rolling-Stock Company? We are relieved from the consideration of that question by other matters which must control our judgment. We are of opinion that the bill filed by Hoke in the circuit court of the United States exhibited no ground for the exercise of the equitable jurisdiction of the court, and that the proceedings of that court thereon are without warrant of law. It would be difficult to classify the bill under any known head of equity jurisdiction. It declares no contest concerning property, no dispute of any kind between the parties thereto. It asserts no dereliction in duty by the defendant corporation or its officers, and no ground to warrant the interference of a stockholder for the protection of his rights. There is no dispute to be adjudged, no right to be asserted, no decree prayed. The court is merely asked to take the property of the defendant corporation under its management during the pendency of a writ of error to be sued out by the company with respect to judgments obtained in another court, because, if such writ should be sued out, the company, by reason of its insolvency, would be unable to supersede the judgments. In other words, it is sought to make a bill in equity operate as a supersedeas bond upon writ of error in a court of another jurisdiction, and to demand that for such

purpose a court of the United States should become the manager of the business of the corporation. A new nomenclature must be adopted to properly designate the bill in question. We know of no better name by which to characterize it than a bill to hinder and delay creditors.

The indisputable facts disclose, also, that this suit in the United States court is manifestly, and upon the face of the bill, collusive. If any right is asserted by this bill,—and we are unable to discover any,—it was a right which could properly be asserted by the corporation. No effort is stated to procure proper action by the directors, of which the complainant was one, nor is a failure therein asserted, and the bill contains no allegation negating collusion. The ninety-fourth rule in equity requires that these things should be stated. These necessary averments are doubtless wanting, for the reason that they could not truthfully be asserted. The complainant is the owner of one share of the capital stock out of 3,000, and is one of the directors of the company. He is the clerk of Berthold & Jennings, the other directors, and the owners of two-thirds of the capital stock of the company, and who have, as officers of the company, with the knowledge and consent of Hoke, executed to themselves, as individuals, a mortgage upon all the property of the company, and also judgment notes which have passed into judgment and the property of the company levied upon thereunder; and all this subsequent to the obtaining of judgments by O'Hara, and, as is asserted by the bill in the state court, for the purpose of hindering, delaying, and defrauding him in the collection of his debt. He asks that these liens be recognized. It is a significant fact, also, that the bill contains no reference to or mention of the creditors' bill that had previously been filed in the state court. There can be no question that the suit is collusive and vexatious. We cannot forbear to say that this proceeding is not deserving of judicial sanction. It is not to be tolerated that the courts of the United States shall be thus used. It cannot be permitted that a conflict between courts of federal and state jurisdiction—always to be deprecated, and to be avoided, if possible—may thus be projected to further the supposed interest of desperate litigants. The courts of the United States will not sanction such proceedings, nor become party to an unwarranted conflict with the courts of another jurisdiction. Upon its face, the bill is without equity to sustain it, and should have been dismissed by the court *sua sponte*. It presented no case for the exercise of equitable jurisdiction, and no warrant or justification for the appointment of a receiver.

It is objected that the appellant had not obtained leave of the court appointing him to prosecute this appeal. We had occasion in *Bosworth v. Association* (decided at the present session) 80 Fed. 969, to consider the question of the right of a receiver to appeal. This case is distinguishable from that, in this: that the receiver here is not the appointee of the court from whose decree the appeal is taken. If it be necessary that in all cases a receiver should obtain the authority and the direction of the court appointing him to appeal in any case pending in another jurisdiction, and if it be true

that the appellees here can properly object for want of such leave, we do not doubt that the authority conferred by the order of appointment to apply to the circuit court of the United States for the restoration of the property to the rightful jurisdiction of the state court, and to carry on all proceedings necessary and proper for that purpose, is ample to warrant this appeal, which was, in fact, allowed by the court below. The decree is reversed, and the cause is remanded, with directions to the court below to grant the prayer of the petition, and to direct its receiver to release and turn over to the appellant, as receiver, all the property of the North & South Rolling-Stock Company which at any time has come to his possession as such receiver, and to account for and pay over to the appellant, as such receiver, all moneys in his hands or property received by him as earnings of the property and railroad cars of which he at any time has had possession, under the order of the court below.

HOOK v. AYERS et al.¹

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 320.

1. **PLEDGES—CHANGE OF POSSESSION.**

The intent to pledge does not constitute a pledge, but there must be delivery to the pledgee; and therefore, where bonds held by the president of a railroad company for the company never passed from his control, there was not a pledge of them to a syndicate of which he was a member, though he may have intended to pledge them to secure loans made by the syndicate to the company, there being no actual delivery of them to the trustee of the syndicate who held the notes of the company.

2. **SAME—EQUITABLE PLEDGE.**

To apply the doctrine of equitable pledge, there must be a contract from which it sufficiently appears that the particular property was designed by the debtor to be subjected to the payment of the debt.

3. **SAME—AUTHORITY OF RAILROAD PRESIDENT.**

The president of a railroad company cannot so contract with himself, in another capacity, without the sanction or knowledge of the directors and stockholders, that an equitable pledge upon the property of the company can be enforced to the detriment of creditors.

4. **ESTOPPEL.**

Members of a syndicate who sold their interest therein to another member, with knowledge that he claimed that certain bonds in his possession were held in trust as collateral for a claim of the syndicate, held estopped to deny that the bonds are so held. Woods, Circuit Judge, dissenting.

5. **SAME—NOTICE TO PARTNER.**

An estoppel resting upon two members of a firm by reason of an individual transaction cannot bind the firm of which they are members, as notice to a partner, to bind the co-partnership, must be with reference to a transaction within the scope of the co-partnership.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

This cause was before this court upon the appeal of the present appellant, and is reported in Hook v. Ayers, 24 U. S. App. 202, 12 C. C. A. 554, 63 Fed. 847, and 24 U. S. App. 487, 12 C. C. A. 564, 64 Fed. 660, to which reference is made for the facts as then developed. The decree was reversed, and the cause remanded for further proceedings in accordance with the opinion of

¹ Rehearing denied June 17, 1897.

the court. Upon filing the mandate of this court, Marshall P. Ayers, Augustus E. Ayers, and John A. Ayers, the appellees, filed in the court below, and by leave of that court, their amended cross bill in substance charging the same equitable pledge asserted in their original cross bill; the recovery of a judgment by them against the Jacksonville Southeastern Railway Company upon the loan mentioned in the cross bill; the issuance of an execution thereon, and its return unsatisfied; that William S. Hook, the president of that railway company, as such president received from the Louisville & St. Louis Railway Company the 247 bonds issued by that company to the Jacksonville Southeastern Company, had delivered 125 of them to the appellees as security for advances made, and had unlawfully, without authority of the railway company, the owner of them, and in fraud of the rights of the creditors of the road, appropriated the other 122 to his own use, and subsequently made a gift of them to his wife, Mary B. Hook. William S. Hook answered to this cross bill, denying, as he had before denied, the alleged equitable pledge of the 122 bonds to the appellant, asserting "that said one hundred and twenty-two bonds were sold by the Jacksonville Southeastern Railway Company, or, more accurately speaking, were pledged by said company as security for money obtained by it, and applied by it to the payment of its debts, and in support of its operating expenses; that said bonds were pledged to secure indebtedness due from said company to the complainants Marshall P. Ayers, John A. Ayers, and others, and with the full knowledge and consent of the said complainant Augustus E. Ayers; that afterwards the said Marshall P. Ayers and John A. Ayers sold all their interest in said one hundred and twenty-two bonds to this respondent, and received the price agreed upon for the same by them; that this respondent paid the said Marshall P. Ayers and John A. Ayers for their respective interest in said bonds the sum of three thousand dollars, the bases for the whole of said bonds being thirty thousand dollars; that such payments were made by respondents and received by the two complainants in the months of June and July, 1889. Respondent says that said sale was made with the full knowledge of the fact by the complainant Augustus E. Ayers, and that said complainants are estopped to set up any claim to said bonds, or any part of them. But, if the complainants in the cross bill shall be held to be entitled to set up any claim to said bonds as judgment creditors, then they must redeem said bonds, and must pay the amount of money for which the same were at that time and have since been held by respondent, with interest upon the same at the rate of six per cent. per annum." Mary B. Hook, the appellant, also separately answered the amended cross bill; confirming her answer to the original cross bill, and resting her title to the 122 bonds upon the rights of her husband, William S. Hook, from whom she received the bonds as a gift. Further testimony was thereupon taken with respect to the transactions at issue, but the facts, so far as necessary to be stated, are embodied in the opinion upon the former appeal, and in this opinion. The court below decreed, as it had before decreed, that the proceeds of the sale of the Louisville & St. Louis Railway should be applied first to the payment in full of the 125 bonds pledged to the appellees, and thereafter, if any proceeds remained, to the payment of the 122 bonds claimed by Mary B. Hook, the appellant.

Thomas Worthington (Isaac L. Morrison, of counsel), for appellant.

William Brown, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge, upon this statement of the case, delivered the opinion of the court.

We held when this case was previously before the court that the appellants, as pledgees of the 125 bonds, were not entitled to an equitable lien upon the remaining 122 bonds. That ruling is *res judicata*. The amended cross bill presents the appellees in the character of judgment creditors, so that they are now entitled

to question the transaction by which Mary B. Hook claims to have acquired the ownership of the remaining 122 bonds, unless they are estopped by the transaction between William S. Hook and two of the appellees with respect to the sale to Hook of their interest in the Chicago, Peoria & St. Louis Syndicate, or, if not technically estopped, unless the firm is bound by notice of this transaction. Our attention will first be directed to the question whether there was in fact any valid pledge of the 122 bonds by the Jacksonville Southeastern Railway Company to William S. Hook, or to any other person, for the benefit of the syndicate. The cross bill proceeds upon the theory that these bonds never passed from the custody of the railway company, and are still its property. The answer asserts the pledge, and assumes the burden of its proof. The fact of the pledge, if one there was, rests wholly upon the testimony of William S. Hook and Marcus Hook. So far as the evidence discloses, there was no action by the directors of the company authorizing such pledge, nor any knowledge by them of the intention of Hook, as president, to make such pledge, except as herein stated. Nor is there any written pledge of any kind, nor any entry in the books produced from which such pledge could be inferred, except possibly the entry of October 1, 1889, in the books of the syndicate company, by which, after the purchase of his fellows' interest in the syndicate, William S. Hook charged to himself, at a stated sum, these 122 bonds, which transaction cannot be sanctioned, and is not defended by counsel. William S. Hook testifies that in December, 1887, at the time of the pledge of the 125 bonds to the appellees, he stated to Augustus E. Ayers, one of the appellees, that he intended to hold the 122 bonds to secure the syndicate for advances made by the Chicago, Peoria & St. Louis Company; that "at practically the same time" he deposited the 122 bonds with the American Exchange National Bank of New York, subject to the order of T. J. Hook & Co. This claimed deposit was by an order on the trust company in New York, which was trustee under the mortgage securing the bonds. T. J. Hook & Co. was William S. Hook, and none other. The transaction, therefore, was in plain English, this: William S. Hook, as president of the Louisville & St. Louis Railway, delivered its bonds to the trustee under the mortgage for countersigning and delivery to William S. Hook as president of the Jacksonville Southeastern Railway. William S. Hook, as president of the latter company, ordered the trustee to deliver them to the American Exchange Bank, to be held subject to the control and direction of William S. Hook. This firm of T. J. Hook & Co. was engaged in no business except that of keeping this bank account with the American Exchange National Bank, and the only person interested in it was William S. Hook. The Jacksonville Southeastern Railway Company was not indebted to the firm of T. J. Hook & Co. Mr. Hook declares the firm never purchased these bonds; never held them, except upon his own motion, as custodian, to protect advances made by the Chicago, Peoria & St. Louis Syndicate to the Jacksonville Southeastern Railway Company. It does not appear

that in December, 1887, any advances had been made by the syndicate to the Jacksonville Southeastern Railway; nor does it appear when any such advances were made, except that on May 31, 1888, William S. Hook, as president of the Jacksonville Southeastern Railway Company, executed to the Chicago, Peoria & St. Louis Railway Company a promissory note for \$65,000 on account of money advanced and expended in the construction of the Louisville & St. Louis Railway. This note was delivered to Marcus Hook as treasurer of the Chicago, Peoria & St. Louis Railway Company, and with and as collateral to the note of the latter company for a like amount, and, by the direction of William S. Hook, passed from Marcus Hook as treasurer to Marcus Hook individually, "to be held as trustee for the benefit of the syndicate." Soon after the execution of these notes, the members of the syndicate executed receipts for the dividend declared by the syndicate, but received no money therefor; and Marcus Hook declares that at that time he explained to each member of the syndicate that he held these notes, and that they were secured by the 122 bonds "which were under my control as collateral." He never had control or possession of them. He had only been authorized by William S. Hook to sign checks in the name of T. J. Hook & Co. These bonds never passed beyond the control of William S. Hook, or out of his custody. In June, 1889, William S. Hook purchased the interest of the other members of the syndicate; and thereafter, in October, 1889, he directed an entry upon the books of the syndicate or the company controlled by the syndicate, crediting upon the \$65,000 notes the sum of \$61,000, as the value of the 122 bonds which at the time were in the bank in the city of New York subject to the order of T. J. Hook & Co. It may be that William S. Hook intended to hold these 122 bonds as security for such advances as the syndicate should make to the Jacksonville Southeastern Railway Company. But the intent to pledge does not constitute a pledge. It was ruled in *Casey v. Cavaroc*, 96 U. S. 467, that delivery and possession are of the essence of a pledge, and without them no privilege can exist as against third persons. There must be delivery to, and possession by, the pledgee. *Christian v. Railroad Co.*, 133 U. S. 233, 10 Sup. Ct. 260. Story, in his treatise on Bailments (section 297), observes:

"Until the delivery of the thing, the whole rests in an executory contract, however strong may be the engagement to deliver; and the pledgee acquires no right of property in the thing."

It is clear, upon this record, that there never was any delivery of these bonds to Marcus Hook as trustee. The only possible control or right that he had to deal with them was as the agent and servant of William S. Hook, under his authority to sign checks in the name of T. J. Hook & Co. He does, indeed, declare that he stated to the members of the syndicate that these bonds were under his control; but, as matter of fact, the bonds were at all times, from their inception down to the time when he says he gave them to his wife, in the custody and under the control of William S. Hook. The delivery of these bonds to the trust company by the

company making them was a delivery to the Jacksonville Southeastern Railway Company, and to William S. Hook as its president. The deposit of them in the New York bank to the credit of T. J. Hook & Co., which was an alias of William S. Hook, did not dispossess the company of these bonds. He still held them as president of the company, and they remained under his control. Whatever his intention with respect to a pledge of the bonds, it was never effectuated by any action of the owner of them, or by delivery of them to Marcus Hook, the trustee of the syndicate, who held in trust the notes of the two railway companies. There was no delivery to him of the bonds. They never passed from the possession or control of William S. Hook, and his possession of them was the possession of the Jacksonville Southeastern Company. Nor do we discover sufficient ground to apply the doctrine of equitable pledge. That doctrine rests upon the idea that the possession of the thing remained with the owner, and that by some executory contract, expressed or implied, a right or interest in the thing has been created, which equity will recognize and enforce, upon the maxim that equity will regard as done that which ought to be done. There must, however, be a contract from which it sufficiently appears that the particular property was designed by the debtor to be subjected to the payment of the debt. Here was no such contract. William S. Hook asserts that he declared his intention to hold the bonds as security for advances which might be made by the syndicate. He says that he took them into his personal possession by subjecting them to the order of T. J. Hook & Co. This act, however, was not authorized by the railway company. Nor can it be permitted that as president of the company, and without the sanction of its directors and shareholders, he may contract with himself to the detriment of its creditors and shareholders. If the company, by its directors, had sanctioned the acts of William S. Hook with respect to those bonds, there might be sufficient shown to call for the application of the doctrine invoked. It would, however, be dangerous to declare that one in a representative capacity may so contract with himself, without the knowledge or acquiescence of those whom he represents, that an equitable pledge upon the property of the company could be asserted and enforced. It was so simple a matter to have procured such declaration of pledge, either legal or equitable, which a court of equity would recognize, that the want of such action casts suspicion upon the transaction, and especially in a case in which an officer of the corporation is dealing with himself. So far as we can discover, there existed merely an intention on the part of William S. Hook that the bonds should be pledged to the syndicate, unaccompanied by any act of the debtor company. The intention to pledge was that of the creditor, not of the debtor, and upon that there cannot properly be invoked the doctrine of an equitable pledge.

We are next to inquire whether the appellees are estopped to assert that these bonds are the property of the Jacksonville Southeastern Company. Marshall P. Ayers and John A. Ayers were members of the syndicate, and disposed of their interest therein

to William S. Hook with knowledge that he claimed the 122 bonds to be held in trust as collateral security for the claim of the syndicate. They received the money of William S. Hook with that knowledge. He parted with his money to them, relying, as they well knew, upon holding these bonds as collateral security to the debt he purchased. We said before, possibly obiter, and the majority of the court is still of opinion, that they are estopped by their contract of sale. That the claimed pledge of the bonds is ineffectual as against creditors and shareholders cannot weaken the effect of the estoppel. The supposed pledge fails through defective action, which, so far as their own rights are concerned, Marshall P. Ayers and John A. Ayers could perfect, and did sanction by taking the money of William S. Hook with knowledge of his claim. These two men cannot therefore now be heard to question a transaction which they have thus approved, and in the avails of which they have participated. The sale of the interest in the syndicate transferred the debt and that which secured the debt. We do not attempt to vary, or in fact vary, the terms of the written contract. It is not the case of an independent oral agreement inconsistent with the stipulations of the written contract. It is merely the application of the doctrine of estoppel, by which one who has participated in the avails of a transaction which is incomplete, and cannot therefore bind creditors, shall not be heard to deny the transaction. And by the application of this doctrine the contract is not impugned, but is made effectual as against Marshall P. Ayers and John A. Ayers to the purposes intended by and expressed in it, to wit, the transfer of their interest in the debt, and in the supposed collateral, and to no greater extent. But how can the estoppel that rests upon the two conclude the firm of which they were members? The transaction had relation to the individual business of the two members of the firm, and was in no way related to the co-partnership business. We know of no principle in the law of estoppel by which the firm can be thus concluded. It is urged, however, that if the principle of estoppel cannot be applied here, since two of the co-partners had notice of William S. Hook's claim to hold these 122 bonds as collateral to the syndicate debt, that was notice to the firm. The doctrine that a partnership is bound by notice to one of the partners results from the agency of the partner, and because of his duty to communicate his knowledge to his partners. But notice to a partner, to bind the co-partnership, must be with reference to a transaction within the scope of the co-partnership business, and not the knowledge derived by one co-partner in the transaction of his private business; for, in respect to private matters, there exists no duty upon one to communicate his information to his co-partners. *Dunklee v. Mill Co.*, 23 N. H. 245; *Bank v. Savery*, 82 N. Y. 291. It is, however, said that Augustus E. Ayers had notice prior to the sale to William S. Hook of his intention to hold these bonds as security for advances which the syndicate might make to the Jacksonville Southeastern Company, and that with such knowledge he stood silent, not objecting, and therefore should be concluded.

There was no duty resting upon Augustus E. Ayers, as a creditor of the Jacksonville Southeastern Railway Company, to enter his objection to the carrying out of the intentions of William S. Hook with respect to these bonds. Whatever William S. Hook might do, he did at his peril. Owing him no duty in this regard, Augustus E. Ayers cannot be estopped by his silence. There is no evidence in this record that he knew of the sale by his partners of their interest in the syndicate, and, if he did, we are unable to perceive that such knowledge would conclude him with respect to any just claim of the firm as creditor of the Jacksonville Southeastern Railway Company. He did not actively consent to any appropriation of the bonds by William S. Hook. If, knowing of Hook's claim to the bonds, he was silent when Hook dealt with his partners for their interest, that silence induced no action. He made no representation, he concealed no fact which he was bound to communicate to Hook; nor did the latter part with any valuable thing upon the faith of his silence. It may seem inequitable to permit a recovery by this firm, in view of the fact that two of its members received the money of William S. Hook when they knew that he claimed these bonds as security for the debt which he purchased. It might be possible—we do not, however, so decide—to recognize this equitable consideration, if we had before us evidence of the condition of the co-partnership, and the relative interests of the partners. The record, however, is silent upon that subject. We have no data upon which to work out the equity, if we were permitted so to do.

The decree under consideration would seem to be predicated upon an erroneous basis, because it recognizes the claim of the appellant, but subrogates her rights to those of the appellees. Our conclusion denies her right to the bonds in controversy, and asserts them to be the property of the railway company. In the distribution of the proceeds of the sale, these bonds should not share with those held by the appellees, because the latter are held as collateral to the debt of the company. The decree, however erroneous in theory, conforms to the prayer of the amended cross bill, and in that regard is favorable to the appellant, and cannot be impugned by her. It is not opposed by the appellees. The decree must therefore be affirmed.

WOODS, Circuit Judge. Concurring fully with the principal opinion in other respects, I cannot agree that upon the facts disclosed there is an estoppel against Marshall P. Ayers and John A. Ayers, any more than against Augustus E. Ayers. They made no representations in respect to the ownership of the bonds. They were ignorant of the facts, and it was only upon the representation of William S. Hook, who knew all the facts, that they were led to believe, if they did believe, that the bonds had been pledged as collateral to the debt of the Jacksonville & Southeastern Railway Company to the syndicate of which they were members. If there was fraud or deception in the transaction, Hook was the wrongdoer, and they were the victims. He had full knowledge.

They knew, if they remembered it, only what he or his agent, Marcus Hook, had told them under circumstances which called for no action or thought on the subject by them; and more than a year before they parted with their interest in the syndicate, at which time nothing was said about the bonds. There was, therefore, by no possibility an estoppel in pais. Indeed, that is not understood to be asserted. "The majority of the court is still of opinion that they are estopped by their contract of sale," it is said; but that cannot be, unless the bonds were within the terms of the contract. The contract is in writing, and its terms cannot be in doubt. Each member of the syndicate executed to William S. Hook a written assignment of his interest in the property of the syndicate. It is not pretended that the syndicate had ever had any interest in the bonds except as pledgee. We are all agreed that there was no pledge, and no valid agreement to make one; and it is therefore clear that no interest in the bonds was transferred to Hook, or purported to be transferred to him, by force of the contract of sale. It is said, however, that the members of the syndicate disposed of their interest therein to Hook with a knowledge that he claimed that the bonds were held as collateral for the benefit of the syndicate. The fact is not beyond question, but let it be conceded. Hook knew the contrary, and, if the other members believed it, it was because he had misled them; so that, as we have already seen, an estoppel in pais is out of the question. If the meaning of the majority opinion is that the execution of the contract of sale, with a knowledge of Hook's claim that the bonds were pledged, was equivalent to an agreement or binding consent that the claim was true, that proposition can be given no significance here without a plain disregard of the rule that written contracts cannot be varied by proof of antecedent or contemporaneous parol agreements. The written assignment did not include an interest in the bonds, and it is not competent to show a parol agreement, deduced from assertion on one side and acquiescence on the other, that an interest in the bonds should be included. There might, in such a case, upon a proper showing, be a reformation of the contract in order to express the whole intention of the parties; but to declare an existing estoppel upon the facts as they are seems to me to be a departure from established principles, which are of the greater importance because they are of every-day application. It seems to me to be aside from, and in part a begging of, the question, to say, "It is merely the application of the doctrine of estoppel, by which one who has participated in the avails of a transaction which is incomplete, and cannot therefore bind creditors, shall not be heard to deny the transaction." There is no question here concerning the rights of creditors other than the appellees. The transaction in the avails of which Marshall P. Ayers and John A. Ayers participated was in no sense incomplete. It was consummated, and is evidenced by a writing of unequivocal terms; and the question is, what was the actual transaction? Were the bonds included? It is said that one who has participated in the avails of it cannot deny the transac-

tion. That proposition, as here applied, is reasoning in a circle. The bonds are brought into the transaction only by force of the supposed estoppel, but the estoppel asserted arises after the transaction, by reason of the avails thereof being taken by the parties supposed to be estopped. They did not share in the avails of the bonds, unless they were included in the transaction; and yet the proposition is that, because the appellees shared in the avails, the bonds must be deemed to have been included. It seems clear to me that, if there was an estoppel, it must be found outside of the transaction to be affected thereby; and, for the reasons already stated, that cannot be. If the supposed pledge failed for want of effective action—there was in fact no action at all, but at most an intention on the part of Hook alone—Marshall P. Ayers and John A. Ayers could, of course, perfect it, as against their own rights, by an agreement to that effect; but such an agreement resting in parol cannot be shown, when the effect is, as here, to vary a contract in writing. It is to be observed that Hook's answer does not attempt to set up an estoppel against Marshall P. Ayers and John A. Ayers. It alleges an outright sale by them to him of their interest in the bonds, for a price paid, and not a sale by force of an estoppel in connection with the actual sale which was made of their interest in the property of the syndicate. The estoppel attempted to be set up is against the three Ayerses, and it is predicated, as against two of them, solely on the alleged sale of their interest in the bonds, and, as against the third, upon his alleged knowledge of that sale at the time it was made. In short, the theory of the answer is that two of the appellees had parted with their interest in the bonds by contract of sale, and that the other was cut off by an estoppel in pais. The answer fails because there was no such contract, and such an estoppel, upon the facts, against Augustus E. Ayers was impossible. Against the other two, no estoppel outside of the contract was pleaded, and, if it had been, it could not have prevailed. Decree affirmed.

DADIRRIAN v. GULLIAN et al.

(Circuit Court, D. New Jersey. May 4, 1897.)

EQUITY PLEADING — SUPPLEMENTAL BILL — INFRINGEMENT OF TRADE-MARK — NEW PARTIES.

Complainants, after securing a decree against certain parties restraining the use of a trade-mark, sought by supplemental bill to make parties to the suit others who had purchased the business from the original defendants, and were using the trade-mark, and also certain persons, formerly servants of the original defendants, who had entered the employ of the new users of the mark. It appeared that the original defendants had made no attempt to transfer a right to use the mark, and that the new users of it did not base their claim to use it upon any rights supposed to be derived from the original defendants. *Held*, that leave to file the supplemental bill should be denied.

Betts, Hyde & Betts, for complainant.
Louis C. Raegener, for defendants.

KIRKPATRICK, District Judge. Markar G. Dadirrian, the complainant herein, having obtained on decree an injunction against Muggerditch Gullian, Albert Gullian, and Otto Heisenbittel, trading as M. Gullian & Co., restraining them, their agents and servants, from using the trade-mark "Matzoon" as a label for a fermented milk preparation, asks leave by petition to file a supplemental bill for the purpose of making Senekerim Gullian, Taquhy Gullian, Nazar Gullian, and Reuben Gullian parties to his original suit. The reasons alleged in the petition are that, pending the suit against M. Gullian & Co., the said M. Gullian & Co. made an assignment and transfer of their business in preparing, putting up, selling, and offering for sale a liquid preparation of fermented milk to Taquhy Gullian, who is the wife of Senekerim Gullian, and the same was accepted by her with full knowledge of the pendency and object of the suit, and that subsequently the property was transferred to Senekerim Gullian, who had like knowledge. It does not appear that any claim was made by Dadirrian to the exclusive right to manufacture the fermented milk which he sold under the trade-mark of "Matzoon." His only object in bringing the suit was to protect his right to use his trade-mark in connection with the manufactured article. He did not object to the manufacture and sale of fermented milk. That was a business in which any one might engage without hindrance from him, and therefore the sale of the utensils necessary to the carrying on of that legitimate business could not afford any ground for making the purchasers parties to a controversy which does not necessarily pertain to the business. It does not appear that M. Gullian & Co. undertook to convey to Taquhy Gullian any right to use the trade-mark "Matzoon," which was the subject-matter of the suit, or that she ever made use of the word "Matzoon" in selling the product of her business; on the contrary, it is admitted that Taquhy, after the decree and injunction had been obtained by Dadirrian, changed its name to "Lebben." Recently it is said that Senekerim Gullian has come into possession of the business and appliances so purchased by his wife, Taquhy, and that he is now engaged in manufacturing fermented milk, and is selling it under the name of "Matzoon," but he does not claim to so call it by virtue of any right derived either from his wife, Taquhy, or M. Gullian & Co. The other persons named in the petition—Nazar Gullian and Reuben Gullian—were servants of M. Gullian & Co., and have ceased to be such. They are now in the employ of Senekerim. No other reason is advanced why they should be made parties except that they are the sons of Muggerditch Gullian, and live in the same house with him, and Senekerim, their brother. I have already held that Senekerim Gullian was carrying on this business on his own behalf, and in good faith, and that neither he nor his brothers, Nazar and Reuben, though once the servants of their father, Muggerditch, were bound, having ceased to be such servants, to obey the injunction granted in the suit to which they were not parties. They should not, more than other strangers, be in any way concluded by the decree, but be permitted to have their day in court to offer such defenses to their actions as they may be advised. The purchase by Senekerim of the utensils

to manufacture the articles which he now offers for sale, even though it were from M. Gullian & Co. direct, cannot change his status or impair his rights. The injunction was issued, not to prevent the manufacture and sale of fermented milk, but to forbid the use of the trade-mark "Matzoon" as an aid in procuring purchasers. It is true that Senekerim is now using the prohibited word for that purpose, but he does not base his right upon any grant or transfer from M. Gullian & Co., the defendants, but upon the ground that Dadirrian, the complainant, has no exclusive privilege to do so. Leave to file the supplemental bill is denied.

PEIROE v. BANE.

(Circuit Court of Appeals, Seventh Circuit. June 8, 1897.)

No. 347.

MASTER AND SERVANT—RAILROAD APPLIANCES—ASSUMPTION OF RISK.

A railroad company or a receiver operating a railroad owes no duty to its or his servants to provide cars or engines of but one pattern, and any risk arising from an obvious difference in construction of particular cars or engines from those to which they are accustomed is assumed by such servants.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

The injury which was the subject-matter of this action happened to George Bane, the defendant in error, while in the service of the receiver of the Toledo, St. Louis & Kansas City Railroad Company, in the capacity of brakeman upon freight trains. On the 18th day of January, 1895, at about 4 o'clock p. m., the defendant in error and the train crew were summoned at Frankfort, Ind., to take charge of a through freight train destined for Charleston, Ill. At that time he was notified that a certain switch engine, which had then just come from the repair shops at Frankfort, and was standing on a siding, was to be taken out in the train as a "dead engine"; that is, an engine without steam, and not doing active work. This engine was to be taken to Charleston for service there in switching. It was constructed with a sloping tank, extending to within two feet of the rear end of the tender, and with a footboard at the rear end of the tender, being in length a foot and 5 inches less than the width of the engine, and being 14 inches above the rails. Above this footboard, and upon the floor of the tender, were two hand rails, each about 2 feet long, one upon each side of the drawbar, with a space of 10 inches between them. These were placed 15 inches back from the rear end of the floor of the tender, and 30 inches back from the end of the drawbar. This switch engine, being in perfect repair, was placed in the freight train with six or eight freight cars between it and the locomotive that hauled the train and a number of miscellaneous freight cars behind it. The defendant in error, as head brakeman, was placed at the head end of the train. When near Cayuga, and going up a steep incline, known as "Cayuga Hill," the train, in order to surmount the hill, was parted into two sections. The first section proceeding up the incline became uncoupled immediately behind the dead switch engine, by reason of the pin in the coupler rising, and letting out the link. The conductor and the defendant in error at this time were at the rear end of the section, some three cars behind the dead engine, and, upon the uncoupling of this section, applied the brakes to bring the rear portion of the section to a stop. Bane then descended, and signaled to the engineer to back up. As the front part of the section returned, he went towards it, stepped upon the footboard of the dead engine, and, when the two parts of the section came together, he coupled them with the pin, which still remained in the drawbar

head. The section was then taken over the hill, and placed upon a siding, the engine returning for the rear section which it brought up, when the train was again coupled and proceeded. At about 11 o'clock at night, about two hours after leaving Cayuga, and when nearing Ridge Farm, Ill., the train again became uncoupled immediately behind the dead switch engine, and in the same manner as before. Bane was at that time on top of a box car between the two engines. The forward part of the train proceeded to the switch at Ridge Farm, and then the engineer, upon being informed of the mishap, reversed his engine, and backed the train to the rear portion, which had become disengaged, and was about a quarter of a mile distant. In going that distance, Bane stood upon the footboard of the dead engine, having hold of the hand rail on the south side of the rear end of the tender. Upon approaching the rear end of the train, he signaled to the fireman with his lantern, which he held in his right hand, holding to the hand rail with his left hand. The train not slowing, Bane undertook to cross upon the footboard to the other side of the engine, in order to signal to the engineer. He stood with his back to the tender, and, turning to pass around the drawbar, he examined, with the aid of his lantern, the step on the further side of the drawbar, satisfying himself that it was in proper condition, but paid no attention to the hand rail on the tender, and did not examine it. In attempting to cross around the drawbar, he reached for the hand rail, and his hand rested on the smooth surface of the frame of the tank in the 10-inch space between the two hand rails. He lost his balance, fell backward upon the north rail of the track, and received the injuries complained of. The negligence charged in the declaration is the failure "to have upon the rear end of the tender of the switch engine a hand rail reaching from one side thereof to the other, to reasonably protect employes engaged in operating such switch engine and tender, and in coupling the same to other cars." At the trial the case was rested upon the conclusion of the evidence for the plaintiff, the defendant below offering no testimony, but moving the court to direct a verdict for the defendant. The adverse ruling of the court upon that request is assigned for error.

Clarence Brown and Charles A. Schmettau, for plaintiff in error.
F. W. Dundas, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). The test of liability is failure in the discharge of duty. Unless the master stood in breach of duty in hauling, as part of this freight train, a switch engine of the construction of the one in question, responsibility for the injury here cannot justly be imposed upon him. This switch engine was not being operated. Bane had no concern with it except as it constituted part of the freight train being hauled. Neither the hand rail nor the footboard was for use in connection with the operation of the train. Bane used these instrumentalities as a convenience in an attempt to cross from one side to the other of the train. He assumed, without examination, that with respect to the hand rail the switch engine was of like construction to some others with which he was familiar, and that the hand rail was continuous across the engine. Liability is asserted upon the broad pretense that the master had no right to haul a switch engine in this train unless it was equipped with a continuous hand rail across the rear end. The contention cannot be upheld. The master owes no duty to the servant to provide cars or engines of but one pattern. There rests no such obligation upon the master. "A railroad company is guilty of no negligence in receiving into its yards, and passing over its line, cars, freight or passenger, different from those

itself owns and uses." *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298. In that case liability was asserted because a foreign car, having deadwoods or bumpers, was hauled in a train with other cars, which had none, and thereby the danger of coupling was enhanced. There, as here, the cars were not out of repair or in defective condition. They were merely of different construction. The court observed:

"But all this was obvious to even a passing glance, and the risk which there was in coupling such cars was apparent. It required no special skill or knowledge to detect it. The intervener was no boy placed by the employer in a position of undisclosed danger, but a mature man, doing the ordinary work which he had engaged to do, and whose risks were in this respect obvious to any one. Under those circumstances, he assumed the risk of such an accident as this, and no negligence can be imputed to the employer."

The master has the right to haul over his road cars or engines of different construction, particularly if they are in ordinarily safe condition. The risk in operation is assumed by the servant, although it is thereby enhanced, provided the risk be apparent, not requiring special skill or knowledge to detect it. In such case the master and the servant stand on common ground, with equal means of knowledge. If the hand rail in question can be said to have been of defective construction, because not continuous, the defect was obvious, and open to the observation of all. In such case the servant assumes the risk. *Railroad Co. v. Meyers*, 46 U. S. App. 226, 236, 22 C. C. A. 268, and 76 Fed. 443. The court should therefore have withdrawn the case from the jury. The judgment is reversed, and the cause remanded, with directions to award a new trial.

SILVER PEAK MINES v. HANCHETT.

(Circuit Court, D. Nevada. May 21, 1897.)

No. 635.

AFFIDAVITS—IRREGULARITY OF FORM.

An affidavit which begins by reciting, "S., a corporation, the plaintiff above named, by M., its attorney, being duly sworn," etc., though irregular in form, is not a nullity, the true interpretation thereof being that it is the affidavit of M., who is the attorney of the corporation. An attorney may make the affidavit for the corporation.

The heading to the affidavit for attachment referred to in the opinion is as follows: "Silver Peak Mines, a corporation, the plaintiff above named, by M. A. Murphy, its attorney, being duly sworn, says," etc. The heading in the affidavit attached to the complaint is as follows: "M. A. Murphy, being duly sworn on behalf of the plaintiff in the above-entitled action, says," etc. The motion to dissolve the attachment was based upon the ground that there was no affidavit on file made by or on behalf of the plaintiff.

M. A. Murphy, for plaintiff.

James F. Dennis, for defendant.

HAWLEY, District Judge (orally). I think the form of the heading of the affidavit is subject to criticism. The form as to the affidavit of the complaint is certainly much better. But the point that is raised is purely technical in its character, and it goes simply to the form, and not the substance, of the affidavit. The true interpretation to be given to that affidavit is that it is the affidavit of **M. A. Murphy**, who is the attorney for the corporation. It is not susceptible, in my judgment, of any other judicial interpretation. The law is well settled that an agent or an attorney may make the affidavit. *Grocery Co. v. Smith*, 61 Mo. App. 665, 669; *Drake, Attachm.* §§ 93-93b, and authorities there cited; 3 Am. & Eng. Enc. Law (2d Ed.) 207, and authorities there cited. The motion to dissolve the attachment is overruled.

FOSTER v. CRAWFORD.

(Circuit Court, D. Indiana. May 31, 1897.)

1. REVIVAL OF JUDGMENT.

A proceeding to revive a judgment being a collateral proceeding, no error in such judgment is available against it, if the court which rendered it was duly organized, and had jurisdiction of the subject-matter and the parties.

2. LEVY OF EXECUTION—PRESUMPTIVE EVIDENCE OF SATISFACTION.

Though the levy of an execution upon sufficient personal property is, *prima facie*, presumptive evidence of the satisfaction of the debt, such presumption is overcome by proof, even without the return of the officer, that the property levied on was returned to the execution defendant.

A. W. Hatch, for plaintiff.

W. R. Crawford, for defendant.

BAKER, District Judge (orally). The first reason assigned by counsel why the judgment ought not to be revived is that the judgment appears to be void upon its face, in consequence of the defendant having an answer on file setting up matter in bar of the plaintiff's complaint, and that he was called and defaulted, and the matter submitted to a jury simply for the assessment of damages, whereas the cause ought to have been, as is claimed, submitted to the jury upon the issues raised by the pleadings, and the whole question of the defendant's liability determined by the jury after hearing all the evidence of the parties, respectively, in regard to the matters of complaint and matters of defense. The error so pointed out, if an appeal had been taken, and the correctness of the judgment challenged in a direct proceeding, would have been availing, and the judgment would undoubtedly have been reversed. The present attack, however, is collateral; and, where a collateral attack is made upon a judgment, different principles control. If three things are found or are shown affirmatively by the judgment to exist, the judgment will be valid and unassailable as against a collateral attack. These three things are: First, a regularly organized court; secondly, jurisdiction over the person of the defendant; and, third, jurisdiction over the subject-matter. All these requisites affirmatively appear on the face of the

judgment read in evidence, and however irregular or wrongful the action of the court may have been, inasmuch as the court was a competent court, inasmuch as it had jurisdiction over the subject-matter and over the person of the defendant, it had power to render a judgment which would be unassailable, regardless of any intervening errors, when attacked collaterally. It follows that the judgment as to this debt is conclusive as to the amount of the indebtedness then existing.

It was secondly insisted by counsel that the credit of \$8,552 made upon the judgment was too small, for the reason that it appeared from the testimony of the defendant and the memoranda that he produced on the hearing that there was actually collected on the collaterals assigned the sum of \$10,481, of which amount the present plaintiff, William Foster, received the sum of \$9,957, and that he ought to be charged with that amount as of the 9th of June, 1888. Mr. Foster, however, testifies that he was directed by the defendant, Henry Crawford, to make liberal provision by way of payment to Mr. T. C. Annabal, to Mr. Gordon, and to Mr. Cummings, who, as he testifies, were acting in connection with the litigation out of which the collection of taxes arose, in the interest of Mr. Crawford. If what Mr. Foster says is true, Mr. Crawford delegated power to Mr. Foster to determine what should constitute a reasonable payment that was to be made to these parties; and there has been no evidence adduced to show that there was any fraud, or want of good faith or of fair dealing, on the part of Mr. Foster, in liquidating the claims of Mr. Annabal at \$1,000, of Mr. Gordon at \$250, and of Mr. Cummings at \$100; and therefore the court cannot say, under the evidence, that Mr. Crawford was entitled to a larger credit as of the 9th of June, 1888, than \$8,552, which he received.

It is further insisted that shortly after the rendition of the judgment a levy was made, upon an execution issued on this judgment, upon a number of engines upon the railroad in which the defendant, Mr. Crawford, was interested; and it is insisted that, inasmuch as there is no return of record showing what disposition was made of that levy, it amounts to a satisfaction of the judgment, and, consequently, that the court is without power to ascertain the balance, if any, due upon the judgment, and to order an execution to issue therefor. It is undoubtedly the settled law that a levy of an execution upon sufficient real or personal property is *prima facie* presumptive evidence of the satisfaction of the debt; but it is simply *prima facie*, and, like all *prima facie* cases, stands good simply until countervailing evidence is introduced. In this case Mr. Foster has testified—and on that he is uncontradicted—that, shortly after the engines had been levied upon, they were surrendered into the possession of Harry Crawford, and that he took them away to Lafayette, where some of them were repaired or rebuilt, and that they went into use upon the road in which the defendant is interested. I think that it is competent to show, without any return of the officer, by such evidence as was introduced in this case, that the engines were surrendered to the execution defendant, and I think such surrender completely answers the *prima facie* presumption arising from the levy.

The plaintiff is entitled to a judgment for a revivor of the judgment in the sum of \$9,390, and to have an execution issued thereon for that amount; to all of which the defendant, by Henry Crawford, at the time excepted. The defendant prayed an appeal, and the bond is fixed at \$10,000; no execution to issue until 30 days from this date. It is agreed by the defendant, as the condition of the staying of issuing execution, that no transfer of property in the state of Indiana shall be made pending the suit.

MINNEAPOLIS, ST. P. & S. S. M. RY. CO. v. EMERSON et al.¹

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 361.

1. RAILROADS—FIRES FROM LOCOMOTIVES—INSTRUCTIONS—CONFLICTING EVIDENCE.

Whether a fire which destroyed plaintiff's property was communicated from one of defendant's locomotives or from a forest fire raging in the vicinity, *held* to be a question of conflicting evidence and debatable inferences, which the court properly refused to withdraw from the jury.

2. APPEAL AND ERROR—RULINGS ON NEW TRIAL.

Rulings by the federal courts on motions for new trials are not reviewable on error.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

This was an action at law by J. W. Emerson and D. W. Emerson against the Minneapolis, St. Paul & Sault Sainte Marie Railway Company to recover damages alleged to have been caused to plaintiff's property by fire communicated from a locomotive. In the circuit court, verdict and judgment were given for plaintiffs, and the defendant sued out this writ of error.

Michael H. Bright and Charles B. Keefer, for plaintiff in error.

W. H. Flett, for defendants in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The defendants in error recovered a judgment against the plaintiff in error for damages caused by fire to timber lands and to logs, poles, posts, and other forms of timber accumulated near the tracks of the company's railroad at Romulus, Lincoln county, Wisconsin. The negligence charged in the declaration consisted in carelessly managing, operating, and running a locomotive, not properly equipped and constructed to arrest sparks, so as to set fire to grass, weeds, and brush which had been mowed and carelessly permitted to remain upon the company's right of way until extremely dry and inflammable, whereby fire from a locomotive was communicated "to the property, premises, and effects of the plaintiffs, and burned and destroyed the same." The chief question is whether the court erred in refusing to direct a verdict for the plaintiff in error. It would be a laborious task, unavailing as a precedent or for any useful purpose, to summarize the evidence. The contention of the plaintiff in error is: First, that the estab-

¹ Rehearing denied June 17, 1897.

lished facts in the case point conclusively to a neighboring forest fire as the cause of the damage to the plaintiff's property; and, second, that if the evidence falls short of the first proposition, it throws the question "whether the engine caused the loss into the field of conjecture." These questions were submitted to the jury upon a charge which could not have made it more clear that the plaintiffs could not recover unless the jury was satisfied by a preponderance of the evidence, and able to say "with a reasonable degree of certainty," what caused the fires seen on the right of way of the company; "that the fire was caused in the manner specified in the declaration"; "that the whole damage was caused that way"; and that, if the preponderance of the evidence was that the fire was caused in some other way, no matter what, or if the evidence was equally balanced, leaving the cause of the injury "in the realm of conjecture" and the jury unable to "settle down to any final conclusion from a preponderance of the evidence," the verdict should be for the defendant. That the evidence was sufficient not only to warrant but to require that the case be submitted to the jury we have no doubt. Of the very elaborate argument to the contrary the most that can be said is that, if made to the jury, it might have been enough to win and to justify a different verdict; but at the same time it demonstrates that the case was one of conflicting evidence and of debatable inferences which could not properly have been withdrawn from the jury.

It follows, of course, that there was no error in refusing a special instruction to the effect that, if the fires seen on the company's right of way might have been caused either by the locomotive or by the forest fire, there was no evidence to warrant the jury in saying that they were caused by the one rather than the other. One of the fires on the right of way was on the south side of the track, where it is insisted it could not have been caused by a spark from the locomotive, because a strong south wind was blowing, which must have carried all sparks from the engine northward, and therefore, it is urged, must have been caused by a spark from the forest fire. That was a question to be determined upon the pertinent circumstances of which there were many disclosed by the evidence.

The other special request for instruction which was refused does not present an essentially different question. It reasserts the proposition that, if sparks carried by the wind from the forest fire might have set the fires upon the company's right of way, there could not be a verdict for the plaintiffs.

Error has been assigned upon exceptions to the admission of testimony. We are of the opinion that no error in that respect was committed, but, if there were, it was unimportant.

The ruling upon the motion for a new trial presents no question. In the federal practice errors of law, and any ruling which may be reviewed upon writ of error, may be assigned as error directly, but should not be embraced in a motion for a new trial; and, if they are, the ruling upon the motion is not thereby made reviewable. In this instance the motion embraces no ruling or question which we have not considered upon the errors properly assigned. The judgment below is affirmed.

DE BEAUMONT v. WILLIAMES.

(Circuit Court of Appeals, Third Circuit. May 10, 1897.)

PATENTS—LIMITATION OF CLAIMS—INFRINGEMENT.

The De Beaumont patent, No. 187,825, for an improvement in heaters and feeders for steam boilers, is limited by the prior state of the art to the particular arrangement and combination of parts described and specified. The apparatus is intended simply to feed the boiler, and has no relation to a system of steam heating, and is therefore not infringed by a vacuum system of steam heating, in which the vacuum pump discharges the hot water from the return pipe into an open tank, whence it is pumped into the boiler by an ordinary boiler-feed pump.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a suit in equity by Delia De Beaumont, administratrix of Alexandre De Beaumont, against Napoleon Williames, for alleged infringement of a patent for an improvement in heaters and feeders for steam boilers. The circuit court held that complainant had failed to prove title to the patent, and therefore dismissed the bill. 71 Fed. 812. The complainant has appealed.

Mrs. Carrie B. Kilgore and David C. Harrington, for appellant.
Ernest Howard Hunter, for appellee.

Before ACHESON, Circuit Judge, and BUTLER and BUFFINGTON, District Judges.

ACHESON, Circuit Judge. This suit, under the amended bill, is founded exclusively upon letters patent No. 187,825, granted on February 27, 1877, to Alexandre De Beaumont for an improvement in heaters and feeders for steam boilers. In his specification the patentee states:

"The main object of my invention is to utilize the whole or a portion of the exhaust steam of a steam engine, by forcing it into a boiler with a supply of water, in the manner described hereafter."

Then, after a brief reference to the accompanying drawing, which exhibits a vertical section of the apparatus for carrying the invention into effect, the specification proceeds thus:

"A is the cylinder, to which is adapted a plunger, B, the latter being reciprocated in the present instance from a shaft, D, through the medium of an eccentric, a, and rod, b, and the shaft being driven by the engine. At the bottom of the cylinder is a tubular projection, d, the upper end of which forms the seat for a valve, e, which rises, when the plunger is moved upward, and permits exhaust steam to enter the cylinder from the pipe, E, which communicates with the exhaust pipe of the steam engine. Water is also admitted in the form of a jet, to the cylinder, beneath the plunger, through the pipe, F, which communicates with a hydrant or reservoir, a check valve, f, in the pipe, F, opening on the ascent of the pump plunger, and closing on its descent. G is the discharge pipe, through which, and through the chest, H, containing a check valve, the exhaust steam may be forced directly into the boiler."

The patentee then states that, as the pump operates continuously, he uses in connection with the discharge pipe, G, a device for automatically regulating the amount of water which passes into the boiler, so that it will accord with the requirements of the latter, and

the specification proceeds to describe this regulating device. This description we need not here reproduce or further mention, for this regulating device is the subject-matter of the second claim of the patent, and that claim is not here involved. The alleged infringement is only of the first claim, which claim is as follows:

"(1) The combination of the pump, A, the pipe, E, communicating with the exhaust pipe of the engine, valve, e, water pipe, F, and force pipe, G, communicating with the boiler."

We have already quoted at length everything contained in the specification of the patent relating to the subject-matter of the first claim. That claim, obviously, is for a combination of specified parts. The specification, in connection with the illustrative drawing, shows very clearly the purpose of the invention, and the means devised by the patentee for carrying the same into effect. The invention is designated as "a new and useful improvement in heater and feeder for steam boiler," and "the main object" is stated to be "to utilize the whole or a portion of the exhaust steam of a steam engine, by forcing it into a boiler with a supply of water." The operation of the described apparatus is this: When the plunger is moved upward the valves, e and f, are opened, and the exhaust steam through the pipe, E, and cold water through the pipe, F, simultaneously enter into the pump cylinder beneath the plunger. Then, upon the descent of the plunger, the valves, e and f, are closed, the check valve in the chest, H, is opened, and the combined exhaust steam and water forced directly into the boiler through the pipe, G. There is no suggestion in the specification, or indication in the patent drawing, that the exhaust steam is to be utilized for any other purpose than thus to supply a hot feed to the boiler. Now, it was not a new thing to utilize exhaust steam for the purpose stated in De Beaumont's patent. For a very long time prior to his invention it had been a common practice to supply steam boilers, by means of feed pumps, with water heated by the condensation of exhaust steam; the cold water and the exhaust steam meeting in a condensing chamber or receptacle, and the water of condensation being pumped therefrom into the boiler. Indeed, the De Beaumont patent purports to be for a mere improvement in heaters and feeders for steam boilers. Under the proofs, it is very clear that at the date of De Beaumont's invention the state of this art was such that no claim was allowable except for the special means devised and described by the patentee for accomplishing the stated purpose. *Railway Co. v. Sayles*, 97 U. S. 554. Accordingly, we find that the first claim of the patent in suit is for a specific combination of elementary parts. Upon well-settled principles, then, this claim must be construed strictly, and the patentee held to the particular arrangement of parts described and specified. *Duff v. Pump Co.*, 107 U. S. 636, 2 Sup. Ct. 487; *Bragg v. Fitch*, 121 U. S. 478, 7 Sup. Ct. 978; *Snow v. Railway Co.*, 121 U. S. 617, 7 Sup. Ct. 1343; *Wright v. Yuengling*, 155 U. S. 47, 15 Sup. Ct. 1. Has infringement of this claim by the defendant been shown?

The defendant is the grantee of letters patent No. 256,089, dated April 4, 1882, for an improvement in apparatus for heating buildings. It appears that the defendant erected under this patent three

steam-heating plants in the city of Philadelphia,—one on Carter's alley, at the rear of No. 224 Chestnut street, one on the Walnut street wharf, at the Philadelphia & Reading station, and one at the Catholic High School. These plants are illustrated by drawings made by the complainant's witness Mr. Gallagher, which are in evidence as exhibits. It is alleged that these heating plants infringe the first claim of the patent in suit. The distinguishing characteristic of the defendant's apparatus, as installed in each of the above-named plants, is the circulation of steam through the heating coils and pipes by means of a partial vacuum throughout the steam-heating system, created and maintained by a vacuum pump. This vacuum pump is connected with a large pipe at the return end of the system. By the action of the vacuum pump the exhaust steam and any water from condensed steam are drawn from the heating coils and pipes into the large return pipe. There is also admitted into this large return pipe a jet of cold water, to cool the heated vapor before it reaches the vacuum pump. The contents of this return pipe are discharged by means of the vacuum pump into a tank. This tank is connected with the steam boiler by an independent pipe, through which, by means of a second pump, the hot water collected in the tank is delivered into the boiler. The vacuum pump employed in the defendant's apparatus is the standard double-action pump, and is entirely different from the plunger pump of the De Beaumont patent. The second pump used by the defendant is an ordinary boiler-feed pump, of the type which existed before the De Beaumont invention. Notwithstanding the manifest differences, the complainant's witnesses expressed the view that each of these heating plants installed by the defendant at the above-named places embodies the De Beaumont invention. In so stating, these witnesses, no doubt, were honest enough. They proceeded, however, upon a mistaken idea as to the scope of the De Beaumont patent. It has no such extent as these witnesses supposed. On the contrary, as we have already seen, the patent is of very limited scope, not only because of the anterior state of the art, but also by reason of the statements of the specification, and the definite terms of the first claim. It is very clear to us that no infringement by the defendant has been shown. Passing by dissimilarities in details of construction, there are radical differences between De Beaumont's apparatus and the apparatus set up by the defendant, in purpose, in mode of operation, and in combination of essential parts. The patent in suit has no relation whatever to the vacuum system of steam heating, or, indeed, to any system of steam heating. The De Beaumont apparatus is intended simply to feed the steam boiler, and his pump is in direct communication with the boiler. The function of the defendant's vacuum pump is to create and maintain a partial vacuum in a steam-heating system. In the three steam-heating plants in question the vacuum pump has no direct communication with the steam boiler. The discharge by that pump of the accumulations of the return pipe is not to the boiler, but into a tank. That tank is an open tank, in the sense that it is not air-tight. It is therefore impossible for the vacuum pump to make delivery into the boiler. The proof is quite convincing that, as the

defendant's heating plants are organized, it is not practicable to force the water of condensation into the boiler by means of the vacuum pump. The water discharged by the vacuum pump into the tank cannot reach the boiler without the aid of further appliances. In fact, the defendant employs an additional pump—an ordinary boiler-feed pump—to deliver to the boiler the heated water collected in the tank. We have no hesitation in holding that the combination of the first claim of the De Beaumont patent is not to be found in any of the heating plants that the defendant is shown to have installed. We are of the opinion that upon the question of infringement the appellant's case entirely fails. Having, then, upon a consideration of the substantial merits of the controversy, reached a conclusion which is fatal to the appellant, and requires an affirmance of the decree dismissing the bill of complaint, we think that it is not necessary for us to consider the other question in the case, namely, whether the proofs established the complainant's alleged title to the patent in suit. The decree of the circuit court is affirmed.

THE HERCULES.

THE MORGAN.

TAYLOR v. CROSSLEY.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1897.)

No. 206.

COLLISION—FAILURE TO STAND BY—PRESUMPTION.

The act of September 4, 1890, providing that if the master of a vessel which has been in collision fails, without reasonable cause, to stand by until he ascertains whether the other vessel is in need of assistance, the collision shall, "in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default," merely puts upon a vessel which so fails to stand by the burden of showing that she was not responsible for the collision; and where the facts preceding the collision are shown, and it does not appear that such vessel was in fault, and it further appears that the other vessel was guilty of a fault sufficient to account for the collision, then the former cannot be found guilty of contributory fault merely because of her failure to stand by. 70 Fed. 334, reversed.

Appeal from the District Court of the United States for the Eastern District of Virginia.

This was a libel in rem by W. W. Crossley, master of the schooner Morgan, against the steam tug Hercules (George Taylor, her master, claimant), to recover damages resulting from a collision. The district court found both vessels in fault, and entered a decree for divided damages. 70 Fed. 334. The claimant has appealed.

Robert M. Hughes, for appellant.

Floyd Hughes, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

BRAWLEY, District Judge. The decree of the court below holding both vessels in fault for the collision in the libel mentioned, and there being no appeal in behalf of the schooner, our attention will be limited to the consideration of the fault imputed to the tug. The learned judge, in his opinion, holds that "the tug was in fault in failing to stand by the schooner after the collision, as well as in other particulars not material to the decision." The Morgan was a three-masted schooner, loaded with coal, which sailed from Hampton Roads on March 24, 1893, bound for New Haven. The steam tug Hercules, having in tow the barge Charter Oak on a 200-fathom hawser, was bound south to Norfolk. The collision occurred between half past 10 o'clock and 11 o'clock at night in the Atlantic Ocean, about 20 miles to the southward of Winter Quarter Shoal lightship, and about 40 miles from Cape Charles lightship. The tug struck the schooner on the port side, between the fore and the main rigging, and cut down into her timbers, making a large aperture. The schooner was promptly hauled up in the wind and hove to. She proved to be in a sinking condition, and, spite of all efforts to staunch the leak, the water gained so rapidly that her master endeavored to make port, but was unable to do so, and at 5 o'clock the water had so increased in the hold that the crew were obliged to take to the small boat, and were rescued the same morning by a passing tug. The schooner sank at 6 o'clock in the morning of March 25th, about seven miles northeast of Winter Quarter lightship. At the time of the collision the schooner was making about 5 or 6 knots an hour. The tug was making from $2\frac{1}{2}$ to 4 knots an hour, the wind and tide being against her. There was a heavy sea running, and a thick fog.

' The testimony, as is usual in such cases, is more or less conflicting. As the collision occurred in the open sea, in the nighttime, and in a thick fog, the rule which requires a steam vessel to keep out of the way of the sailing vessel must be construed according to the circumstances. That it was the duty of the tug to proceed slowly in such weather is clear. The officers and men aboard of her say that she was making from 2 to $2\frac{1}{2}$ knots an hour, but the court below finds that she was moving at about 4 knots. It does not hold that this was too rapid a speed, and it is not clear to us that the rate of speed can be imputed to her as a fault. The Martello, 153 U. S. 70, 14 Sup. Ct. 723. Nor is it clear to us that there was any failure on the part of the tug to keep a proper lookout, or in giving the proper signals. The testimony in her behalf was that everything was done that ought to be done. The court below, which had the advantage of hearing that testimony, has not found her at fault in either particular. The testimony of the master in charge was that immediately before the collision he heard one faint blast of the fog horn aboard the schooner; that he put his wheel a-port, and in a second or two saw a red light. The testimony showed that the schooner was not provided with a mechanical fog horn, as required by law, and for this the court below has held her in fault. As it is not clear from the testimony that there was any act of commission or omission on the part of the tug tending to bring about the collision, and as the opinion of the

court below, which was made a part of the decree, has not pointed out such fault, it remains to consider only the correctness of the conclusion which holds the tug responsible in one-half of the damage for its conduct after the collision in failing to stand by. The act of September 4, 1890 (1 Supp. Rev. St. [2d Ed.] p. 800), provides:

"Section 1. That in every case of collision between two vessels it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without serious danger to his own vessel, crew, and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew, and passengers (if any), such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision, and also to give to the master or person in charge of the other vessel the name of his own vessel and her port of registry, or the port or place to which she belongs, and also the name of the ports and places from which and to which she is bound. If he fails to do so, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default.

"Sec. 2. That every master or person in charge of a United States vessel who fails, without reasonable cause, to render such assistance or give such information as aforesaid shall be deemed guilty of a misdemeanor, and shall be liable to a penalty of one thousand dollars, or imprisonment for a term not exceeding two years; and for the above sum the vessel shall be liable, and may be seized and proceeded against by process in any district court of the United States by any person, one-half such sum to be payable to the informer and the other half to the United States."

There is some conflict in the testimony as to the conduct of the tug after the collision. The master, mate, and fireman of the tug testify to efforts made to find the schooner, and that she disappeared in the darkness and fog, and could not be found, and that the usual signals of distress were not given or heard; but, inasmuch as the court below has found that she did not stand by, we will assume the correctness of that finding, and consider whether, for that reason alone, the tug should be held responsible. Our act is a copy of one which has long been in force in England, the only material difference being that while, under the English statute, the punishment inflicted is a revocation of the master's license, the second section here makes it a misdemeanor, punishable by fine and imprisonment. Both are in the nature of penal statutes designed to punish the master for the neglect of that duty which considerations of humanity alone impose, and which, long before either act, was recognized as a duty in the admiralty jurisdiction. It is creditable to the merchant marine of both countries that few cases are reported where the failure to stand by and render assistance have come before the courts, and this case is not presented in an aspect which permits an expression of opinion as to whether the master of the tug is liable to punishment for the omission to do what the statute required. We have only to determine whether, by reason of the statute, we are bound to presume that he has been guilty of some "wrongful act, neglect, or default," because there has been an "absence of proof to the contrary." In a case where the testimony has been full respecting all the acts and incidents leading up to the collision, and the judge who heard the same has failed to predicate a decree against the tug because of any acts or omissions on the part of the master or others tending to

produce it, and where our examination of the testimony fails to convince us that the collision was brought about by their fault, it would be a violent construction of the statute to hold that by reason of it alone the tug should be held responsible because of an omission of duty after the collision, and that, too, in the face of a decree not appealed from, holding that, in part at least, such collision was due to the negligence of the schooner. The case would be different if there had been an absence of proof as to the collision itself,—if, for example, the crew of the schooner had not been rescued, as happily they were, and for that or other reasons there was a lack of testimony respecting it, then the failure to stay by, unless explained, would have raised a presumption that the collision was caused by the wrongful act, neglect, or default of the master of the tug. It is in such cases that the statute becomes operative and, in "absence of proof to the contrary," fastens the responsibility upon those who, failing in one duty, which was plain, may reasonably be charged with that which was doubtful. When one, disregarding cries for assistance, runs away from the scene of a crime, a strong presumption arises that he has committed it; but where there is positive proof by eye-witnesses that he did not, he cannot be convicted of it simply because he ran away, although he might be convicted of running away, if that were made a penal offense. So we construe this statute to mean that, if a master of a vessel that has been in collision with another fails to stay by her, and shows no reasonable cause for such failure, the law will presume that the collision was caused by some negligent act or omission on his part, and, in the absence of proof to the contrary, will fasten upon him the responsibility for the collision. It puts upon him the burden of showing that he was free from fault. It assumes that one who fails to offer assistance to those whose distress is caused by him is presumably at fault in the act which caused the distress, and it denounces pain and penalties against his inhumanity, and holds his ship responsible for the pecuniary fine; but it does not condemn without a hearing. The obligation imposed is not unqualified; it is carefully guarded by conditions; it permits presumptions to be rebutted by proofs, and it is only "in the absence of proof to the contrary" that his responsibility is made absolute.

In *The Queen of the Orwell*, 1 Marit. Law Cas. 300, the eminent Dr. Lushington thus construes the English statute:

"Now, for the penalty, or what may be called the penalty, 'in case he fails so to do, and no reasonable excuse for said failure,' it shall be attended with certain consequences which are enumerated in the enactment. The effect of that, I think, is precisely what has been stated,—that, supposing such a state of things to occur, there is thrown upon the party not rendering assistance the burden of proof that the collision was not occasioned by his wrongful act, neglect, or default. It does not go further. Assuming this case to come within the provisions of the statute, the proper question I shall have to put to you is that which I should put if no such statute at all existed,—whether this collision was occasioned by the wrongful act, neglect, or default of the steamer."

The conceded violation of any statutory requirement creates a presumption against the party in default, but this rule cannot be extended further than to hold that when an accident occurs it is obligatory upon the party who has failed to comply with the statute to

show that such default certainly did not and could not possibly contribute to the disaster.

Conceding the correctness of the conclusion of the court below that the master of the tug failed to stay by and render assistance, his conduct is to be gravely reprehended, and in a proper proceeding doubtless he may be made to suffer the penal consequences that follow the violation of the statute; but to hold that such violation makes the tug responsible, in all events, for the collision itself, is to extend its meaning beyond its plain words. While such misconduct creates the strongest presumption against it, and requires that the tug should show affirmatively that the collision was not due to its fault or neglect, when such "proof to the contrary" has been offered, we find no authority in reason or precedent for holding it responsible. The English cases under the statute are *The Adriatic*, 3 Asp. 16; *The Vallego*, Ad. Div. April 27, 1887; *The Germania*, 21 Law T. (N. S.) 44. The American cases are *The Robert Graham Dunn*, 63 Fed. 167, affirmed 17 C. C. A. 90, 70 Fed. 270; *The Kenilworth*, 64 Fed. 890; *Towboat Co. v. Winslow*, 22 C. C. A. 327, 76 Fed. 595. In all of these cases there was evidence either of some fault in addition to the failure to stay by or an absence of proof that the vessels held responsible were not in default. They are, therefore, clearly distinguishable from the case now under consideration, where the evidence showed fault on the part of the schooner sufficient to cause the collision, in her failure to provide herself with the mechanical fog horn, which the regulations require. In *The Pennsylvania*, 19 Wall. 137, where a bark was provided with a bell instead of a fog horn, the court says:

"How can it be proved that, if a fog horn had been blown, those on board of the steamer would not have heard it in season to have enabled them to check their speed or change their course, and thus avoid any collision? Though there were two lookouts on the steamer, each in his proper place, the bark's bell was not heard until the vessels were close upon each other. Who can say the proximity of the vessels would not have been discovered sooner if the bark had obeyed the navy regulations? * * * The truth is, the case is one in which, while the presumption is that the failure to blow a fog horn was a contributory cause of the collision, and while the burden of showing that it was in no degree occasioned by that failure rests upon the bark, it is impossible to rebut the presumption."

In *The Martello*, 153 U. S. 65, 14 Sup. Ct. 723, the bark was provided with a tin fog horn, not sounded by mechanical means. The proof in that case, as in this, was that one blast of the horn was heard aboard the steamer, which was proceeding at the rate of six miles an hour. The court held that, while such speed may not be excessive, even in a dense fog, upon the open ocean, a different rule applies to a steamer just emerging from the harbor of the largest port on the Atlantic coast, and found that a speed of three miles an hour was proper under those circumstances. It says: "If the barkentine had been provided with a more powerful horn, it appears to be not only possible, but probable, that more than one blast would have been heard, and the steamer thus apprised of the course and distance of the bark," and quotes with approval the opinion of Sir Robert Phillimore in *The Love Bird*, 6 Prob. Div. 80, to the effect

that under such circumstances the burden was on the bark to show "that by no possibility could the sounding of a mechanical fog horn * * * have prevented the collision, or that it would not possibly have given more warning to the other vessel." The court below having found that the schooner was in fault in not having a mechanical fog horn, and that this was one of the causes of the collision, we are of the opinion that it was a cause sufficient to account for it; and the testimony not showing any wrongful act, neglect, or default on the part of the tug which tended to produce it, our conclusion is that there is such "proof to the contrary" as relieves the tug from responsibility under the statute. The decree of the district court is reversed.

MEMORANDUM DECISIONS.

THE ASPASIA.

STEINWENDER v. THE ASPASIA.

(Circuit Court of Appeals, Second Circuit. March 19, 1897.)

SHIPPING—DAMAGE TO CARGO—PERILS OF SEA.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by Steinwender and others against the ship *Aspasia* to recover for damage to cargo. The district court found that some of the goods were damaged by the fault of the ship, and others by extraordinary sea perils, for which she was not responsible, and decreed accordingly. 79 Fed. 91. From this decree the libelants have appealed.

Lawrence Kneeland, for appellants.

Charles C. Burlingham, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Decree of district court affirmed, with interest and costs, on decision of district judge.

BARBER et al. v. PITTSBURGH, F. W. & C. RY. CO. et al. (Circuit Court of Appeals, Third Circuit.) Questions of law certified to the supreme court of the United States. See 17 Sup. Ct. 488.

BURDON CENT. SUGAR-REFINING CO. et al. v. PAYNE et al. (Circuit Court of Appeals, Fifth Circuit.) Questions of law certified to the supreme court of the United States. See 17 Sup. Ct. 754.

CALIFORNIA REDWOOD CO. v. BELCHER et al. (Circuit Court, N. D. California. April 12, 1897.) Bill in equity to have the respondents decreed to hold, in trust for the complainant, the legal title to a certain quarter section of land. Bill dismissed. Page, McCutchen & Eells, for complainant. Henley & Costello, for respondents.

MORROW, District Judge. This case presents substantially the same questions which were raised in the case of California Redwood Co. v. Little (No. 11,812; just decided) 79 Fed. 854; and upon the authority of that case, and of the case of Mortgage Co. v. Hopper, 12 C. C. A. 293, 64 Fed. 553, the bill will be dismissed, with costs.

CALIFORNIA REDWOOD CO. v. MAHAN. (Circuit Court, N. D. California.) Bill in equity to have the respondent decreed to hold, in trust for the complainant, the legal title to a certain quarter section of land. Bill dismissed. Page, McCutchen & Eells, for complainant. Henley & Costello, for respondent.

MORROW, District Judge. This case presents substantially the same questions as were raised in the case of California Redwood Co. v. Little (No. 11,812; just decided) 79 Fed. 854; and upon the authority of that case, and of the case of Mortgage Co. v. Hopper, 12 C. C. A. 293, 64 Fed. 553, the bill will be dismissed, with costs.

CALIFORNIA REDWOOD CO. v. SMITH et al. (Circuit Court, N. D. California.) Bill in equity to have the respondents decreed to hold, in trust for the complainant, the legal title to a certain quarter section of land. Bill dismissed. Page, McCutchen & Eells, for complainant. Henley & Costello, for respondents.

MORROW, District Judge. This case presents substantially the same questions as were raised in the case of California Redwood Co. v. Little (No. 11,812; just decided) 79 Fed. 854; and upon the authority of that case, and of the case of Mortgage Co. v. Hopper, 12 C. C. A. 293, 64 Fed. 553, the bill will be dismissed, with costs.

FOURTH ST. NAT. BANK v. YARDLEY.

(Circuit Court of Appeals, Third Circuit. April 23, 1897.)

No. 8.

BANKS AND BANKING—EQUITABLE ASSIGNMENT—CHECKS AND DRAFTS—SPECIAL AGREEMENT.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a suit in equity by the Fourth Street National Bank against Robert M. Yardley, receiver of the Keystone National Bank, to subject moneys in his hands to the satisfaction of an alleged equitable charge or lien thereon. The circuit court dismissed the bill, and complainant took an appeal to the circuit court of appeals. The latter court certified certain questions to the supreme court for decision, and, having received its answers thereto (see 17 Sup. Ct. 439), has now filed the following opinion.

R. C. Dale, for appellant.

Silas W. Pettit, for appellee.

Before ACHESON, Circuit Judge, and BUTLER and GREEN, District Judges.

PER CURIAM. In this case this court certified to the supreme court of the United States two questions of law arising upon the facts of the case, which facts, as stated in our certificate, are as follows: "On the 19th day of March,

1891, the said Fourth Street National Bank advanced twenty-five thousand dollars (\$25,000) in clearing-house gold certificates to the said Keystone National Bank to enable it to meet its debtor balance in the Philadelphia clearing house under these circumstances: On said date Gideon W. Marsh, the president of the Keystone National Bank, acting on its behalf and by its authority, came to the banking room of the said Fourth Street National Bank, in the city of Philadelphia, and there represented to the officials of that bank that the Keystone National Bank owed a balance at the clearing house which it could not meet, because its funds were in the city of New York, and exhibited to them a memorandum showing a balance to the credit of the Keystone National Bank in the Tradesmen's National Bank of the city of New York of about twenty-seven thousand dollars (\$27,000), stating that his bank wished to draw against it and get clearing-house certificates; and he asked the Fourth Street National Bank to accept the draft of the Keystone National Bank for twenty-five thousand dollars (\$25,000) against this 'reserve account in the New York bank,'—that is to say, against the said fund in the Tradesmen's National Bank,—and give his bank clearing-house gold certificates therefor. Relying upon these representations of Marsh, and on the faith of his statement, supported by the said memorandum, that the Keystone National Bank had in the Tradesmen's National Bank the specified fund against which it proposed to draw, the Fourth Street National Bank gave Marsh, for the use of the Keystone National Bank, clearing-house gold certificates to the amount of twenty-five thousand dollars (\$25,000), and took its draft, of which the following is a copy: 'Keystone National Bank, No. 5086. Philadelphia, March 19, 1891. Pay to the order of R. H. Rushton, cashier, (\$25,000.) twenty-five thousand dollars. John Hayes, Cashier. To the Tradesmen's National Bank, New York.' R. H. Rushton was the cashier of the Fourth Street National Bank. The books of the Keystone National Bank show that on the 19th day of March, 1891, it had to its credit in the Tradesmen's National Bank of the city of New York the sum of twenty-six thousand nine hundred and seven and $\frac{2}{100}$ dollars (\$26,907.32), and on the same day an entry was made therein charging against that credit the said draft for twenty-five thousand dollars (\$25,000) it had given to the Fourth Street National Bank. The draft for twenty-five thousand dollars (\$25,000) was duly forwarded to New York for collection, and was presented for payment to the Tradesmen's National Bank on the morning of March 20, 1891. Payment thereof was refused upon the ground that the drawee had not in hand funds of the drawer sufficient to pay the same. In fact, the Tradesmen's National Bank had in cash and in collection items (drafts) for the Keystone National Bank the sum of twenty-six thousand nine hundred and seven and $\frac{2}{100}$ dollars (\$26,907.32), of which eighteen thousand and fifty-six and $\frac{21}{100}$ dollars (\$18,056.21) were remitted by the latter-named bank to the former on March 19, 1891, and the rest previously. The Tradesmen's National Bank then had in hand in cash, to the credit of the Keystone National Bank, the sum of nineteen thousand seven hundred and twenty-five and $\frac{2}{100}$ dollars (\$19,725.62), and had in addition the said collection items to make up the full sum of twenty-six thousand nine hundred and seven and $\frac{2}{100}$ dollars (\$26,907.32). Afterwards this money was paid, and the said collection items or drafts were turned over to Robert M. Yardley, the receiver of the Keystone National Bank, and out of the collection items he realized sixty-one hundred dollars (\$6,100), and he thus had in his hands from this source, when the bill in this case was filed, the sum of twenty-five thousand eight hundred and twenty-five and $\frac{2}{100}$ dollars (\$25,825.62) in cash. On the 20th day of March, 1891 (some time during the morning), by the order of the comptroller of the currency of the United States, the Keystone National Bank was closed, and thereafter Robert M. Yardley was appointed receiver thereof." The two questions propounded to the supreme court were these: "First. Do the above facts show an equitable assignment by the Keystone National Bank to the Fourth Street National Bank of twenty-five thousand dollars of the fund, consisting of cash and collection items or drafts, as aforesaid, belonging to the Keystone National Bank, in the hands of the Tradesmen's National Bank? Second. If the stated facts do not show such equitable assignment of the whole twenty-five thousand dollars, do they show such equitable assignment of the cash so in the hands of the Tradesmen's National Bank, namely, the sum of nineteen thousand seven hundred and twenty-five and $\frac{2}{100}$ dollars?" We have received from the supreme court of the

United States its mandate directed to this court, and certifying that it is the opinion of the supreme court that the first question certified to that court must be answered in the affirmative. This affirmative answer to that question is decisive of the controversy between the parties to this appeal, and requires a reversal of the decree of the court below dismissing the bill, and the entry of a decree in favor of the complainant in the bill. Accordingly, the decree of the circuit court is reversed, and the cause is remanded to that court, with directions to enter a decree in favor of the complainant in the bill in conformity with the decision of the supreme court of the United States, as signified by its affirmative answer to the first certified question above set forth.

KING v. McDONALD et al. (Circuit Court of Appeals, Fourth Circuit. May 4, 1897.) No. 190. Appeal from the Circuit Court of the United States for the District of West Virginia. Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge. This is an appeal from the circuit court of the United States for the district of West Virginia. The case depends upon the same facts, is governed by the same principles, and must take the same course, as the case of *King v. Williamson*, 80 Fed. 170, the result of which has just been announced. The decree of the circuit court is affirmed, with costs.

KING v. WHITE et al. (Circuit Court of Appeals, Fourth Circuit. May 4, 1897.) No. 191. Appeal from the Circuit Court of the United States for the District of West Virginia. Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge. This is an appeal from the circuit court of the United States for the district of West Virginia. The case depends upon the same facts, is governed by the same principles, and must take the same course, as the case of *King v. Williamson*, 80 Fed. 170, the result of which has just been announced. The decree of the circuit court is affirmed, with costs.

UNITED STATES v. UTZ. (Circuit Court of Appeals, Third Circuit. April 30, 1897.) In Error to the Circuit Court of the United States for the District of New Jersey. For opinion, see 75 Fed. 648. J. Kearney Rice, for plaintiff in error. Chas. A. Hess, for defendant in error. Before ACHESON and DALLAS, Circuit Judges, and BUFFINGTON, District Judge.

ACHESON, Circuit Judge. This suit was brought in the court below on the 23d day of February, 1895, under the act of congress of March 3, 1887 (24 Stat. 505). The petition sets out a contract in writing entered into on the 31st day of January, 1888, by and between William Utz (the petitioner), as party of the first part, and the United States (the defendant), as party of the second part, whereby the petitioner agreed to do the cartage of all merchandise in the custody of the government at the port of New York "from the first day of February, 1888, up to and including the first day of February, 1890, at the rate of fourteen and one-half cents per package for all packages from the importing vessel, and from general order store and warehouses to public store, with the exception of sample packages; and that said party of the first part will cart all sample packages from all points at the rate of one cent per package." The suit is for an alleged balance due the petitioner under this contract, he alleging that he had carted a large number of packages upon which he was entitled under the contract to compensation at the rate of 14½ cents per package, but upon which he had received payment at the rate of only 1 cent per package. The court below sustained the claim of the petitioner to the extent of \$4,536.56, and gave judgment in his favor against the United States for that sum. The record shows that as to a part of the peti-

tioner's allowed claim, namely, the sum of \$1,631.21, the right of action accrued more than six years before the suit was brought. In all other particulars than those above specified, the finding of fact by the court below, and its stated conclusions of law in this case, were the same as they were in the suit of William Utz, Thomas M. Garrett, and William H. Kirby against the United States. The questions for determination by this court are therefore the same in these two causes, and the decision which we have just made in the case of *U. S. v. Utz*, 80 Fed. 848, is decisive of the controversy here. For the reasons stated at length in our opinion in that case, the judgment of the court below in this case must be reversed. Accordingly, the judgment of the circuit court is reversed, and the cause is remanded to that court, with directions to dismiss the petition.

WALTER BAKER & CO., Limited, v. SANDERS et al.¹ (Circuit Court of Appeals, Second Circuit. May 26, 1897.) No. 126. Appeal by Complainant from a Decree of the Circuit Court of the United States for the Southern District of New York.

PER CURIAM. The facts in this case, which deals with unfair competition in the sale of cocoa, are so nearly identical with those in the chocolate case between the same parties (No. 125; 77 Fed. 181) that it is unnecessary to discuss them. A mandate will issue in this case similar to that in No. 125.

¹ For corrected report, see 82 Fed. 1006.